1951 SCC OnLine Gau 79 : 1951 Cri LJ 1457

Gauhati High Court

(BEFORE DEKA, J. (ON DIFFERENCE BETWEEN), THADANI, C.J. AND RAM LABHAYA, J.)

Kachu Gogoi ... Petitioner;

Versus

The State

Criminal Revn. No. 87 of 1950

Decided on May 14, 1951 and July 5, 1951

The Judgment of the Court was delivered by

RAM LABHAYA, J.:— Kochu Gogoi, petitioner, was convicted under Section 457, I.P.C., along with one Bapuram Duara. He was sentenced to undergo R.I. for 3 months and was also ordered to pay a fine of Rs. 200/-. Both Bapuram and Kochu Gogoi appealed from the order of the trial Magistrate. The learned Additional Sessions Judge, U.A.D., upheld the convictions and sentences of imprisonment but reduced the sentence of fine in each case to a sum of Rs. 50/- and in default of payment ordered further R.I. for 1 month, Kochu Gogoi alone has come up in revision to this Court.

2. The occurrence in question was said to have taken place at about 2 A.M. on the night following the 21st August, 1948. According to the prosecution version, Bapuram was caught in the house of the complainant Gunaram Gogoi. He raised the alarm and also informed the Gaonbura of it. Later he came to the scene of the occurrence and wrote out a report to the Officer-in-charge of the Sibsagar Police Station. He gave this written report to the complainant, who produced it at the Police Station. The report was marked Ex. 1 in the trial Court. It bears the signatures of Naga Ram Gaonbura and 6 others. All that it states is that at 2 A.M., a thief entered the house of Gunaram by breaking open the wall. He was caught and was being detained. Another thief was stated to have run away. The police was requested to take the one who had been apprehended, to the Police Station. When this written report was banded over to the Officer-in-charge of the Police Station, the following question was put to the complainant:

> "Who has written this ejahar and what do you know of the occurrence?"

In answer to this question, a detailed statement was made by the complainant. He informed the Police that Ex. 1 was written by the Goanbura on information supplied by him in the presence of other people who had assembled. He further stated that Bapuram and Kochu Gogoi had entered his house by breaking open the wall. They tried to steal his boxes and other properties belonging to him. He was awakened and seized both of them. He could recognise them in the torch light. He shouted for assistance. Kochu Gogoi ran away after dealing him a blow with his stick on his waist. But he could detain Bapuram by seizing his dhoti that he was wearing. Villagers came and witnessed it. Nothing could be removed from his house. Bapuram was said to be in the custody of the Gaonbura. On a further question, he admitted that Bapuram had come to kidnap the girl (meaning his sister).

3. After necessary investigation, Bapuram alone was sent up for trial. In column 2 of the charge sheet, it was stated that Kochu Gogoi was not arrested and sent up. The charge sheet was received in Court on the 3rd September, 1948. The case was sent to the Sub-divisional Magistrate, who adjourned the hearing on two occasions. On the 25th November, 1948, two prosecution witnesses were examined. These were Gunaram Gogoi and, Alam Gogoi. The learned Magistrate then ordered the Police to submit a charge sheet against Kachu Gogoi as well as it seemed to him that a case was made against him. In compliance with this order, a charge sheet against Kachu Gogoi was submitted, and both the accused were found guilty.

4. The two witnesses examined by the learned Magistrate before his order of the 25th November 1948 directing the Police to submit a charge sheet had apparently been examined by the police spite of this, the investigating officer did not arrest or charge sheet Kachu. It is safe to presume that in his opinion the material available was not such, as to justify his prosecution. The learned Magistrate after examination of two witnesses only, observed that it seemed to him that a case had been made out against Kachu Gogoi and on the

basis of his opinion obtained a charge sheet which the Police had avoided submitting.

5. The learned Counsel for the petitioner has contended that the learned trial Magistrate in directing the police to submit a charge sheet against the petitioner exercised his powers u/s. 190(c) of the Criminal Procedure Code but without observing the procedure laid down in S. 191 of the Code.

6. There is considerable force in this argument. What happened was that the police submitted a charge sheet only against Bapuram. The prosecution of Kachu Gogoi was not sought. The learned Magistrate did not at that stage, on a consideration of the final report of the police, order that a charge sheet be submitted against Kachu also. He thus passed no orders under S. 173 Cr. P.C. directing the police to produce Kachu Gogoi on the basis of any disagreement with the Police. On the contrary, he proceeded with the case against Bapuram in accordance with the charge sheet submitted by the police and proceeded to examine witnesses. After examining two witnesses, he came to the conclusion, apparently on the evidence recorded by him, that it seemed to him that a case was made out against one Kachu and on its basis he directed the police to submit a charge sheet against Kachu. It is clear that his order was based not on any police report but on the evidence that was produced before him. In compliance with his directions, a charge sheet was submitted on the next hearing and Kochu was also produced. Practically the order of the Court to the police to submit charge sheet against Kachu amounted to summoning him on the basis of evidence recorded in his absence. The learned Magistrate was, therefore, taking action against Kachu not on any report but on evidence produced before him. The Code does not authorise a Magistrate expressly to order the police to submit a charge sheet against any person. In some cases some Magistrates are authorised to order the police to investigate certain cases. Even in such cases the police are entitled to come to their own conclusion and the Magistrate cannot direct them to put in a charge sheet against any person when, in their opinion, no case is made out against him. The proper procedure for a Magistrate, who proposes to take judicial action against any person, is to take cognizance of the accused should have the benefit of the procedure case against him u/s. 190(c) in order that the provided in S. 191. The Magistrate would not be justified in demanding a charge sheet from the Police and thereby to deprive the accused of the privilege given to him by S. 191 to have his case tried by another Magistrate or by the

Sessions Court. Even where a charge sheet has been obtained by the Magistrate from the Police, the fact that the Magistrate is really responsible for the initiation of the proceedings remains and as such he would not be competent to try the case. The accused would be entitled to have it transferred to some other Magistrate, for the Magistrate may not be the prosecutor and the Judge in the same case. This view of the law receives ample support from the illustration to S. 556 of the Cr. P.C. According to this illustration, a collector who directs the prosecution upon consideration of information furnished to him for a breach of the excise laws is disqualified from trying the case as a Magistrate. The explanation to S. 556 would not, therefore, apply where the Magistrate himself directs the prosecution upon a consideration of the information received by him.

7. In '*Nek Ram* v. *Emperor*', A.I.R. (18) 1931 All 273, the Magistrate after going through the Police Diary and seeing some counterfeit coins came to the conclusion that the investigation had not been properly made by the police. He returned the papers to the Superintendent of Police and though he did not in writing suggest to the police to prosecute any other person, it was found that the Magistrate had in mind the prosecution of another person against whom no charge sheet had been submitted. The result was that a charge sheet was submitted against a second accused. It was held that the correct procedure for the Magistrate was to take action U/s. 190(i)(c) so that the accused could avail of the provisions contained in S. 191 of the Code of Criminal Procedure. As, in that case, the right procedure had not been followed, the case was ordered to be transferred to another magistrate.

