

(2008) 02 AHC CK 0011
In the Allahabad High Court
Case No : Criminal R. No. 211 of 2008

Kiran Pal and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 06-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 190(1), 200, 202(1), 202(2)
Penal Code, 1860 (IPC) — Section 364

Citation : (2008) 2 ACR 1171

Hon'ble Judges : A.P. Sahi, J

Bench : Single Bench

Advocate : Aditya Prasad Mishra, for the Appellant; A.G.A., for the Respondent

Judgement

A.P. Sahi, J.—This revision questions the correctness of the order dated 15.11.2007 on the ground that the court below has proceeded on an erroneous assumption of facts and law.

2. An F.I.R. was registered on 11.9.2003 u/s 364, I.P.C. in which the revisionists were named as accused. The Investigating Officer recorded the statements of the witnesses and thereafter submitted his report on 13.10.2003 to his higher authorities stating therein that no offence is made out. The Circle Officer of the area concerned directed the Investigating Officer to hand over the investigation to some other Inspector and again a report was submitted on 27.12.2003 supporting the earlier investigation as proposed as no offence was made out. The said report was submitted to the Court for acceptance upon which objections were called upon and a protest petition was filed by the O.P.No. 2 supported with affidavits of the witnesses Smt. Urmila, Angoori and his own affidavit dated 2.3.2006. The learned Magistrate has, relying on the same, rejected the police report and has summoned the applicants.

3. Learned Counsel for the applicants contends that the order is perverse inasmuch as there are no statements on record on oath of the eye witnesses and there was no occasion to do so inasmuch as the same would be required only if

the case is treated to be a complaint case. On the contrary, the affidavits of the said witnesses have been taken into consideration which is an extraneous material and as such no cognizance could have been taken by him u/s 190(1)(b), Cr. P.C. In these circumstances, it is urged that the Magistrate could have proceeded only to treat the case as a complaint case after recording the statements of the witnesses and he could not have taken cognizance on the basis of the affidavits which were filed, as the said procedure is contrary to the law laid down in *Pakhandu v. State* (XLIII) 2001 ACC 1096: 2001 (3) ACR 2541, as followed by a learned single Judge in the case of *A. K Chauhan v. State*, (XLIX) 2004 ACC 435.

4. Learned A.G.A. on the other hand, contends that the Magistrate has recorded a clear finding to the effect that the police did not record the statements of the witnesses as were desirable u/s 161, Cr. P.C. and what ever facts were adduced in the case diary, the same was presented in a distorted manner and hence the Magistrate has rightly exercised discretion for summoning the applicants. He contends that if the Investigating Officer has failed to discharge his duties which he was obliged to do under the provisions of Cr.P.C. read with U.P. Police Regulations, then in that event, it cannot be said that the Magistrate has taken into consideration any extraneous material for the purposes of proceeding to summon the applicants. He further contends that in view the decision of this Court in the case of *Rafiquddin and Azizuddin Vs. State of U.P. and Smt. Nafeesa Begum*, , and as reiterated in the case of *Sukhpal Singh v. State* 2006 Cril LJ 2238: 2006 (2) ACR 1416, there was no occasion to defer with the view that has been taken by the Magistrate, as the facts stated in the protest petition simply corroborate the facts which were actually discovered during investigation, and there being no difference in the same, the Magistrate was fully within his jurisdiction to defer with the said report and summon the applicants u/s 190(1)(b). He contends that when the material is substantially the same, then there was no occasion for the Magistrate to adopt the procedure u/s 190(1)(a), Cr. P.C. He further contends that having attempted a petition u/s 482, Cr.P.C. which was dismissed as withdrawn on 21.1.2008, the applicants have made a second attempt by questioning the validity of the said order and, therefore, there is no occasion to interfere with the same as no error has been pointed out by the applicants.

