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**(2015) 05 AHC CK 0003**

**In the Allahabad High Court**

**Case No : Criminal Misc. Case No. 1654 of 2015**

Naseem and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

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**Date of Decision : 26-05-2015**

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 190(1)(a), 190(1)(b), 200, 202

Penal Code, 1860 (IPC) — Section 147, 148, 149, 308, 397

**Citation : (2015) 3 ACR 3228**

**Hon'ble Judges : Vishnu Chandra Gupta, J**

**Bench : Single Bench**

**Advocate : I.B. Singh, Senior Advocate, for the Appellant**

**Final Decision : Dismissed**

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## **Judgement**

Vishnu Chandra Gupta, J.—By means of this petition, under Section 482 of the Code of Criminal Procedure (in short "Cr.P.C."), the petitioners have prayed for quashing the further proceedings of Case No. 3691 of 2011 (Irfanuddin Vs. Mohd. Naseem and others) arising out of Case Crime No. 255 of 2009, Police Station Kotwali Kunda, District Pratapgarh and also quash the summoning order dated 24.02.2015.

2. Heard Sri I.B. Singh, learned Senior Counsel for the petitioners and learned A.G.A. for the State.

3. Brief facts for deciding this petition are that opposite party No. 2 Irfanuddin lodged a first information report against the petitioners and others at Case Crime No. 255 of 2009, under Sections 147, 148, 149, 397 IPC, Police Station Kotwali Kunda, District Pratapgarh with the allegations that on 23.06.2009, the informant Irfanuddin went to meet Sri Udai Bhan Singh, Block Development Officer, who is residing as tenant in the house of Sri Pradeep Chandra Shukla situated at Nuri Masjid Wali Gali, Kunda. At about 2:30 P.M., when the informant coming back with Scorpio vehicle belonging to his elder brother Minhabuddin, the

petitioners along with others surrounded the vehicle of the informant and assaulted him with bomb and country made pistol at the distance of 20 meters from the house of Pradeep Chandra Shukla. Consequently, the informant and one Mohd. Kadir received injuries in this incident. Thereafter, the injured persons were taken to CHC, Kunda for treatment by Sri Udai Bhan Singh and Alok Kumar Shukla from where they were referred to Allahabad.

4. The Police of Police Station Kunda started investigation. During investigation, petitioner Mohd. Naseem moved an application before I.G., Range Allahabad for transferring the investigation on the ground that the complainant influenced the investigation. On the application of Petitioner Mohd. Naseem, the investigation of this case was transferred from Police Station Kunda to Police Station Manikpur. After transferring the investigation, a third story was developed and the Investigating Officer arrested two persons, namely, Abdul and Mohd. Wasil, who were shooters of a named gang. The arrest of Mohd. Wasil and Abdul was published in daily newspapers. Abdul and Mohd. Wasil confessed their guilt and stated that they attacked upon the informant Irfanuddin along with two other co-accused, namely, Rafiq @ Gunda and Davendra Kumar alias Papu. The Investigating Officer moved an application before learned Chief Judicial Magistrate on 12.12.2009 for recording the statements of Rafiq and Davendra Kumar in the light of the statements given by Abdul and Mohd. Wasil. In the meantime, the informant moved an application before the Superintendent of Police, Pratapgarh for transferring the investigation. On the application of the informant, the investigation was transferred to Police Station Kotnagar. During investigation, the one of the injured Mohd. Kadir submitted an affidavit before the District Magistrate swearing the facts that he has not seen any of the accused person while he was being attacked. It has also been stated in the affidavit that he named the accused persons on the basis of hearsay version. Thereafter, the Investigating Officer submitted final report on 27.10.2009. Learned Magistrate issued notice to opposite party No. 2 to file protest petition against the final report. The opposite party No. 2 filed protest petition. Learned Magistrate accepted the protest petition and rejected the final report submitted by the police vide order dated 01.11.2011 and treated the protest petition as a complaint case after recording the statements under Sections 200 and 202, Cr.P.C. The learned Magistrate vide impugned order dated 24.02.2015 summoned the petitioners and one Haasim under Section 308 IPC to face trial and issue the process under Section 204, Cr.P.C. Aggrieved by the order dated 24.02.2015, the petitioners filed the present petition.