8. In *Mahomed Sadiq* v. *Emperor*', AIR (25) 1938 Lah 19, Coldstream J. expressed the view that when a charge sheet is filed against any person at the instance of the Magistrate and then the case is taken cognisance of on such a charge sheet, though apparently the case is taken cognisance of on a police report, the action of the Magistrate amounts to his taking cognisance u/s. 190(i)(c), he being the real originator of the proceedings. According to him an accused person, in such circumstances, would be entitled to have the case transferred to some other Magistrate and the failure on the part of the Magistrate to comply with the provisions of S. 191 will vitiate the entire proceedings in his court. Applying the principle of S. 191, he quashed the proceedings in the case and ordered a retrial. In this case the Magistrate had directed the police to take the petitioner into custody and to take proper action after investigation. He did not order a charge sheet to be submitted. He was merely responsible for the initiation of the proceedings. Even then the principle of S. 191 was applied to the case.

9. In '*Gundo Chikko* v. *Emperor*', AIR (8) 1921 Bom 365, a Magistrate ordered the police to send up a charge sheet u/s. 414 I.P.C. in respect of one of the prosecution witnesses in a theft case which he had heard and after obtaining the charge sheet from the police in pursuance of his directions he tried the case and convicted him. It was held that the Magistrate took cognisance of the case u/s. 190(b). It was held further that the mere fact that the Magistrate directed the police to institute proceedings shows that the Magistrate did not take cognisance of the offence at that time and that it was after the receipt of the police report that he took cognisance. The action was, therefore, held to fall U/s. 190(b), Cr. P.C. But it was laid down at the same time that the Magistrate was the prosecutor in the case and he could not be both the prosecutor and the Judge. The conviction was reversed on this basis.

10. In his explanation, the learned Magistrate has suggested that the action he took in the case against the petitioner would fall under S. 190(b). He has referred to certain authorities. I have examined the three available cases referred to by him '*Jagat Chandra* v. *Queen Empress*', 26 Cal 786, '*Charu Chandra Das* v. *Narendra Krishna*', 4 CWN 367 and '*Dedar Bux* v. *Syamapada Malakar*', 41 Cal 1013. These do not support his view. The 'Bombay case', AIR (8) 1921 Bom 365 referred to above, however, is an

authority for the view that when cognisance of the offence is taken after obtaining a charge sheet from the police, such cognisance should be regarded as having been taken u/s. 190(b) and not under Sec. 190(c). The circumstances in this case are slightly different. The learned Magistrate, even before obtaining the charge sheet, expressed the opinion on evidence recorded by him that a case seemed to have been made out against the petitioner. In these circumstances, his ordering the police to submit a charge sheet meant no less than an order summoning the accused through Police. But, even if we do not go so far and give effect to the Bombay view, the

Magistrate was disqualified from trying the case by reason of the fact that he could not at the same time be the prosecutor and the Judge. The disqualification of the Magistrate then would not arise from the fact that cognisance was taken u/s. 190(c), but from the fact that as an originator of the proceedings he was incompetent to try the case.

11. If the Lahore view is followed, the principle of S. 191 would be applicable. If the Bombay view is taken, the Magistrate would be disqualified from trying the case on the principle embodied in S. 556 of the Cr. P.C. The disqualification of the Magistrate to try the case would remain whichever view is adopted. If the action of the Magistrate is held to be covered by S. 190(c) the trial would be without jurisdiction also for the reason that the Magistrate was not authorised, according to his own report, to take cognisance of this offence u/s. 190(c) by the Provincial Government as required by S. 191, sub-sec. (3) of the Cr. P.C. It seems to me that on no possible view of the matter was the Magistrate competent to try the petitioner. The conviction, therefore, must be quashed on this basis.

12. The question that would arise then would be whether this is a fit case in which the accused may be ordered to be retried by competent court. I have carefully considered this question and I am of the opinion that the material available to the prosecution does not at all justify adoption of this course.

13. The prosecution case at the trial was that at about 2 a.m. on the night of occurrence the complainant was awakened from his sleep by the fall of tin boxes near his head. He flashed his torch light and saw the petitioner along with Bapuram inside his bed room. He seized Bapuram's dhoti and Kochu's hand and shouted for assistance. He was then dragged out into the courtyard by both Bapuram and Kachu Gogoi and Kachu succeeded in getting himself released from his grip. He also hit the complainant with his stick, Ex. 1. He (complainant) caught hold of the stick and at the same time continued to hold Bapuram. In the meantime Puneswar, Ulma Gogoi and Mitharam came. They were followed by others. Kachu made good his escape when these people came. According to the complainant the accused entered his bed room by cutting the wall and he was dragged through that very opening. Then case the Sarkari Gaonbura. Bapuram was kept in the custody of the people who had assembled. The gaonbura then wrote out a report and asked the complainant to take the same to the thana. He (complainant) made it over to the Police Officer who asked him some questions which he answered. He signed the statement which the police officer recorded.

14. According to the version of the complainant given in Court, it would appear that at least Puneswar, Alam Gogoi and Mitharam saw the accused Kochu running away. He has not suggested that any of these witnesses saw Kachu striking him with a stick. He said that others came and then the accused ran away. But he has not named them.

The important witnesses are thus Puneswar, Ulma Gogoi and Mitharam. The other witnesses are Ratna Gogi and the Gaonbura besides the complainant.

15. The trial Magistrate found that the prosecution version of the case stood substantiated. He did not see any improbability in it. The learned Additional Sessions Judge on appeal relied on the statements of P.Ws. 2, 5 and 6. In his view their testimony proved the version of the complainant. The courts below considered the prosecution version as a whole. They did not make any distinction between the two accused. Their cases were not considered separately.

16. The question before us now is not how far the prosecution version is true so far as Bapuram is concerned. All we have to see is whether Kachu Gogoi participated in any offence which proved facts may disclose. The occurrence is said to have taken place at 2 A.M. The Gaonbura deposed that he came at about 4 A.M. Both the complainant and the Gaonbura have deposed that the Gaonbura wrote out a report which was sent to the police. The complainant himself took it to the thana. The contents of this report are revealing. All that was said was that on the night of the occurrence, a thief entered the house of the complainant by breaking open the wall. He was caught and was kept in custody. The report further brought out that another thief had run away. The prayer contained in this report was that the thief who was being detained may be taken to the police station. The Gaonbura signed this report and 6 others attested it. Of these six persons Alam Gogoi (P.W. 2) and Ratna Gogoi (P.W. 3) were the only persons examined. The other 4 persons, namely, Maria Gogoi, Kulai Gogoi, Sonati Sandikai and Loknath Gogoi were not examined as prosecution witnesses.