5. The question as to whether affidavits can be entertained or not, need not detain this Court. Section 297, Cr.P.C. entails the authority before whom affidavits can be sworn and affirmed. The question is as to whether such affidavits can be taken into consideration at the time of summoning and taking cognizance u/s 190(1)(b), Cr.P.C. This question in turn depends on, as to whether such material is extraneous material or an additional material which cannot be looked into at the time of taking of cognizance. This Court in the case of *Sukhpal Singh* (supra) after disclosing the language of the relevant provisions, and after consideration of impact of the decision, relied by the learned Counsel for the applicants, has held as follows in para 10 of the said decision :

10. In the backdrop of this proposition of law the contention of the learned Counsel for the applicants that the affidavits were filed in support of the protest petition, therefore, Magistrate was bound to adopt the procedure of complaint case is to be examined. At a glimpse, the contention seems to be attractive but in essence is devoid of substance. When the notice is issued to the informant before accepting the final report, affording him an opportunity of hearing as to whether the final report be accepted or not, the opportunity must be meaningful and not an empty formality. At this stage the informant is free to support his case by filing the affidavits of the witnesses of the investigation for the limited purpose to show that a perusal of the case diary itself makes out an offence. If such affidavits or affidavit is filed, it cannot be asked that Magistrate is bound to adopt and observe the procedure of complaint case. Merely because some affidavit as aforesaid, have been filed along with the protest petition does not divest the Magistrate to take cognizance u/s 190(1)(b), Cr.P.C. It is left to the discretion of the Magistrate to adopt either of the two courses provided under Sections 190(1)(a) and 190(1)(b). He may summon the accused on the identical material contained in the case diary and affidavits filed for the purposes of non-acceptance of final report u/s 190(1)(b), Cr.P.C. or he even can treat the protest petition, at the behest of the informant to be a complaint, and then follow the procedure of complaint case. (Emphasis mine). Thus the Magistrate can look into the case diary and the affidavit filed for the rejection of the final report and for taking cognizance u/s 190(1)(b) and there is no bar to it if the affidavit reiterates the same facts which are mentioned in the case diary itself. Only because the affidavits are filed with the contents that the final report be rejected and accused be summoned, Magistrate is not bound to follow the procedure of a complaint case and such an affidavit or affidavits does not take away his power to act u/s 190(1)(b), Cr.P.C. If the contention of the counsel for the applicant for following the procedure of the complaint case in such an event is allowed to prevail then it will be repetition statements of those very facts contained in the case diary and affidavit and will, therefore be an unnecessary exercise by the Magistrate loathing him with additional burden for no gains. Consequently the proposition that the Magistrate was bound to follow the procedure of complaint case, when affidavit is filed for the purpose of not accepting the final report, advanced by the applicant's counsel, cannot be accepted and is repelled and consequently rejected.

6. The Court further went on to hold as follows in paras 12 and 13 of the said decision :

12. Turning towards the ruling cited by the learned Counsel of the applicants (1) Pakhandi and Ors. v. State of U.P. and Anr. 2001 ACC 1096 : 2001 ALJ 2798. This judgment by Division Bench of this Court is the outcome of a reference made by Hon'ble Sushil Harkauli, J. The question referred was "whether the view taken in the aforesaid case of Mohabbat Ali is correct." Mohabbat Ali v. State of U.P. 1985 ACC 25: 1984 CrL LJ 954: 1984 ACR 484 (LB), is relatable to the proposition as to whether the summon protest petition for offences triable by

court of sessions is bound to follow the proviso to Section 202(2), Cr.P.C. for examination of all the witnesses of the complainant before summoning or not. The said proviso mandates that if the offence is triable by court of sessions then the Magistrate, while conducting inquiry u/s 202(1), Cr. P.C., shall call upon the complainant to produce all his witnesses and examine them on oath. The intention of the Legislature behind the said proviso is clear and easily understandable. Magistrate in such cases is not the trial court and has to commit the case for the trial to the Court of Sessions. For that he has to follow the procedure and the documents to the accused as is referred to thereunder before making the committal order. Consequently, on the both the Courts firstly, that the accused should come to know on what basis and on what evidence he has been sent for trial to the sessions trial court and secondly, the sessions court be in a position to know that is the evidence against the accused before it and for what offence necessitated the enactment of the said proviso. While dealing with the said proposition in Pakhandi's case, 2001 All LJ 2798 (supra) it was laid down in para 16 thereof : Where the Magistrate decides to take cognizance of the case u/s 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) 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 u/s 190(1)(a) of the Code, and calls upon the complainant to examine himself and the witnesses present, if any, u/s 200 (Emphasis mine).

