
(2005) 01 AHC CK 0109

In the Allahabad High Court

Case No : Criminal Miscellaneous Application No. 13323 of 2005

Ganga Ram and Anr.

APPELLANT

Vs

State of U.P.& Anr.

RESPONDENT

Date of Decision : 19-01-2005

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190(1)(a), 190(1)(b)

Citation : (2005) 01 AHC CK 0109

Hon'ble Judges : Poonam Srivastava, J

Final Decision : Dismissed

Judgement

Mrs. Poonam Srivastava, J.—Heard Sri. V. K. Tripathi, learned Counsel for the applicants and learned A. G. A. for the State.

2. This application has been filed for quashing the order dated 152002 passed by Additional Chief Judicial Magistrate 4th, Mathura in Case No. 116 of 1998, under Sections 304B, 201 I.P.C., Police Station Math, District Mathura.

3. The facts giving rise to the dispute is that a first information report was registered at Case Crime No. 116 of 1998, under Sections 304B. 201 IPC, Police Station Math. SubDistrict Math, District Mathura against the husband and other family members. On the basis of investigation, the Investigating Officer submitted a final report on 1101998 which has been annexed as Annexure5 to the affidavit. Notice was issued to the complainantopposite party No.2. He filed protest petition and affidavits. The Magistrate by means of the impugned order rejected the final report and summoned the accused in exerise of under Section 190(1) (b) Cr. P. C. The submission on behalf of the applicants is that the deceased died on account of her illness and it is not a case of dowry death and, therefore, the Investigating Officer rightly submitted final report. In support of the contention, a decision of this Court, Gajendra Kumar Agarwal v. State of U. P., 1994 U. P. Criminal Rulings, 308, has been placed before me. Emphasis is that once a final report was submitted and in the event, the Magistrate is not in agreement, he should also give an opportunity of hearing to the accused and it is

not only the complainant, who should be heard. I have gone through the said decision. In the said case, the protest petition was filed against the final report and the Court was of the view that the accused should also be given an opportunity of hearing.

4. Another case cited by the Counsel for the applicants is, Pappu alias Subodh Kumar v. State of U. P., 2004 U. P. Criminal Rulings 249. In the said case, the Magistrate has taken cognizance after considering the affidavit of two witnesses and it was held that the cognizance was taken not under Section 190(1)(b) Cr. P. C. but it was on the basis of protest petition, therefore, the Magistrate has followed the procedure of a complaint case. Another decision relied upon by the Counsel for the applicants is, Smt. Mithilesh Kumari v. State of U. P., 1996 (33) ACC 214. In this case it was held that if the Magistrate takes cognizance on the report submitted by police and statement of witnesses examined by police it will be a case where the cognizance is taken under Section 190(1)(b) Cr. P. C. but in the event, he decided to proceed under Section 200 Cr. P.C. after taking evidence then it will be a case of cognizance under Section 190(1) (a), Cr. P. C.

5. In the instant case the Magistrate has passed an order without recording any statement under Sections 200 and 202, Cr. P.C. in the case of Pakhandu v. State of U. P., 2001 U.P. Criminal Rulings 604, a Division Bench of this Court had gone into detail regarding the circumstances when the Magistrate takes cognizance whether it is under Section 190 (1)(b) or 190 (1)(a). In paragraphs 14, 15 and 16 of the said decision reliance was placed on a case decided by the Apex Court. Paragraphs 14, 15 and 16 of the said decision are quoted below:

“(14) In the case of Tularam v. Kishan Singh, AIR 1977 SC 2401, it was held that if the police, after making an investigation, sent a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of the case under Section 190(1)(b) on the basis of material collected during investigation and issue process or in the alternative he could take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he was of opinion that the case should be proceeded with.

(15) From the aforesaid decisions, it is thus clear that where the Magistrate receives final report the following four courses are open to him and he may adopt any one of them as the facts and circumstances of the case may require:

(I) He may agree with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant; or

(II) He may take cognizance under Section 190(1)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or

(III) He may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) He may, without issuing process or dropping the proceedings decide to take cognizance under Section 190 (1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr. P. C. and thereafter decide whether complaint should be dismissed or process should be issued.