17. When the report written by the Gaonbura was handed over to the Police, certain questions were asked by the Police officer and the answers to these were recorded. The oral statement so made has also been made a part of the first information report. The oral report was made at 8 A.M. In this report the complainant for the first time mentioned the names of both the accused. He said that Bapuram and Kochu Gogoi had entered his house by breaking open the wall with the object of committing theft. He seized both and could recognise them by the torch light. He raised alarm. Kochu ran away after giving the complainant a blow with his stick on his waist but he could detain Bapuram till the villagers came. He also admitted that Bapuram had come to kidnap the girl (meaning his sister) who lived in the house.

18. It is a question whether the oral report made after the written report that was handed over to the police could be regarded as part of the F.I.R. It would be more appropriate to treat it as a statement made in the course of the police investigation. If that view is taken its use would be available only to the accused in conformity with the provisions contained in S. 162 Cr. P.C. But even if this is treated as a part of the F.I.R., as has been done in the courts below without any objection from the accused, it is clear that the prosecution version given at the trial cannot be regarded as credible when seen in the light of the two statements constituting the F.I.R. The Gaonbura wrote the report for the Police some two hours after the occurrence. The name of Kochu is conspicuous by its absence from the report. Kochu admittedly lives close to the house of the complainant. His house is on the opposite side of the road at a distance of 9 nals from the complainant's house. He was known to all the prosecution witnesses from before. The prosecution case at the trial was that apart from Gunaram, Mitharam and Puneswar (P.Ws. 5 and 6) saw Kochu in the courtyard of the complainant's house. Puneswar even chased him for some distance. Mitharam is the father of the complainant and was in the house. He deposed that he was roused from his sleep by the shouts of his son. He came to the courtyard and saw Gunaram complainant Bapuram and Kochu. Before he could reach them, Kochu hit Gunaram with a lathi and ran away. Puneswar came and he chased him but could not apprehend him. Bapuram was kept detained till the villagers arrived. He also stated that the

Gaonbura was sent for and he came and saw the broken

wall, the torch light and the fallen boxes. He does not state that he told the Gaonbura what he had seen himself. Puneswar, P.W. 6, is a son of Ulma Gogoi, P.W. 2. He also deposed to having witnessed the complainant Gunaram struggling with Kochu and Bapuram and as Kocliu started running before he could reach them, he gave him a chase. Puneswar is related to the complainant. Mitharam is his father. They did not sign the report which was prepared when the Gaonbura came. Puneswar and Gunaram had gone to call him. According to him both informed him that they had succeeded in apprehending one of the culprits and Kochu, the other, had run away. Before he prepared his written report, Kachu's name was mentioned to him if his statement at the trial is believed. He got the information both from Puneswar and Gunaram. In spite of this the written report does not mention the name of Kachu. Gunaram, complainant, the Gaonbura (P.W. 4) and Puneswar (P.W. 6) give no explanation why, when Kachu was known to them when he was definitely identified by Gunaram, Puneswar and Mitharam, his name was not mentioned in the written report. The prosecution could offer no reasonable explanation for this omission. The learned Government Advocate has now suggested that it was just a brief report by which the Gaonbura wanted to inform the police that a culprit had been apprehended and that he should be taken to the thana. This is not convincing, for, if that was the idea there was no need to refer to the second person who had made good his escape. The Gaonbura could state that the detailed report would be made by the complainant himself. He has referred to the second man but has not given the name.

19. It would be a perfectly legitimate inference that when the Gaonbura prepared that report, the name of the second culprit if there was one was not known. If the prosecution version given at the trial were true, the name of Kochu would certainly have appeared in the document. The omission to mention the name of Kochu in the document in the absence of any reasonable explanation by itself makes the prosecution case extremely doubtful. The importance of the First Information about the occurrence emanating from the complainant lies in the fact that it is a statement made soon after the occurrence. The memory is then fresh and if the statement is made soon after the occurrence, there would be no opportunity left for successful fabrication. As observed by their Lordships of the Privy Council in '*Emperor* v. *Nazir Ahmad*', AIR (32) 1945 P.C. 18 its object is to obtain early information of alleged criminal activity and to record the circumstances before there is time for them to be forgotten or embellished. The implication is that when once the prosecution case is put in the first information, opportunities for improving it are considerably reduced as any prosecution case that may be subsequently set up can be checked up in the light of the F.I.R. particularly when it is made by the complainant himself.

20. The prosecution version given at the trial, even when seen in the light of the detailed oral report made by the complainant himself does not appear to be in any better light. In this report Kochu Gogi was no doubt charged by name. It was also stated that he and Bapuram entered the house by breaking open the wall for purposes of theft and according to this report they were seized in the house. Kochu ran away and Bapuram was detained till villagers came. No names of any witness are mentioned. It is significant to note that in this report also it was not stated that the complainant was dragged out of his room to the courtyard by the two accused, that there was a struggle in the courtyard and it was in the course of this struggle that Puneswar and Mitharam came and saw Kochu running away. Nor is it stated that

Puneswar pursued him. In fact, even the names of Puneswar and Mitharam are not mentioned in the report. Mitharam is living in the same house. Puneswar is admittedly related to the complainant. The villagers who were referred to but whose names were not mentioned in this report have not been examined except Alam Gogi and Ratna Gogoi. But these two do not depose to saving seen Kochu. They saw only Bapuran. They support the prosecution version to this extent that Gunaram mentioned the name of Kachu when they reached the scene of occurrence. But then they too give no explanation why his name was not mentioned in the written report which was prepared in their presence and also in the presence of Puneswar and Mitharam. The situation then is that the prosecution version given at the trial finds no support from the F.I.R. on the most material part of the story. It is a considerably improved version and it comes only from the three prosecution witnesses whose names also do not appear in the detailed report made some 6 hours after the occurrence. Mitharam, father of the complainant, stated that Gunaram had a torch in one hand and a lathi in the other. If this was so, it would not be possible for him to keep his hold on Bapuram. The learned Magistrate was of the opinion that this part of the statement is incredible. He observed that he would have disbelieved the prosecution story so far as it related to the apprehension of Bapuram if other prosecution witnesses had also seen the torch light in the hand of Gunaram. He thus relied for his finding on the evidence of witnesses other than Mitharam, whom he described as an old man and who probably was confused and could not correctly state where he saw the torch.