5. It has been contended by learned counsel for the petitioners that learned Magistrate without considering the case diary and without application of mind casually treated the protest petition as complaint after rejecting the final report. It has also been contended that learned Magistrate has committed illegality while treating the protest petition as complaint and rejecting the final report and proceeding with the complaint. Learned Magistrate at the time of accepting the final report cannot simultaneously passed an order treating the protest petition

as complaint. The summoning order is a non-speaking order and the petitioners have illegally been dragged in this litigation due to political rivalry. It has also been contended that learned Magistrate ought to have summoned the accused Abdul and Mohd. Wasil, who confessed their guilt instead of rejecting the final report and to take cognizance under Section 190(1)(b) of Cr.P.C.

6. On the contrary, learned A.G.A. submitted that mere confessional statement given by the alleged accused, namely, Abdul and Mohd. Wasil by itself is not an admissible piece of evidence especially when it is not corroborated with the evidence of any eyewitness. It has also been contended that so far as the affidavits of Mohd. Kadir is concerned, if it is taken to be correct, at this stage, the fact that the incident took place is established as alleged by Mohd. Kadir who received injuries in the incident. It has also been contended that the statements under Sections 200 and 202, Cr.P.C. also corroborated the story as alleged in the first information report. The truthfulness or meticulous examination of material is not at all required at the stage of taking cognizance. It has also been contended that the story of attacking upon the informant and Mohd. Kadir by Abdul and Mohd. Wasil was not found satisfactory during investigation and, therefore, no charge-sheet was submitted against them. Therefore, the order passed by learned Magistrate is fully justified.

7. It is not *res integra* that learned Magistrate while accepting the final report can treat the protest petition as complaint. It is not in dispute that by accepting the final report, the order of taking cognizance has been passed. The provisions of Section 300, Cr.P.C. could not be attracted. It is well settled principle of law that after accepting the final report, the Magistrate can proceed on the basis of complaint or on the basis of protest petition treating it as complaint.

8. The argument of learned counsel for the petitioners is that the Magistrate become *functus officio* after accepting the final report and cannot proceed further in view of the law laid down by the Apex Court in *Rakesh and another Vs. State of Uttar Pradesh and another*; (2014) 13 SCC 133 affirming the judgment of the Allahabad High Court rendered in Criminal Misc. Case (U/s 482, Cr.P.C.) No. 64 of 2008 (*Rakesh and another Vs. State of U.P. and another*) decided on 04.03.2013 (Delivered by me Justice Vishnu Chandra Gupta).

9. In para 12 of the judgment of Allahabad High Court in the case of *Rakesh Kumar (Supra)*, it was held that learned Magistrate have not only three options as mentioned in *Gangadhar Janardan Mhatre Vs. State of Maharashtra and Others*, (2004) CriLJ 4623 : (2004) 8 JT 208 : (2004) 8 SCALE 329 : (2004) 7 SCC 768 : (2005) 1 UJ 32 but also one another option to treat the protest petition after dropping the proceedings on the basis of police report and to take cognizance under Section 190(1)(a) of Cr.P.C. upon the original complaint or protest petition.

10. Paras 11 and 12 of the judgment of Allahabad High Court rendered in the case of *Rakesh Kumar (Supra)* are quoted below:

"11. So far as the first contention of petitioners is concerned, the counsel for the petitioner relied upon the judgment of this Court in Gopi Singh Vs. State of U.P. and Babu Khan . This Court while delivering the judgment in Gopi Singh's case (supra), relying upon the judgment of the Apex court in Gangadhar Janardan Mhatre Vs. State of Maharashtra and Others, (2004) CriLJ 4623 : (2004) 8 JT 208 : (2004) 8 SCALE 329 : (2004) 7 SCC 768 : (2005) 1 UJ 32 held that Magistrate have three options in case the final report is submitted before the Magistrate

(i) He may accept the report and drop the proceedings.

