

(2007) 08 AHC CK 0221

Allahabad High Court

Case No: None

Mohammed Yusuf Husain and
Others

APPELLANT

Vs

State of Uttar Pradesh and
Zeeshan Haider

RESPONDENT

Date of Decision: Aug. 7, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 190, 200, 202
- Penal Code, 1860 (IPC) - Section 147, 323, 452, 504, 506

Citation: (2008) CriLJ 493

Hon'ble Judges: Saroj Bali, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Saroj Bali, J.

This criminal revision is directed against the order dated 28.2.2001 passed by the II Additional Civil Judge (Senior Division)/Additional Chief Judicial Magistrate, Bijnor, in case No. 76 of 2001 Zeeshan v. Yusuf and Ors. whereby summoning the revisionists for the offences punishable under Sections 147, 323, 452, 504, 506 I.P.C..

2. The facts giving rise to the revision broadly stated are these:

An application under 156(3) Cr.P.C. was moved by the Opposite Party No. 2 alleging that on 10.8.98 at about 1 P.M. the accused-revisionists came armed with lathi and sticks to the house of the complainant and using abusive language subjected him to assault with lathi, sticks, kicks and fists. The S.H.O., Chanadpur was directed by the A.C.J.M., II to register and investigate the allegations made in the application. The First Information Report was registered on 18.9.1998 as case Crime No. Nil of 1998 under Sections 147, 323, 452, 504, 506 I.P.C. After investigation final report was submitted by the police. Notices were issued to the complainant. A protest petition

alongwith affidavits of complainant and witnesses Mehaboob Raza and Naiyar was filed. By the impugned order the cognizance u/s 190(1)(b) of Code of Criminal Procedure was taken on the basis of protest petition and affidavits filed in support thereof.

3. The contention of the revisionists is that the Magistrate committed illegality by summoning the revisionists without recording statements of the complainant and witnesses under Sections 200 and 202 Cr.P.C.

4. Heard Sri Akhtar Husain, learned Counsel for the revisionists, Sri V.M. Zaidi and Sri A.M. Zaidi, learned Counsel for the opposite party No. 2, the learned A.G.A. and have perused the record.

5. The learned Counsel for the revisionists argued that on receipt of the protest petition with affidavits the Magistrate was empowered to take cognizance only u/s 190(1)(a) of the Code of Criminal Procedure treating the protest petition as a complaint and adopting the procedure of complaint case as contained in Chapter XV of the Code of Criminal Procedure. The learned Magistrate having not taken cognizance straightaway on final report, the provisions of Section 190(1)(b) were not applicable.

6. On the other hand the learned A.G.A. and learned Counsel for the opposite party No. 2 contended that the Magistrate had jurisdiction to summon the revisionists after taking cognizance u/s 190(1)(b) of the Code of Criminal Procedure.

7. The Apex Court in [Abhinandan Jha and Others Vs. Dinesh Mishra](#), held that on receiving final report it was not within the powers of the Magistrate to direct the police to submit a charge-sheet but it is open to him to agree or disagree with the police report. If he agrees that there is no case made out for issuing process, he may accept the report and drop the proceedings. He may come to the conclusion that further investigation is necessary in that event he may pass an order to that effect. If ultimately the Magistrate is of the opinion that the facts set out in the police report constitute an offence, he can take cognizance of the offence, notwithstanding the contrary opinion expressed in the police report. It was observed therein that the Magistrate in that event could take cognizance u/s 190(1)(c) of the Code. The reference to Section 190(1)(c) was a mistake for Section 190(1)(b) as pointed out in a later decision of *H.S. Bains v. State* (XVIII)1981 ACC 146 (SC).

8. In *H.S. Bains* (Supra), it was held by the Apex Court that the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses expressed in the police report submitted to the Magistrate u/s 173(2) Cr.P.C. The Magistrate may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police.

9. In *India Carat Pvt. v. State of Karnataka* (XXVI)1989 ACC 280(SC) it was held as under:

The position is, therefore, now well settled that upon receipt of a police report u/s 173(2) a Magistrate is entitled to take cognizance of an offence u/s 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusions arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers u/s 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case u/s 190(1)(a) though it is open to him to act u/s 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

10. In *Pakhando and Ors. v. State of U.P. and Anr.* (XXXXIII)2001 ACC 1096, a Division Bench of this Court held that where the Magistrate receives final report the following four courses are open to him and he may adopt any one of them:

(I) He may agreeing 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 u/s 190(1)(b) and issue process straightaway 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 u/s 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.

11. Where the Magistrate decides to take cognizance u/s 190(1)(b) ignoring the conclusions reached at by the Investigating Officer and applying his mind

independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not permissible at that stage to consider any material other than that collected by the investigation Officer. In the instant case the cognizance was taken on the basis of the protest petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the complainant and the witnesses who had filed affidavits under Sections 200 and 202 Cr.P.C. The Magistrate could not take cognizance u/s 190(1)(b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taken into account extraneous material i.e. protest petition and affidavits while taking cognizance u/s 190(1)(b) Cr.P.C. the impugned order is vitiated.

12. In view of the above discussion, the revision succeeds. The impugned order dated 28.2.2001 is set aside. The case is remanded to the Magistrate concern for a decision afresh in accordance with law.

13. Certify the judgment to the court below within two weeks.