21. The statement of the complainant that the two accused entered the house for purposes of theft also is not correct. In the detailed report that he made he did admit that Bapuram had entered the house with a view to kidnapping the girl (his sister)

22. The complainant stated that Kochu hit him with a lathi. He was sent to the hospital for medical examination. No evidence has been adduced at the trial to show that he had any injury on his person. The version suffers from the lack of circumstantial support. There is the omission of the name of the petitioner in the first written report. This omission is a circumstance in favour of the accused: '*Bachan* v. *Emperor*', AIR (14) 1927 Lah. 149. It introduces an element of doubt in the prosecution case. The oral report does not mention the names of the principal witnesses though they are related to the complainant and he knew, according to his statement in court, that they had seen Kochu running away. This is another suspicious circumstance. The version at the trial differs in material particulars from that given in the F.I.R. These circumstances taken collectively make the prosecution story given at the trial extremely doubtful to say the least: '*Akbar* v. *Emperor*', AIR (18) 1931 Lah 157. The inconsistency between the F.I.R. and the evidence at the trial is a matter for the prosecution to explain and no great weight can be attached to the failure of the defence to cross-examine the informant on this point '*Awadh Singh* v. *Emperor*', AIR (34) 1947 Pat. 23.

23. The courts below have not considered any of these circumstances and they have accepted the evidence of two interested witnesses at its face value. The circumstances of this case are such that even if the trial had not been vitiated by the disqualification attaching to the trial Magistrate by reason of his being the prosecutor, there would

have been justification for interference in revision on the merits even though normally this Court may not disturb concurrent finding of facts. In '*Mohabli* v. *Emperor*', AIR (2) 1915 Lah 438 and in '*Ram Narain Gir* v. *Emperor*', AIR (8) 1921 Pat. 469,

discrepancies between the F.I.R. and the evidence at the trial were held sufficient for setting aside convictions in revision. The prosecution case has been damaged beyond repair by interested persons and there is no reliable evidence by which participation of the petitioner in the offence that he was charged with could be satisfactorily proved. No purpose would be served by ordering a retrial. I would, therefore allow this petition, set aside the conviction of the petitioner and acquit him.

24. THADANI, C.J.:— I regret I am unable to agree to the order proposed by my learned brother. In my opinion, the revision application should be dismissed.

25. With all respect, I think the view taken by my learned brother that on the facts of this case the trying Magistrate took cognisance of the offence in respect of the applicant under sub-cl. (c) of Cl. (i) of Sec. 190 Cr. P.C. is contrary to what I regard as settled law, namely that where a Magistrate receives a Police report within the meaning of Sec. 173 Cr. P.C. against an accused person 'A' and takes cognisance of the offence, and the same Magistrate then orders, during the course of the trial against 'A' that 'B' should also be sent up, he nevertheless takes cognisance of the offence both against 'A' and 'B' under Sub-cl. (b) of cl. (1) of S. 190, and not under cl. (c) of S. 190(i), Cr. P.C. S. 190 Cr. P.C. speaks of cognisance of an offence, and not of an offender.

26. The fact that in this case, the Trying Magistrate asked the Police to send up the applicant also for trial during the course of the trial against one Bapuram, did not deprive the Magistrate of jurisdiction to try the applicant. If the applicant apprehended that he would not get a fair trial at the hands of the Magistrate because he had ordered the Police to send him up for trial, along with Bapuram, his proper course was to apply for a transfer of the case u/s. 528 or 526 Cr. P.C. a course which he did not adopt.

27. Cases dealing with the question before us are collected at pages 494 and 495 of Ratanlal's '*Law of Crimes*', 9th edition, * and in all those cases the view taken is that the Magistrate takes cognisance u/s. 190(i)(b), Cr. P.C. and the question of the application of S. 191 Cr. P.C. does not arise. (Vide '*Sarwa* v. *Emperor*', 14 Cr. L.J. 290, '*Mehrab* v. *Emperor*', 17 S.L.R. 150 F.B., '*Rajni Kanto* v. *Emperor*', 8 CWN 864, *Hakim Ally* v. *King-Emperor*', 7 Cr. L.J. 414, *Emperor* v. *Manikka Gramani*', 30 Mad 228, '*Gundo Chikko* v. *Emperor*', 23 Bom. L.R. 842, '*Intazkhan* v. *Emperor*, AIR (21) 1934 Rang 193, '*Raghunath Puri* v. *Emperor*', AIR (19) 1932 Pat 72. So far as I know, there is not a single reported case of a Division Bench in which on the facts before us, the view taken was that the Magistrate has taken cognisance u/s. 190(i)(c), Cr. P.C.

28. None of the cases upon which my learned brother has relied were cited at the Bar, and I see them for the first time considered in his judgment. Even so, with all respect, I do not think they have any application to the facts of the case, and those that have, support the view that the case falls under S. 190(i)(b), and not u/s. 190(i)(c), Cr. P.C. Taking the first case, the one reported in '*Nek Ram* v. *Emperor*', A.I.R. (18) 1931 All. 273, a decision of a single Judge, it is to be observed that the application before the learned judge was for quashing the proceedings and, in the alternative, for transfer of the case. The learned Judge, while refusing to quash the proceedings directed the transfer of the case under the provisions of S. 526 Cr. P.C. In the body of the Judgment, Bennet J. stated:

> "In any case, it is clear that the Magistrate had the prosecution of Nek Ram in his mind, at the time he sent the papers (to the police). For the purpose of transfer, that, I consider is sufficient". This, therefore, was the reason of the transfer. The rest of the dicta of the learned Judge are clearly obiter. The learned Judge has given no reason why he thought the learned Magistrate took cognisance under sub-clause (c) of Cl. (i) of S. 190 Cr. P.C. I do not think the obiter dicta of a Single Judge can be preferred to judgments of Division or Full Benches of other High Courts reported

in cases to which I have referred in earlier part of my judgment.

29. The case reported in '*Mahomed Sadiq* v. *Emperor*', A.I.R. (25) 1938 Lah. 19 again a decision of a single Judge, has no application to the facts of this case. In that case, the original proceedings u/s. 107 Cr. P.C. had finally terminated. After the termination of the proceedings u/s. 107 Cr. P.C. the learned Magistrate suspected that some offence had been committed with reference to a minor girl concerned in the proceedings u/s. 107 Cr. P.C. and the Magistrate informed the Police accordingly. The Police thereupon for the first time, after the termination of the proceedings under S. 107 Cr. P.C. submitted a charge sheet and the Magistrate took cognisance of certain offences under Sections 363, 366, 376 and 343 I.P.C. It was in these circumstances that Coldstream J., took the view that the Magistrate had taken cognisance of the offence u/s. 190(i)(c), and not u/s. 190(i)(b) Cr. P.C. Manifestly the learned judge regarded the Magistrate as a complainant in the case, the complaint being based upon his suspicion that an offence with reference to the girl had been committed in the previous proceedings u/s. 107 Cr. P.C. which had been disposed of by him. The case before Coldstream, J., was not a case where a Magistrate had taken cognisance u/s. 190(i)(b) against 'A' and then, during the course of the trial against 'A', had asked the Police to send up 'B' also. Apart from this manifest distinction between the case before Coldstream J., and the case before us — a distinction which makes the decision of Coldstream J., quite inapplicable — it is plain from the operative part of the order passed by Coldstream J. that it was for the purposes of transferring the case that the learned Judge applied the principle of S. 191 Cr. P.C. The operative part reads:

> "At the same time, it seems clear that the action of the Magistrate 'practically amounted' to his taking cognizance under S. 190(i)(c). 'I think it proper to apply the principle of S. 191 Cr. P.C.,' and I accordingly accept the recommendation of the Sessions Judge, quash the proceedings, and order re-trial by another Magistrate to be selected by the District Magistrate."