(ii) He may disagree the report and take the view that there is sufficient ground for further proceeding took cognizance of the offence and issued process.

(iii) He may direct further investigation to be made by the police under Section 156(3) Cr.P.C.

12. The Division Bench of this Court also considered this aspect in the light of judgment reported in 2002 (1) JIC 104 (Pakahndo and Ors. v. State of U.P. and Anr) and after considering the several judgments of the Apex Court observed that apart from aforesaid three options the Magistrate has one more option that is;

"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 proceeded to act under Sections 200 and 202 Cr.P.C. and thereafter decided whether complaint should be dismissed and process should be issued."

11. The Apex Court while affirming the judgment of this Court held that learned Magistrate after accepting the final report equipped the power to proceed under Section 190(1)(b) or under Section 190(1)(a) of Cr.P.C. as the case may be. The Magistrate while differing with the opinion of the Investigating Officer has an option to proceed directly under Section 190(1)(b) of Cr.P.C. on the basis of police report or to treat the protest petition as complaint and proceed to inquiry into the matter under Chapter XV of Cr.P.C. and to summon the accused on the basis of inquiry conducted.

12. It has also been contended by learned counsel for the petitioners that learned Magistrate while accepting the final report and proceeding under Chapter XV of Cr.P.C. on the basis of protest petition cannot take into consideration the police report as he expressed his difference of opinion with the Investigating Officer and rejected the opinion of the Investigating Officer. The pleadings of the petitioners shows that they on one hand insisting that the police report should be taken into consideration and on the other hand, they stated that once the final report is accepted, the court become functus officio and cannot proceed further.

13. So far as the police report is concerned, it contains not only the opinion of the Investigating Officer but also certain documents collected during

investigation like injury reports or the documents with regard to the recovery etc. Once, the Magistrate defer with the opinion of the Investigating Officer, it is not mean that the document collected during investigation by the Investigating Officer cannot be used by the informant to give strength to the allegations made in the protest petition or complaint. The document collected during investigation can be taken into consideration by the court while treating the protest petition as complaint and while taking the cognizance under Section 190(1)(a) of Cr.P.C. The converse is any how runs in a different direction. Once, the Magistrate rejected the final report by differing with the opinion of the Investigating Officer and found sufficient material to proceed against the accused persons in the police report may take cognizance under Section 190(1)(b) of Cr.P.C. and while taking cognizance under Section 190(1)(b), the Magistrate would confine with the material available in the police diary collected during investigation. The other material, which has been furnished by the informant with the protest petition, if the same is not found place in the police diary, cannot be the basis for taking cognizance under Section 190(1)(b) of Cr.P.C. but once, the magistrate decide to proceed under Section 190(1)(a) of Cr.P.C., he may not only consider the material collected during inquiry under Chapter XV of Cr.P.C. but also look into the document, which has been collected by the I.O. and form part of the inquiry and in such case, the order of magistrate taking cognizance under Section 190(1) (a) of Cr.P.C. cannot be said to be without jurisdiction or illegal.

14. So far as the merit of this case is concerned, the informant fully corroborated the story as narrated in the first information report. The doctors verified the injuries received by the informant and Mohd. Kadir in the incident. The identity of the petitioners has been established by the informant and in the opinion of this Court, it is sufficient to proceed against the petitioners as held by the trial court. The meticulous examination of the evidence or truthfulness of the allegations at this stage cannot be looked into by this Court.

15. Hence, in the opinion of this Court, this petition lacks merit and is liable to be dismissed at the admission stage.

16. Accordingly, this petition is dismissed.