

(2006) 11 AHC CK 0077
In the Allahabad High Court

Dharmendra Swami Sharma and Others	APPELLANT
Vs	
State of U.P. and Ashok Kumar Baghel	RESPONDENT

Date of Decision : 13-11-2006

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 190, 200, 202
Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 327

Citation : (2006) 11 AHC CK 0077

Hon'ble Judges : Poonam Srivastava, J

Bench : Single Bench

Judgement

Poonam Srivastava, J.—Heard learned Counsel for the petitioners and learned A.G.A. for the State.

2. The First Information Report has been registered at the instance of the respondent No. 2 as a counterblast to the report lodged by the petitioners. After investigation, the police submitted a final report on 14.2.2003. Notice was issued to the respondent No. 2. The respondent No. 2 preferred a protest petition. Learned Magistrate, Firozabad rejected the final report and summoned the petitioners vide order dated 4.6.2004. This order was challenged in revision. The revisional court dismissed the revision on 23.8.2006. Both the orders are impugned in the instant writ petition.

3. Submission on behalf of the petitioners is that the Magistrate allowed the protest petition, therefore, he was bound to follow the procedure provided u/s 190(1)(a) Cr.P.C. Since he failed to record the statement of the complainant and witnesses under Sections 200 and 202 Cr.P.C, the order summoning the petitioners is illegal. Reliance has been placed on two decisions of this Court Anil Kumar v. State of U.P. and Anr. XLIV 2004 A.C.C. 345, Mithlesh Kumari v. State of U.P. and Ors. XXX 1996 A.C.C.214. Learned Counsel for the petitioners has laid emphasis on the observation made by the Magistrate that the protest petition has been allowed.

4. After hearing counsel for the respective parties, I am satisfied that the impugned orders do not suffer from any illegality whatsoever. It is settled principle of law that when the police after completing investigation came to a conclusion that no case is made out against the accused and submitted a final report, it is incumbent upon the Magistrate to give a notice to the complainant for giving an opportunity of hearing. It is discretion of the Magistrate either to look into the case diary, evidence collected by the police and issue process straightaway u/s 190(1)(b) Cr.P.C. or to proceed as a complaint case after examining the witnesses u/s 200 and 202 Cr.P.C. There are catena of decisions of this Court including decision of a Division Bench of this Court *Pakhandu and Ors. v. State of U.P.* and *Anr.* XLIV 2001 A.C.C. 096 as well as the Apex Court, it is option of the Magistrate to proceed as the facts and circumstances of the case required him to do so. In the recent decision of the Apex Court *Popular Muthiah v. State Represented by Inspector of Police* 2006 (11) UR 307 (S.C.). Paragraph No. 49 of the said decision is quoted below:

We have noticed hereinabove that the jurisdiction of the learned Magistrate in the matter of issuance of process or taking of cognizance depends upon existence of conditions precedent therefor. the Magistrate has jurisdiction in the event a final form is filed (i) to accept the final form; (ii) in the event a protest petition is filed to treat the same as a complaint petition and if a prima facie case is made out, to issue processes; (iii) to take cognizance of the offences against a person, although a final form has been filed by the police, in the event he comes to the opinion that sufficient materials exist in the case diary itself therefor; and (iv) to direct re-investigation into the matter. [See *Abhinandan Jha and Others Vs. Dinesh Mishra*, see also *Minu Kumari and Another Vs. The State of Bihar and Others*,

5. In view of the decision mentioned above, a bare reading of Section 190(1) Cr.P.C, it is apparent that the Magistrate while summoning the accused has clearly observed that he has heard the counsel for the complainant, perused the case diary and other documents available on record as documentary evidence, he is satisfied that final report submitted by the police is incorrect. In the circumstances, it is clear that there is no illegality whatsoever committed by the courts below. The impugned orders are legal and do not call for interference by this Court in exercise of jurisdiction under Article 226 of the Constitution of India. The writ petition lacks merit and is, accordingly, dismissed.

6. However, it has been stated in paragraph No. 22 of the writ petition that the petitioner No. 2 is aged about 72 years and is a heart patient. He is not in a position to move without help, therefore, in the event he is sent to jail, he will be in great difficulty.

7. In view of this assertion, I direct the courts below that in the event the petitioners surrender and move bail application in case crime No. 448-A of 2002, under Sections 147, 148, 149, 307, 327, 504, 506 I.P.C, P.S. Ramgarh, District Firozabad, the same shall be considered and disposed off expeditiously. So far as

bail application of the petitioner No. 2 is concerned in the aforesaid case crime number, it shall be considered and disposed off by the courts below expeditiously, preferably, if possible on the same day.