In effect, the learned Judge transferred the case for retrial in the exercise of his powers under the provisions of S. 526 Cr. P.C. a course which had been followed by Bennet, J., In '*Nek Ram* v. *Emperor*', AIR (18) 1931 All 273.

30. The case reported in '*Gundo Chikko* v. *Emperor*', AIR (8) 1921 Bom 365, is an authority for the proposition that even when a case brought on a Police report is disposed of by a Magistrate and the Magistrate is of the opinion that a witness in the case has committed an offence and asks the Police to send up the witness by another Police report, the Magistrate still takes cognisance under S. 190(i)(b) and not under S. 190(i)(c) Cr. P.C. The reason why the learned Judges of the Bombay

High Court interfered. In that case was that the Magistrate in directing the prosecution of the witness after the case against the original accused had been disposed of, had in a sense made himself the complainant. That seems to me clear from what the learned Judge said in regard to the applicability of S. 351, Cr. P.C. Undoubtedly the Magistrate in that case had not acted under Section 351, Cr. P.C. — a course which the Magistrate was fully empowered to take if he had so chosen, and that is why the learned Judges of the Bombay High Court did not accept the view of the Additional Sessions Judge in that case that the Magistrate had taken cognisance under Section 351 Cr. P.C. Had the learned Judges come to the conclusion that the Magistrate had acted under Section 351, they would have been powerless to interfere, for the plain reason that Section 351, Cr. P.C. authorises the arrest and trial of a person, if he is present in Court, along with the accused person whom the Magistrate is trying. In that case before the learned

Judges of the Bombay High Court, the Magistrate had not acted under Section 351, Cr. P.C. It was in these facts that the learned Judges of the Bombay High Court regarded the act of the Magistrate in giving information to the Police against the witness after he had disposed of the case, as a complaint made by the Magistrate, which disabled him from trying the case, in the absence of his having acted under Section 351, Cr. P.C.

31. The case reported in '*Charu Chandra Das* v. *Narendra Krishna*', 4 CWN 367, goes much further than the case reported in '*Gundo Chikko* v. *Emperor*', AIR (8) 1921 Bom 365. It lays down that even where a Magistrate takes cognisance of an offence in which 'A' is an accused person and the case against him has been disposed of, and the Magistrate is of the opinion that another person 'B' was also concerned in the offence with 'A', and issues process against 'B' under Section 204, Cr. P.C. and tries the case against him, the trial is not bad. This decision is in conformity with other later decisions reported in '*Mehtab* v. *Emperor*', 17 S.L.R. 150 (F.B.), *Rajni Kanto* v. *Emperor*', 8 C.W.N. 864, '*Emperor* v. *Manikka Gramani*', 30 Mad 228, '*Intaz Khan* v. *Emperor*', AIR (21) 1934 Rang 193, '*Raghunath Puri* v. *Emperor*', AIR (19) 1932 Pat 72.

32. The law then on the subject, as I conceive it to be is this:

(1) Where a Magistrate takes cognisance of an offence against 'A' on a Police report under Section 190(i)(b) Cr. P.C. and in the course of the trial of 'A' the Magistrate is of the opinion that 'B' is also concerned in the offence, the Magistrate can either issue process himself against 'B' under Section 204 Cr. P.C. or direct the Police to arrest him and produce him in Court, and, on being so produced, the Magistrate can proceed to try tooth 'A' and 'B' at the same trial, and the question of Section 191, Cr. P.C. does not arise.

(2) If 'B' is present in Court the Magistrate can act under Section 351, Cr. P.C. and proceed to try him along with 'A' and the question of Section 191, Cr. P.C. does not arise:

(3) If a Magistrate disposes of the case against 'A' and then directs the Police that 'B' also should be sent up by a separate challan and on that being done, the Magistrate tries 'B', it is possible to take the view that in such a case the direction of the Magistrate could be regarded as a complaint by a Magistrate, and as no Magistrate is entitled to be a Judge in his own complaint, he is debarred from trying the case.

The case before us falls in the first category, and the Magistrate, in trying the case against the applicant along with Bapuram, was perfectly competent to do so, and the validity of the trial cannot be questioned under any provision of the Code of Criminal Procedure.

33. The case reported in '*Dadar Bux* v. *Syamapada Mulakar*', 41 Cal 1013 is, in my opinion, also directly in point — a case in which reference was made to "*Charuchandra Das* v. *Narendra Krishna*', 4 CWN 367. It deals with cognisance of an offence upon a complaint within the meaning of Section 190(i)(a) Cr. P.C. In principle, there is no difference between the cognisance of offence under Section 190(i)(a) and of an offence under Section 190(i)(b), Cr. P.C. In neither case are the provisions of Section 191, Cr. P.C. attracted. In the body of the judgment appear the following observations:

> "The Magistrate in question, we may observe, is not empowered by the Local Government to take cognisance under Clause (c) of Section 190 of the Criminal Procedure Code. The original complaint was, no doubt, not against Dedar Buksh and Bason Bibi. But the Magistrate had already taken cognisance of the offence mentioned in the complaint. Prom the evidence before him, he came to the

conclusion that there was no satisfactory evidence against the four persons mentioned in the complaint but there was evidence against Dedar Buksh and Bason Bibi of offences under Sections 342, 352 and 363 of the Penal Code, 1860. The offences under the two former sections are compoundable, while the offence under the last is not compoundable. The complaint was of very serious offences and this complaint was soon followed by a petition of withdrawal by the complainant, and not by the girl against whom the offences were said to have been committed. We are of opinion that the Magistrate was right in ordering examination of witnesses in order to ascertain if there was any substance in the petition of withdrawal and in the complaint.

