

(2007) 11 AHC CK 0162
In the Allahabad High Court

Paras Tiwari and Others

APPELLANT

Vs

State of U.P. and Devi Prasad Tiwari

RESPONDENT

Date of Decision : 30-11-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 245(2)
Penal Code, 1860 (IPC) — Section 380, 457

Citation : (2007) 11 AHC CK 0162

Hon'ble Judges : Ajai Kumar Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Ajai Kumar Singh, J.—This Criminal revision has been preferred by the revisionists/accused against the order dated 6-2-2004 passed by Civil Judge (Junior Division) Chakiya district Chandauli in Criminal case No. 262 of 2004 State of U.P. v. Paras Tiwari and Ors. under Sections 457, 380 IPC, Police station Shahabad by which the learned Magistrate has rejected the application of the revisionist moved u/s 245(2) Cr.P.C for their discharge.

2. Briefly stated facts are that on the basis of written report dated 22-1-2002 of the complainant Devi Prasad Tiwari, a first information report was registered against the revisionists as Crime No. 10 of 2002 Police station Shahabad under Sections 457, 380 IPC. After completion of investigation final report was submitted by the Investigating officer. Later on reinvestigation was done and again final report was submitted which was filed before the concerned Magistrate. The complainant filed Protest petition dated 13-11-2003 before the Magistrate which was registered as complaint and statement under Sections 200 and 202 Cr.P.C were recorded by the learned Magistrate and on finding that prima facie case is made out against the revisionist accused, learned Magistrate summoned the revisionists for the offences u/s 457/380 IPC vide order dated 14-6-2003. The revisionists accused appeared before the Magistrate and moved an application u/s 245(2) Cr.P.C. for discharging them even before the stage of

recording evidence u/s 244 Cr.P.C. A perusal of the impugned order shows that the learned Magistrate did not make any comment regarding the right of revisionists accused for moving application u/s 245(2) Cr.P.C., and after hearing the parties reached to the conclusion that the points which have been raised on behalf of revisionists accused in the said application are such as, can be decided only after taking evidence during trial. The learned magistrate was of the view that for summoning the accused on the basis of complaint only this much is to be seen as to whether prima- facie case is made out against the accused for proceeding further with the complaint. Learned Magistrate was also of the view that so far as the question of truthfulness of occurrence is concerned, it can only be decided after recording evidence and at the time of giving Judgment on the basis of the evidence of the parties. Learned Magistrate was further of the view that while considering the final report out of the options open to the learned Magistrate, one of the options is that the protest petition may be treated as complaint and in the present case also the learned Magistrate has treated the protest petition as complaint vide order dated 11-3-2003. In view of this learned Magistrate reached to the conclusion that the grounds taken by the revisionist-accused in their application u/s 245(2) Cr.P.C have no merit and the said application is liable to be rejected. Accordingly learned Magistrate rejected the said application of the revisionist accused vide the impugned order. Feeling aggrieved the present revision has been filed by the revisionists accused.

3. Heard learned Counsel for the revisionists learned Counsel for the complainant/ opposite party No. 2 and the learned AGA and perused the records.

The first ground taken by the revisionists in assailing the impugned order is that the learned Magistrate has committed material illegality in summoning the revisionists on the protest petition when the police did not find that any such offences have been committed and submitted final report twice after full investigation. It has been submitted by learned Counsel for the revisionists that the learned Magistrate has committed material illegality in treating the protest petition as complaint and passing the summoning order. To the contrary learned Counsel for the complainant/ opposite party No. 2 submits that the Magistrate can very well treat the protest petition filed against the final report as complaint and the power of Magistrate to take cognizance on such a complaint is not lost merely because the Magistrate has accepted the final report submitted by the Police investigating the incident in question on the basis of first information report. Learned Counsel for opposite party No. 2 in this connection has relied upon the case of Kishore Kumar Gyanchandani Vs. G.D. Mehrotra and Another,

4. In my opinion the Magistrate is fully empowered to take cognizance on Protest petition filed by the complainant against the final report submitted by the Police after investigation and one of the options open to the Magistrate while considering said final report is that he may treat the Protest petition as a complaint. I am also of the view that the power of the Magistrate to take cognizance on such a complaint is not lost merely because the Magistrate has