(16) Where the Magistrate decides to take cognizance of the case under Section 190 (1)(b) of the Code ignoring the conclusions arrived at by the investigating agency and applying his mind independently to the facts emerging from the investigation records, in such a situation the Magistrate is not bound to follow the procedure laid down in Sections 200 and 202 of the Code, and consequently the proviso to Section 202(2) Cr. P. C. will have no application. It would however be relevant to mention that for forming such an independent opinion the Magistrate can act only upon the statements of witnesses recorded by the police in the case diary and other material collected during investigation. It is not permissible for him at that stage to make use of any material other than investigation records, unless he decides to take cognizance under Section 190(1)(a) of the Code and calls upon the complainant to examine himself and the witnesses present, if any, under Section 200.?

6. In the instant case, no doubt the protest petition was filed as well as the affidavits have been mentioned in the impugned order but the Magistrate did not follow the procedure of the complaint case and proceeded to record the evidence and has taken cognizance. It is absolutely clear that the Magistrate has taken cognizance under Section 190(1)(b) and not under Section 190(1)(a) Cr. P. C. Merely mentioning the recital of the affidavits in the order is not sufficient to come to a conclusion that the Magistrate has taken cognizance under Section 190(1)(a) Cr. P. C. In that event, the Magistrate would have proceeded to record statement of the complainant and other witnesses. Since nothing was done but the Magistrate has summoned the accused after taking cognizance, it is absolutely clear that this is a case, where the cognizance has been taken under Section 190(1)(b). This has also been held in a decision by the Apex Court in the case of *M/s. India Carat Pvt. Ltd. v. State*, 1989 Allahabad Criminal Rulings 178. Paragraph 14 of the said judgment is quoted below:

?Since in the present case the Second Additional Chief Metropolitan Magistrate has taken cognizance of offences alleged to have been committed by the second respondent and ordered issue of process without first examining the appellant and his witnesses, the question for consideration would be whether the Magistrate is entitled under the Code to have acted in that manner. The question need not detain us for long because the power of a Magistrate to take cognizance of an offence under Section 190(1)(b) of the Code even when the police report was to the effect that the investigation has not made out any offence against an accused has already been examined and set out by this Court in *Abhinandan Jha*

v. Dinesh Mishra 1967 (3) SCR 668 and H. S. Bains v. State, 1980 A Cr R 423 : 1981 (1) SCR 935 : (AIR 1968 SC 117) : (AIR 1980 SC 1883). In Abhinandan Jha v. Dinesh Mishra (supra) the question arose whether a Magistrate to whom a report under Section 173(2) had been submitted to the effect that no case had been made out against the accused, could direct the police to file a charge sheet, on his disagreeing with the report submitted by the Police. This Court held that the Magistrate had no jurisdiction to direct the police to submit a charge sheet but it was open to the Magistrate to agree or disagree with the police report. If he agreed with the report that there was no case made out for issuing process to the accused, he might accept the report and close the proceedings. If he came to the conclusion that further investigation was necessary he might make an order to that effect under Section 156(3) and if ultimately the Magistrate was of the opinion that the facts set out in the police report constituted an offence he could take cognizance of the offence, notwithstanding the contrary opinion of the police expressed in the report. While expressing the opinion that the Magistrate could take cognizance of the offence notwithstanding the contrary opinion of the police, the Court observed that the Magistrate could take cognizance under Section 190(1)(c). The reference to Section 190(1)(c) was a mistake for Section 190(1)(b) and this has been pointed out in H. S. Bains (supra).?

7. Looking to the facts and circumstances of the case, I am not in agreement with the submissions made by the Counsel for the applicants. Since the protest petition was filed and the affidavits were also on record, which also finds mention in the order, the Magistrate has taken cognizance under Section 190(1)(a). The case diary was before the Magistrate and he has formed his opinion independently. The material before the Magistrate was sufficient to summon the accused. It is a case, where the cognizance has been taken by the Magistrate after he was satisfied that prima facie case is made out and summoned the accused under Section 190(1)(b) Cr. P. C. The application lacks merit and is accordingly rejected.