34. Now, the next question is — whether the Magistrate could take cognisance of the offence against Dedar Buksh and Bason Bibi which came to light in the evidence given by the witnesses. The Magistrate in his explanation has relied on the case of '*Charu Chandra* v. *Narendra Krishna*', 4 CWN 367. The learned Sessions Judge, however, in his letter tries to distinguish the facts of this reported case from those of the present case by pointing out that the reported case was on a Police report, of which the Magistrate had full seisin, and that there was no repudiation of the complaint in that case. The present case, however, is on a written complaint by the husband of the girl Sidheswari. The expression 'complaint' has been defined in clause (h) sub-section (i) of Section 4 of the Criminal Procedure Code. It is clear from the definition that it is not necessary that the complainant should always be the party directly aggrieved by the commission of the offence. The really aggrieved party is the complainant's wife. But according to the definition, the husband is a competent person to apply to the Magistrate with a view to his taking action under the Code."

35. As to the merits of the case, in my view, there is no justification for interference. I would like to emphasise the fact that the revisional jurisdiction of a High Court is not to be exercised as though it were exercising its appellate jurisdiction. In a recent unreported case from Calcutta, the Supreme Court of India has disapproved the practice of High Courts exercising their revisional jurisdiction as though they were exercising their appellate jurisdiction. One has only to refer to Mitra's '*Criminal Procedure Code*', 9th Edition, pp. 1200-1203, to find a plethora of cases of different

High Courts in which the rule observed by High Courts in the exercise of their revisional jurisdiction is "that they will not go into evidence unless it is necessary to do so by reason of special circumstances or by reason of the character of the error of law." I will reproduce some passages from page 1202:

"It is unusual in revision to disturb a finding of fact unless it is so manifestly erroneous that a miscarriage of justice would result from its being uncorrected. Vide '*Emperor* v. *Buransaheb Hasansaheb*, 6 Bom LR 1096; '*Dulichand* v. *Emperor*', 18 Cri. LJ 437, '*Emperor* v. *Shidoo*', 29 Cri LJ 936; '*Emperor* v. *Bankatram*', 28 Bom 533; '*Hiranand* v. *Emperor*', 17 SLR 245, '*Bhuneshwari Pershad* v. *Emperor*', AIR (18) 1931 Oudh 172; '*Haji Jan Mahomed* v. *Emperor*', AIR (22) 1935 Sind 105. Ordinarily the High Courts will not in revision go behind the concurrent findings of the Courts below on a question of fact. '*Maruthayee* v. *Appavu Pillai*', AIR (10) 1923 Mad 237, AIR (22) 1935 Sind 105. It is the settled practice of the High Courts to accept the findings of the Lower Appellate Court as correct, unless such findings are based on illegal evidence or are manifestly erroneous. '*Emperor* v. *Lukman*', 21 Sind LR 107, '*Allahbux Khan* v. *Emperor*', 23 Sind LR 216. When the appellate Court has

dealt with the evidence carefully and has not omitted to consider any relevant or important portion of the evidence, the High Court will not interfere. '*Patto Kumari* v. *Upendra Nath*', 4 Pat L Jour 265. The uniform practice of the High Court is not to exercise its powers of upsetting a finding of fact, except for some extraordinary reason, and the circumstance that the High Court itself, after examining the evidence, might have come to a different conclusion, is not such a reason. '*Queen Empress* v. *Maganlal & Motilal*, 14 Bom 115."

36. At the very outset I would like to observe that in the Memorandum of appeal filed in the Lower Appellate Court, neither the question of the illegality or irregularity of the trial before the Magistrate was taken, nor was the propriety of the conviction assailed on the ground that the statement of the complainant made in elaboration of the letter written by the Gaonbura was a statement recorded in the course of the investigation, the two points on which my learned brother has based his judgment. These two points also do not appear to have been raised in the trial Court.

37. I scarcely think that we will be justified in interfering with the appreciation of evidence in this case by the Courts below from the points of view which were never raised before the Courts below. My learned brother has declined to accept what I consider to be a very proper explanation of the omission in the letter of the Goanbura, namely that the Gaonbura having been roused from sleep at 2 A.M., was only concerned that the Police should forthwith take charge of Bapuram who had been arrested and detained in the house of the complainant, on the ground that was not the explanation given by the prosecution in the Courts below. But plainly there was no need to explain the omission in the Courts below, for, no point was made of it. For the first time, the omission in the letter has been pressed before us, to which a satisfactory explanation has been given by the learned Government Advocate.

38. The First Information Report in this case consisted of 2 parts: (1) a letter written by the Gaonbura in which it is said that on the night of the occurrence a thief entered the house of the complainant by breaking open the wall; he caught him and kept in custody; another thief ran away. At the time the Gaonbura wrote this letter, 6 other persons were present, among whom were the prosecution witnesses 2 and 3; the remaining 4 persons were not examined. (2) When this letter was taken by the complainant to the Police on the following morning at 8 A.M., the Officer in charge put certain questions to him and recorded the answers. In his answers, the complainant named the applicant as one of the intruders. The answers given by the complainant to the Officer-in-charge are, in my opinion, Part I of the First Information Report, and cannot be regarded as statements made to a Police Officer in the course of an investigation. Part V of the Criminal Procedure Code is entitled "Information to the Police and their Powers to investigate." Section 154 of the Cr. P.C. deals with recording of first information reports in cognizable cases. Section 155, Cr. P.C. deals with the powers of the Officer-in-charge when he receives information of a non-cognisable offence. The investigation by a Police Officer in charge of the Police Station begins only when he decides to investigate a cognisable offence under the provisions of Section 155, Cr. P.C. Until then, an investigation cannot be said to have commenced. From the questions put to the complainant by the Officer-in-charge, it is clear to me that the latter had not decided to investigate when he put the questions to the complainant. Section 162, Cr. P.C. deals with the statements made to Police Officers in course of an investigation. In my opinion, the words "in the course of an investigation" mean in the course of an investigation made after the Police Officer decides to act under Section 156 Cr. P.C. until he takes such a decision, his action under Sections 154 and 155 Cr. P.C. including recording of questions and answers in elucidation of a First Information Report, cannot be regarded, as anything done in the course of an investigation.

39. It is to be observed that under Section 154 Cr. P.C. the First Informant is required to sign the report which he makes, whereas under Section 162, Cr. P.C. he is

not required to sign the statement made by him. All that the Police Officer did in this case was to elucidate the letter written by the Gaonbura. What, therefore, the complainant said in the statement which he has signed, is part of the First Information Report, and cannot, in the circumstances of this case, be regarded as a statement made in the course of the investigation. I do not think there is any provision in the Cr. P.C. which debars a Police Officer from putting questions to a First Informant and recording his answers before making up his mind whether he should investigate the case as a cognisable offence.

40. The learned Government Advocate for the State, in my opinion, rightly contended that the Gaonbura who was woken up from sleep at 2 A.M., wrote a very short letter, concerning himself only with the fact that a person, namely Bapuram who had been caught and detained, should be taken, over by the Police without any delay. This is quite a reasonable inference to draw from the circumstances of this case, and I do not think it makes any difference that the Gaonbura was not questioned about it. If the letter of Gaonbura and the answers given by the complainant in elucidation of the letter are read together, it seems-to me that it would not be proper to say that there has been a subsequent concoction of the case. Both the Courts below have accepted the evidence of the complainant and other evidences corroborated as it is by the F.I.R. and come to the conclusion, that the applicant had participated in the offence.

