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**(2009) 05 PAT CK 0063**  
**In the Patna High Court**  
**Case No : Cr. Misc. No. 36335 of 2008**

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|-------------------------------------------|------------|
| Anand Kumar Singh @ Kali Singh            | APPELLANT  |
| Vs                                        |            |
| The State of Bihar and Shiv Shanker Singh | RESPONDENT |

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**Date of Decision :** 06-05-2009

**Acts Referred:**

**Citation :** (2009) 05 PAT CK 0063

**Final Decision :** Allowed

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### Judgement

Ajay Kumar Tripathi, J.—The present application filed on behalf of the petitioner is for quashing the order dated 2.8.2008 passed by Shri V.B. Tiwary, Judicial Magistrate, 1st Class, Pupri at Sitamarhi in Case No. C1-371/05, whereby and whereunder the learned Magistrate has taken cognizance against the petitioner u/s 395 of the Indian Penal Code and has issued summons for his appearance.

2. A dacoity was committed in the house of Shiv Shanker Singh, opposite party No. 2 on 6.12.2004, for which Bajpatti P.S. Case No. 147/04 came to be filed by the opposite party. During the course of dacoity one Gopal Singh was alleged to have died since a bomb was thrown at him. The narration of the events is contained in Annexure-2, the so-called F.I.R. The police registered a case u/s 396/398 of the Indian Penal Code, investigated the matter, duly supervised by the high official and found the case instituted by the opposite party No. 2, the informant of Bajpatti P.S. Case No. 147/04, to be false. The police reached a conclusion that the step-brother of the informant, namely, Gopal Singh, was killed with intention to grab his property and a final form came to be submitted on 9.4.2005.

3. During the investigation and before filing of the final form one protest petition on behalf of the opposite party dated 4.4.2005 came to be filed with a different story but with regard to the same incident. The protest petition, which is Annexure-7, was kept on record of the Court below, nothing was done on the protest petition and no steps were taken by opposite party No. 2, which is evident from the order-sheet of the Court below. One Kameshwar Singh, father

of the deceased Gopal Singh also filed a case with regard to the said incident and the murder of his son, which was registered as Complaint Case No. C1-423/04, which was transferred by the Court of learned Sub Divisional Judicial Magistrate, Pupri for investigation by police u/s 153 of the Cr.P.C. The complaint was registered as Bajpatti P.S. Case No. 141/04 dated 29.12.2004 under Sections 302 and 120B of the Indian Penal Code, in which opposite party No. 2 and others were made accused for murder of son of Kameshwar Singh as stated above. Police investigated this case and filed charge-sheet on 29.8.2005 against Shiv Shankar Singh and others under several sections of the Indian Penal Code including Explosives Substance Act and the Arms Act. The trial thereafter proceeded in the said case.

4. When the trial proceeded against the opposite party No. 2 on the case filed by the said Kameshwar Singh, yet another protest petition came to be filed on 22.9.2005, this time the basic allegations remained the same but a new or a different twist to the facts were sought to be given by opposite party No. 2. The learned Magistrate thereafter came to pass an order dated 2.8.2008 summoning the present petitioner and the other accused persons to face trial in the case of dacoity. The order, therefore, is under challenge in the present application. Learned counsel representing the petitioner submits that the order passed by the learned Magistrate is out and out illegal and bad in law. He submits that the order summoning the petitioner on a second complaint is not maintainable and since there is a bar under law. There was no occasion to summon the petitioner to face trial. In this regard he relies on a decision of Calcutta High Court in the case of Joy Krishna Chakraborty and Others Vs. The State and Another, In addition he also submits that it is a malicious prosecution which has been lodged by the opposite party No. 2 only as a defence for himself because on the complaint lodged by Kameshwar Singh the F.I.R. in question came to be registered and charge-sheet has been submitted against opposite party No. 2 to face trial. Only to muddy the water the opposite party No. 2 has filed the protest petition twice over which is at variance with the initial F.I.R. and he has tried to improve the case according to his convenience when the police initially found the case lodged by opposite party No. 2 to be false.

5. Learned counsel representing opposite party No. 2 submits that the case instituted against his client itself is suspicious because for the death of the son of the complainant the complaint came to be lodged after almost a month and that by itself speaks much for the authenticity but he states that the Court below has rightly summoned this petitioner and other accused persons to face trial u/s 395. On the question of law as to how a second protest can be maintained when a earlier protest petition dated 4.4.2005 was still lying on record and no order had been passed, learned counsel for opposite party No. 2 submits that it is not evident from the order as to which protest petition had been entertained and the Court below seems to have taken the matter in its entirety.

6. This Court has difficulty in accepting the submission made on behalf of

opposite party No. 2 because it is evident from the record that when the first protest petition contained in Annexure-4 was filed on 4.4.2005 it was only ordered to be placed on record and thereafter nothing seems to have been done in the matter and then yet another protest petition which has been treated as complaint was allowed to be filed on 22.9.2005 and thereafter the impugned order has come to be passed.

7. Keeping the ratio of the decision in the case of Joy Krishna v. State (supra), the Court is in agreement with the submission made on behalf of the petitioner that the impugned order dated 2.8.2008 is not sustainable. The Court can only record that the learned Judicial Magistrate has not conducted himself in a fair manner because he has intentionally left the impugned order vague as to which protest petition he was acting upon, so that advantage may accrue to opposite party No. 2.

8. The petitioner has made out a case for interference and the impugned order dated 2.8.2008 summoning the petitioner to face trial u/s 395 of the Code of Criminal Procedure is set aside.

9. The application stands allowed.