13. Thus "of any material other than investigation record" means facts not emerging from investigation records for making out an offence and no other. Thus "of any material other, than investigation record" means different and/or added facts regarding the incident. If the Magistrate takes into consideration those new or added facts mentioned in the protest petition or affidavit for the purposes of summoning the accused then only he has to adopt the procedure of complaint case. The reiteration of those very facts regarding the incident in the protest petition and the affidavit filed in support thereof which finds place in the case diary does not indicate any material other than investigation record. Material means additional statement of fact regarding incident or the occurrence. It is the contents of document in protest petition and affidavit which imbibe "any other material and not the nature of the document-affidavit and/or protest petition itself. Consequently, by using phraseology "any other material" in the aforesaid judgment what this Court meant was additional statement in respect of incident and not the reiteration of those very facts, which has already been stated during the course of investigation. Repetitive narration of facts is not

additional material but the reiteration of same material. (Emphasis mine). Consequently, Pakhandu (supra) is of no help to the applicants as in the present case there is reiteration of the same facts without any other material in the affidavits which had been stated during investigation.

7. In view of the aforesaid position, the question that further arises as to whether such a process amounts to mere an irregularity or is an illegality in terms of Section 460, Cr. P.C. This question has been answered by a learned single Judge of this Court in para 15 in the case of Surya Bhan and Ors. v. State 2007 Cril LJ 2230: 2007 (2) ACR 1841, wherein, it has been held as follows :

15. The contention of the learned Counsel for the Respondent No. 2 is that even if the Magistrate takes wrong cognizance u/s 190(1)(a) or (b), it is merely an irregularity. But this contention cannot be accepted as statute itself provides as to what material is to be-considered by the Magistrate before taking cognizance and procedure for trial of the case will depend on the cognizance taken in accordance with those materials. The cognizance is taken of the offence and, therefore, the Court on perusal of the complaint or report has to satisfy itself on the basis of the facts which constitute the offence. There may be instances where the Magistrate finds that the complaint is not made by the person who can lodge the complaint or the complaint is not entertainable by that Court or cognizance of the offence alleged to have been committed cannot be taken without the sanction of the competent authority etc. In such matters Magistrate should refuse to take cognizance but if the Magistrate takes cognizance in such matters and proceeds, the same may be curable u/s 460, Cr. P.C. But in the case where statute directs as to how and on what material the cognizance is to be taken, any violation thereof will be illegality and not irregularity. As for instance if the Magistrate takes cognizance on a complaint and directs to proceed as a police case or conversely takes cognizance on a police report and directs to proceed as a complaint case, this defect in cognizance would not be irregularity and would not be curable as it would vitiate the procedure. Such contingency is not permissible under law and in the circumstances the contention as raised by the learned Counsel for the Respondent No. 2 is not tenable and cannot be accepted.

8. Apart from this, the observations made in Pakhandu's case (supra) have also been approved in the case of Mathura Prasad v. State 2007 (1) ALJ 55: 2001 (2) ACR 1309. The question, therefore, is that in case the material relied on is the same that was collected during the investigation, then the Magistrate on the strength of the same material can take cognizance u/s 190(1)(b). The question as to whether the material is the same or not and whether it amounts to an additional material or extraneous material, can only be examined by the court below by looking into the records of the case and the facts that emerge on the basis of the controversy involved. In view of this it would be appropriate that the matter is remanded back to the Court below for a decision afresh in the light of the observations made hereinabove.

9. This is necessary, as from the impugned order, this Court does not find the

sifting of facts as per the ratio of the cases referred to herein above The learned Magistrate would be free to arrive at an independent opinion by undertaking the aforesaid exercise as explained in the judgments quoted herein.

10. The order dated 15.11.2007 is set aside and the matter is remanded back to the Court concerned to examine the facts as existing in the light of the law laid down by this Court and discussed herein above and pass a fresh order in accordance with law as expeditiously as possible preferably within six weeks from the date of presentation of a certified copy of this order.

Revision is allowed. No orders as to costs.