41. My learned brother has thought fit to reject the evidence of P.W. 5, Mitharam Ahom on the ground that 'he does not state that he told the Gaonbura what he had been himself.' The credibility of a witness is to be decided with reference to his evidence given in Court, and while serious omissions made by a witness in an earlier

statement may be taken into consideration, I do not think this particular omission can be regarded as serious. The Courts below accepted the evidence of P.W. 5, and I see no reason to reject it. P.W. 1 Gunaram is the complainant, and P.W. 5 Mitharam is his father. P.W. 1 and P.W. 6 had gone to fetch the Gaonbura. Both stated in Court that the applicant had run away and that they had succeeded in apprehending the other accused. My learned brother has disbelieved the evidence of P.Ws. 5 and 6 on the ground that if their evidence were true, the Gaonbura would have mentioned the name of the applicant in his letter. In my opinion, the Courts below were right in not attaching any importance to the omission in the letter, when the complainant immediately on his arrival at the Police Station, implicated the applicant. With all respect, I am unable to agree that it would be a perfectly legitimate inference to draw that, when the Gaonbura wrote the letter, the name of the 2nd culprit, if there was any was not known. The Courts below have not drawn that inference, nor do I myself consider it an inference which can be properly drawn upon the facts of this case.

42. I am unable, therefore, to see how the observations of their Lordships of the Privy Council in AIR (32) 1945 P.C. 18, have any application to the facts of this case. There is no question of embellishment introduced in the case. Undoubtedly the fact that the intruders were 2 in number, was mentioned in the letter of the Gaonbura, one who was apprehended was implicated by name, the other who ran away was named by the complainant as soon as he came to the police station with the letter of the Gaonbura. The interval between the commission of the offence and the recording of the F.I.R., was only 6 hours; it is not alleged that the prosecution witnesses had any time or opportunity falsely to implicate the applicant. Indeed the idea of concoction is negatived by the suggestion made to P.W. 1 in his cross-examination. In the concluding paragraph of the cross-examination of P.W. 1, the suggestion made by the

applicant Kachu Gogoi was that Bapuram was carrying on an intrigue with the complainant's sister, called Jetuki and that Baburam was a guest in the house of Kachu that night and the complainant's sister went to visit Bapuram in Kachu's house, from where she was taken away by the complainant. This suggestion was denied by the complainant. The association then of the applicant Kachu with Bapuram on the night in question for some purpose or other, is not disputed. The simple question for the Courts below for consideration was — whether the purpose was one as alleged by the prosecution, and they have answered the question in the affirmative. The same suggestion was made to P.W. 2 and was denied by him.

43. Indeed the evidence of P.W. 3 who is an uncle of the applicant Kachu is very significant. That very night when P.W. 3 went to the house of the complainant on hearing shouts, he admits that the complainant told him that Kachu had succeeded in running away after having broken through a cut in the wall. No cross-examination of P.W. 3 was directed on this point. The Courts below were entitled therefore to attach the utmost importance to the evidence of the uncle of the applicant and, in my opinion, rightly accepted his evidence that the complainant had implicated the applicant before the complainant and his witnesses went to the Police Station. The evidence of P.W. 3, in my opinion completely negatives the suggestion that the applicant was not identified when the complainant and his witnesses went to the Police Station. P.W. 4 the Gaonbura, who wrote the letter, has stated in his evidence that the complainant had told him that Kachu had succeeded in running away. The Courts below were entitled to accept this evidence even though he had omitted to mention the name of the applicant in the letter. No question was put to this witness why the applicant's name was-omitted from the letter. P.Ws. 5 & 6 have supported the case for the prosecution, and I can see nothing in their cross-examinations to discredit their evidence. It is true that P.W. 5 is the father of the complainant, but that is no ground for rejecting his evidence. He was the most likely person to be present in the house at the hour of the night. In my opinion, the Courts below have rightly accepted the prosecution evidence and rejected the evidence of the 2 defence witnesses.

44. The result is that the application is dismissed. The applicant Kachu Gogoi is ordered to-surrender to his bail and undergo the unexpired period of his sentence. The Rule is discharged.

45. (Note: Due to this difference of opinion between, the two Judges the case was referred to a third. Judge who delivered this judgment as follows:)

46. DEKA, J.:— This is an application filed under Section 439, Cr. P.C. by one Kachu Gogoi who was convicted under Section 457, I.P.C., and sentenced to 3 months' rigorous imprisonment and a fine of Rs. 50/- in default to rigorous imprisonment for one month more by the Additional Judge,. U.A.D. The petition was heard by the Division. Bench of this Court, and, due to the difference of: opinion amongst the two presiding Judges this has-come up before me for hearing and disposal under Section 429, Cr. P.C.

47. The case for the prosecution was that on; the night of 22nd August, 1948, two persons Bapuram and Kachu Gogoi broke into the house of Gunaram (P.W. 1), who was roused by the noise of falling of two of the boxes from the place where they were. Gunaram, according to him, got up-and tried to catch the burglars, who however, pulled him out of the house through the opening made in the wall through which the accused persons entered into the house, Gunaram succeeded in securing Bapuram, but Kachu the present petitioner managed to escape.

48. An information was lodged at the thana next morning, wherein it was stated that at about 2 A.M., on the previous night a thief while entering into the house of Gunaram Gogoi by breaking open the wall had been caught and detained, and another thief had run away. This information which was sent to the police by way of a report,

was written and signed by Naga Gaonbura. (P.W. 4) and endorsed by some other persons including P. Ws. 2 and 3. The Police Officer elicited some more informations from Gunaram who went with the report ((Ex. 1) to the Police Station, and he admitted to have been put certain questions by the Police Officer who entered the questions, and answers in the First Information Report which, he signed.

49. The police after completing the investigation of the case submitted charge-sheet against Bapuram under Section 457, I.P.C., and the case was taken cognizance by Mr. S. Sarkar, 1st Class Magistrate at Sibsagar. The learned Magistrate after examining two of the prosecution witnesses, directed the police to submit a charge-sheet against the accused Kachu Gogoi by his order dated 25-11-48, and the police accordingly submitted, charge-sheet against this accused Kachu Gogoi on 4-1-49.

