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RAJINDRA NATH MAHATO

v.

T. GANGULY, DY. SUPERINTENDENT & ANR.

December 2, 1971

[A. N. RAY AND D. G. PALEKAR, JJ.]

B *Code of Criminal Procedure (Act 5 of 1898), ss. 202, 204 and 561A—
Power to issue process—Who has—Right of High Court to go into weight
of evidence under s. 561A.*

C After taking cognizance of an offence against the respondent the Magistrate enquired into it and submitted a report to the Sub-Divisional Magistrate that a *prima facie* case was made out against the respondents. The Sub-Divisional Magistrate directed the issue of process. The High Court in a petition to quash the issue of process held that under s. 204, the Sub-Divisional Magistrate had no right to issue process since he was not the Magistrate who had taken cognizance of the offence, and also observed that the evidence in the case came from tainted sources.

Dismissing the appeal to this Court.

D HELD: (1) Under s. 204, Cr. P.C. the Magistrate who takes cognizance could issue process and under s. 202, Cr. P.C., a Magistrate to whom a case had been transferred could issue process. Since, in the present case, the magistrate who issued process had not taken cognizance of the offence and there was no order transferring the case to him, the High Court was right in quashing the issue of process. [673 C-F]

(2) Under s. 561A, Cr. P.C., the High Court could go into the question as to whether there was any legal evidence. [673 F-G]

E **CRIMINAL APPELLATE JURISDICTION** : Criminal Appeal No. 291 of 1968.

Appeal by special leave from the judgment and order dated March 28, 1968 of the Calcutta High Court in Criminal Revision No. 159 of 1968.

F *P. K. Chatterjee*, for the appellant.

P. K. Chakravarty, for respondent No. 1.

The Judgment of the Court was delivered by

G **Ray, J.** This is an appeal by special leave from the judgment dated 28 March, 1968 of the High Court at Calcutta quashing the processes issued against the three accused persons.

H The appellant on 8 March, 1966 filed a petition of complaint against the Block Development Officer Purulia, the Officer-in-Charge of the local Police Station and T. Ganguly, the Deputy Superintendent of Police, Purulia under section 395 of the Indian Penal Code on the allegation that during search of the appellant's house they committed dacoity in the house. The Magistrate dismissed the complaint under section 203 of the Code of Criminal

Procedure on the ground that the complaint was incompetent without sanction as the accused were Government servants. A

The complainant thereafter moved the Sessions Judge, Purulia against the order of dismissal. A reference was made to the Calcutta High Court. The learned Single Judge of the Calcutta High Court accepted the reference, set aside the order of the Magistrate and sent the case back for proceeding in accordance with law. B

On 27 March, 1967 the Magistrate Shri S. K. Ganguly took cognizance of the case and fixed a date for holding judicial enquiry. The Magistrate on 22 November, 1967 came to the conclusion that a *prima facie* case under section 395 of the Indian Penal Code had been made out against the three accused and submitted a report to the Sub-Divisional Magistrate, Purulia. The Sub-Divisional Magistrate, Purulia on receipt of the report of the judicial enquiry passed an order on 6 December, 1967 directing the issue of process against all the three accused. This order forms the subject matter of the appeal. C
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One of the accused thereafter moved the High Court at Calcutta for quashing the process. The High Court at Calcutta said that cognizance of the offence was taken by the Magistrate Shri S. K. Ganguly but process was issued by the Magistrate Shri S. Sarkar and held that Shri Sarkar not having taken cognizance of the offence had no right to issue process under section 204 of the Code of Criminal Procedure. The High Court, therefore, quashed the process and observed that the learned Magistrate who had taken cognizance of the offence if he was so advised would be at liberty to issue processes against the other two accused persons. E
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The question for consideration is whether Shri Sarkar could have issued process in the present case. Shri Ganguly was the Magistrate who took cognizance. Shri Sarkar was not the Magistrate who took cognizance. Therefore, under section 204 of the Code of Criminal Procedure the Magistrate who took cognizance of the case could issue process. G

Sections 191 and 192 of the Code of Criminal Procedure contemplate transfer of cases by a Magistrate, who has taken cognizance of an offence. Section 191 of the Code of Criminal Procedure speaks of transfer of a case or commitment to the Court of Sessions on the application of the accused. Section 192 of the Code of Criminal Procedure speaks of transfer of a case by a Magistrate who has taken cognizance to any Magistrate subordinate to him for enquiry or trial. H

A In these cases where either the Magistrate has taken cognizance and is in seisin of the case or where a case is transferred by a Magistrate who has taken cognizance to another Magistrate subordinate to him the complainant is required to be examined under section 200 of the Code of Criminal Procedure. There are certain exceptions with which we are not concerned in the present appeal. The relevant section which confers power on the Magistrate to whom the case has been transferred to issue process is section 202 of the Code of Criminal Procedure. The language of section 202 of the Code of Criminal Procedure is that the Magistrate may, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against. Therefore, the power of the Magistrate to issue process under section 202 of the Code of Criminal Procedure is not limited by the terms of section 204 of the Code of Criminal Procedure to issue process.

D Therefore, the two courses are : first, under section 204 of the Code of Criminal Procedure for the Magistrate taking cognizance to issue process or secondly under section 202 of the Code of Criminal Procedure for a Magistrate to whom a case has been transferred to issue process.

E In the present case there was no order of transfer of the case by Shri Ganguly to Shri Sarkar. The issue of process is a matter for judicial determination. Before issuing a process the Magistrate has to examine the complainant. That is why the issue of process is by the Magistrate who has taken cognizance or the Magistrate to whom the case has been transferred. The High Court therefore correctly quashed the issue of process.

F It was contended on behalf of the appellant that the High Court should not have gone to the question as to whether a *prima facie* case was established or not. The High Court under section 561-A of the Code of Criminal Procedure can go into the question as to whether there is any legal evidence. When the High Court said that the evidence in the present case came from tainted sources and was not reliable the High Court meant what can be described as 'no case to go to the jury'.

G The High Court correctly quashed the process against T. Ganguly. The appeal therefore fails and is dismissed.