earlier accepted the final report submitted by the police investigating the incident in question on the basis of first information report. This view is fortified by the principle of law laid down by the Apex Court in *Kishore Kumar Gyan Chandani v. G.D. Mehrotra and Anr.* (supra). The facts of the said case are that in respect of the incident FIR was lodged on 15-9-1995 making out an offence u/s 279 and 338 IPC. The police on investigation into offences filed final form which was accepted by the Magistrate by order dated 27-1-1996. On 19-4-1996 the Protest petition is alleged to have been filed and on that petition the Magistrate by order dated 7-1-1998 had directed that the same be treated as a complaint. The Magistrate then held an inquiry u/s 202 Cr.P.C. and ultimately on the basis of the materials produced in the inquiry, taking the same with the allegations made in the Protest petition which has already been treated as a complaint, took cognizance for the offences under Sections 279 and 338 IPC. The accused then filed an application before the Magistrate on 12-3-1994 for dismissal of the complaint. The Magistrate, however, dismissed the said application on 24-8-1997. The accused then moved the High Court invoking its revisional jurisdiction and the High Court set aside the order of Magistrate taking cognizance and issuance of process in the complaint proceeding. Thereafter an appeal was preferred before the Apex Court in which the Apex Court held that:

It is too well settled that when the police after investigation files final form u/s 173 of the Code the Magistrate may dis-agree with the conclusion arrived at by the Police and take cognizance in exercise of the power u/s 190 of the Code and the Magistrate may not take cognizance and direct for further investigation in the matter u/s 156 of the Code. Where the Magistrate accepts the final form submitted by the Police, the right of the complainant to file regular complaint is not taken away and intact on such complaint being tiled the Magistrate follows the procedure u/s 201 of the Code and takes cognizance if the material produced by the complainant makes out an offence. This question has been raised and answered by this Court in the case of *Gopal Vijay Verma Vs. Bhuneshwar Prasad Sinha and Others*, where-under the view of Patna High Court to the contrary has been reversed. The Court in no uncertain terms in the aforesaid case has indicated that acceptance of final form does not debar the Magistrate from taking cognizance on the basis of the materials produced in a complaint proceeding.

5. The Apex Court distinguished the case of *Abhinandan Jha v. State of Bihar and Ors.* 1968 Cr.L.J. 97 from the above case and held:

In our view the said decision is not relevant for the purpose and in that decision this Court had merely stated that the Magistrate on receipt of final form by the Police can not direct the Investigating agency to file a charge sheet inasmuch as the filing of charge sheet is within the domain of investigating agency. But the Magistrate has untrammelled power to direct further investigation into the matter or even to take cognizance on the basis of material produced even though the police might have filed final form. The aforesaid decision in our considered opinion is not relevant on the point in issue.

6. In the present case the Magistrate has treated the Protest petition filed by the complainant against the final report (submitted by the Police u/s 173 Cr.P.C.) as a complaint and after following the procedure prescribed under Chapter-XV took cognizance and summoned the revisionists/accused for the offences under Sections 457 and 380 IPC has thus committed no illegality. It is also worthwhile to mention here that the present revision has not been filed against the summoning order dated 14-6-2003 and the same cannot be said to be under challenge in the present revision.

7. The next contention put forward by learned Counsel for the revisionists is that on merit also the impugned order is not sustainable. While supporting the allegations made in the application of the revisionists u/s 245(2) Cr.P.C. moved before the learned Magistrate it has been argued on behalf of revisionists that after full investigation the police did not find any evidence regarding commission of offence u/s 457 and 380 IPC and submitted final reports twice. It has also been submitted on behalf of the revisionists that admittedly there is old enmity between the parties and civil suits are pending, that the first informant is not eye witness and there are no independent witnesses of occurrence and there is no recovery and as such the charge against the revisionists is groundless and the revisionists/accused are liable to be discharged. It has been next contended on behalf of the revisionists that the learned Magistrate has committed an illegality by rejecting the said application of revisionists/accused u/s 245(2) Cr.P.C. To the contrary learned Counsel for the complaint submitted that summoning order was passed by the learned Magistrate on the basis of material on record (the Statement u/s 200 and 202 Cr.P.C.) and on the basis of allegation made in the Protest petition and there is no illegality in this regard. It has further been submitted on behalf of opposite party No. 2 that the points raised above on behalf of revisionists cannot be looked into at this stage and can be determined only on the basis of evidence adduced by the parties during trial and thus the finding of learned Magistrate to this effect suffers from no illegality. I find force in the contention of learned Counsel for the complainant/opposite party No. 2. In my opinion the fact of witnesses being interested witness, improbability of the occurrence and enmity between the parties can only be determined on the basis of evidence of parties available during trial. Hence I find that the finding of magistrate to this effect suffers from no illegality and needs no interference. I also find that in the present case the Magistrate has taken cognizance of the offence on the basis of material on record and there is no illegality in the summoning order or in the impugned order.

8. In view of the above I find that revision has no merit and deserves to be dismissed.

The revision is accordingly dismissed.