50. As regards the defence, the accused Bapuram pleaded that he was in love with Mt. Jetuki, a grown up sister of Gunaram Gogoi and proposed to elope together on the night of occurrence and, he (Bapuram) was as a matter of fact waiting that night at the house of Kachu where by arrangement, Mt. Jetuki went. Gunaram, however, obstructed

his sister from accompanying the accused and dragged him (Bapuram) to his (Gunaram's) house where he was wrongfully confined by the complainant and his kinsmen and was subsequently made over to the police the next day. He denied the story of burglary completely. The accused Kachu on the other hand pleaded alibi, and says that he was not present at the place of occurrence on the night of 22nd August, 1948, nor did he go for break into the house of Gunaram on that night as alleged. His case is that he was implicated only out of grudge by some of the prosecution witnesses.

51. The trial proceeded against both — Kachu Gogoi and Bapuram Gogoi, who were convicted by the trial Magistrate under Section 457, I.P.C. and sentenced to 3 months' rigorous imprisonment and a fine of Rs. 200/- each in default to suffer 2 months' rigorous imprisonment. On appeal the learned Additional Judge, Upper Assam Districts, confirmed the conviction of each of the accused persons under Section 457, I.P.C., but reduced the line imposed to Rs. 50/- in default to one month's rigorous imprisonment and maintained the substantive term of imprisonment.

52. The points taken before me in revision are:

(1) That the procedure followed by the trial Magistrate was irregular in view of the fact that the provisions of Section 191, Cr. P.C., were not applied by the trying Magistrate though he took cognizance of the offence under Section 190(1)(c), Cr. P.C.;

(2) That the learned Additional Judge failed to take into consideration the fact that there was no mention of the name of Kachu Gogoi in the First Information Report, that was sent to the thana by the local Gaonbura soon after the occurrence;

(3) That the Courts below failed to consider and appreciate the inherent improbabilities and absurdities of the prosecution case and that the evidence against the present petitioner was too meagre for the purpose of his conviction under Section 457, I.P.C.

53. I heard the arguments for both sides and had the advantage of reading the judgments of the Hon'ble the Chief Justice and the Hon'ble Mr. Justice Ram Labhaya who had materially differed on the grounds relating to the procedure as well as on the

merits regarding the facts in this case. The Hon'ble the Chief Justice has held that Section 191, Cr. P.C. was not applicable to this case, the cognizance of the case being taken under Section 190(1)(b), Cr. P.C. and in his Lordship's opinion the High Court should be reluctant to go into evidence when there is a finding of the appellate Court based on evidence, — except in special cases to prevent failure of justice. His Lordship has, however, discussed the evidence and supported the view taken by the lower appellate Court as to facts.

54. The Hon'ble Mr. Justice Ram Labhaya, on the other hand holds that the procedure followed by the trial Court was irregular inasmuch as provisions of Section 191, Cr. P.C. were not observed as in his opinion the cognizance of the case against accused Kachu Gogoi was taken by the learned Magistrate under Section 190(1)(c), Cr. P.C. His Lordship discussed the evidence and in his opinion it was not adequate to substantiate the charge under Section 457, I.P.C., against the accused Kachu and he favoured an acquittal. I have read both the judgments of their Lordships with due deference — and must say that I agree with the Hon'ble the Chief Justice on the point that Section 191, Cr. P.C. had no application in the facts and circumstances of this case and that it will be unjustifiable to go into evidence to find the facts for ourselves — the finding arrived at by the lower Courts not being challenged on any legal grounds. Their Lordships have discussed the points very elaborately and I therefore do not propose to discuss them at any considerable length.

55. In my opinion, '*Gundo Chikko* v. *Emperor*', AIR (8) 1921 Bom 365, is quite a good authority on the point that the cognizance taken by the Magistrate in this case was under Section 190(1)(b), Cr. P.C. and not under Section 190(1)(c). '4 CWN 367' and '8 CWN 864', support that view. It does not appear in this case that the Magistrate had heard much of evidence as in the Bombay case, but heard the examination-in-chief of two of the P.W.'s before calling for a charge-sheet against the accused and the trial commenced de novo' after his appearance. Section 351, Cr. P.C. gives wide power to the Court taking cognizance of an offence to proceed against a person originally not summoned or arrested if it appears from the evidence that some offence may be committed by such a person, — and Section 204, Cr. P.C. also gives sufficient jurisdiction to the Magistrate for acting in such a manner as he did. It cannot be construed from the facts that Section 556, Cr. P.C. had any application in this matter or that the Magistrate acted both as the Judge and the Prosecutor. A fresh charge-sheet is permissible and the cognizance of the case was taken on the basis of that charge-sheet. Mr. Goswami failed to show me any authority favouring the view that he pressed.

56. With regard to the second ground taken by Mr. Goswami, Advocate for the petitioner, my view is that the entries made by the Police Officer in the F.I.R., were not admissible, they not being duly proved — and the report (Ex. 1) made by P.W. 4 Nagaram Gaonbura alone was admissible, that being duly proved. The report is undoubtedly cryptic and does not disclose the names of any of the alleged offenders — though the Gaonbura had admittedly sufficient opportunity to enter their names in his report — it being sent after he came to the place of occurrence and at about 4 A.M., in the morning.

57. It has been held by almost all the High Courts that a High Court has very limited jurisdiction to go into facts and should refuse to interfere on that basis in a revision petition made under Section 439, Cr. P.C. unless the finding of fact is based on inadmissible evidence or it is otherwise manifestly erroneous. In this case both the Courts below have come to a concurrent finding that the accused was an associate of Bapuram who was secured by P.W. 1 — and some other P.W's at the place of occurrence, and there is specific evidence of P.W. 1 Gunaram that Kachu had entered into his house and P.W. 6 supports him to the extent that he (P.W. 6) also saw accused Kachu running away. I must say that the evidence of accused Kachu entering

the house is comparatively meagre but his association with Bapuram for the occurrence of the day is sufficiently well proved and is to some extent admitted by the D.W.'s themselves. Even if the learned Additional Judge acted on the sole testimony of Gunaram against this background, — we cannot say that he was manifestly wrong or that his finding is erroneous in law. I am prepared to accept Mr. A. Goswami's contention that another Court of appeal might quite reasonably take a different view of the evidence, — but the powers of the High Court in the matter of revision being restricted more to the points of law and there being nothing extra-ordinary in the circumstances or any palpable error in the findings of facts arrived at by the appellate Court, — in my view it will be wrong to go into evidence to set aside the concurrent findings of the Courts below — and accordingly I agree with the Hon'ble the Chief Justice that the conviction of the accused under

Section 457, I.P.C., must be upheld. It appears to me that this accused was only an associate of Bapuram, — and I would like to treat him more as an abettor and reduce his substantive term of imprisonment to the period already undergone but keep the sentence of fine with the alternative sentence intact.

58. I accordingly direct that the accused should pay the fine and on payment of the same he will be discharged from the bail bond, otherwise he will serve out the sentence in default.

59. The rule is disposed of accordingly.

60. *Conviction upheld: sentence reduced.*

---

* Is it Mitra's "*Code of Criminal Procedure*" 9th Edn.?—Ed.