

(2006) 10 AHC CK 0191**Allahabad High Court****Case No:** None

Aun Mohammad Naqvi alias
Siddan and Mst. Saida Bano

APPELLANT**Vs**

State of U.P. and S.M. Raseed

RESPONDENT**Date of Decision:** Oct. 13, 2006**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 156, 190, 200, 202, 482
- Penal Code, 1860 (IPC) - Section 420, 500

Hon'ble Judges: R.K. Rastogi, J**Bench:** Single Bench**Final Decision:** Allowed

Judgement

R.K. Rastogi, J.

This is an application u/s 482 Cr.P.C. for quashing the order of the Magistrate dated 22.11.2004 whereby the accused had been summoned u/s 420 I.P.C. in Criminal case No. 274 of 2004, State v. Aun Mohammad and others pending before the C.J.M.

2. The facts relevant for disposal of this application are that the complainant opposite party No. 2 had filed an application u/s 156(3) Cr.P.C. against the accused applicants in the court of C.J. M. Varanasi against Aun Mohammad , Shada Bano and Qadir Hussain with these allegations that talks of marriage of the complainant's son S.J. Hussain were going on and the accused applicants No. 1 and 2 offered for marriage of their daughter Shaihar Bano alias Shahana with S.J. Hussain. The complainant and his wife after seeing the girl gave their consent on 25.1.04 for marriage with their son S.J. Hussain and also gave Gifts worth Rs. 10,000/- to Shaihar Bano. Thereafter on 7.2.04 the accused applicants and their another daughter Shabana and some witnesses Nargish and others came to the complainant's house and they saw S.J. Hussain, son of the complainant. They again came to the house of the complainant along with some more persons and then they took one week's

time. Thereafter they gave their consent for marriage and about Rs. 10,000/- were again spent in their reception at the complainant's house. Thereafter on 15.2.2004 the accused again came to the house of the complainant and gave consent for marriage and the date 6.6.04 was fixed for marriage. Engagement ceremony of the girl was performed at her house on 30.4.04 and a sum of Rs. 60,000/- was spent by the complainant. Thereafter engagement ceremony again took place on 15.5.04 at the boy's house and a sum of about Rs. 60,000/- was again spent by the complainant. Thereafter the complainant started preparation for marriage and got the invitation cards printed and a sum of about Rs. 50,000/- was spent in all these arrangements. On 28.5.04 the complainant received a telephonic message from the accused applicant that he would not perform marriage of his daughter with the complainant's son. When complainant told him that all the preparations had been made, he told in reply that the complainant may do whatever he likes. The complainant thereafter came to know that the accused wanted to perform marriage of their daughter with some other boy. Then the complainant asked the accused to give him a sum of Rs. 2 lacs spent by him. Then the accused refused to pay this amount. The complainant's prestige and reputation was badly affected, and in this way the accused committed offences u/s 420 and 500 I.P.C. Therefore the complainant filed an application u/s 156(3) Cr.P.C. praying for a direction to the police station concerned for registration and investigation of the case by the police.

3. At the initial stage the learned Magistrate had passed order on 15.6.04 for investigation of the case by the police. The police after investigation submitted a final report in the case. The complainant filed a protest petition. On that protest petition an additional report was sought from the police station concerned. It was submitted on 13.6.04. Thereafter the learned Magistrate passed order on 22.11.2004 summoning the accused applicants u/s 420 I.P.C. Aggrieved with that order the accused have filed this application u/s 482 Cr.P.C.

4. I have heard the learned Counsel for the applicant and Mr. Rajendra Kumar Rathor, learned Counsel for the opposite party No. 2. as well as learned A.G.A. for the State and perused the record.

5. It was submitted by the learned Counsel for the applicant that after submission of inquiry report by the police in the matter the proper procedure for the Magistrate was to consider the protest petition as a complaint and there was no justification for passing an order summoning the accused as a State case. Learned Counsel for the applicant further contended that the order passed by the Magistrate was completely illegal and unjustified.

6. Learned Counsel for the complainant as well as the learned A.G.A. for the State submitted in reply that the order passed by the Learned Magistrate was correct and, in support of their contentions they relied upon a Division Bench ruling of this Court in Prakhando and Ors. v. State of U.P. and Anr. 63 2001 ACC 1096 and another ruling of Hon'ble Apex Court in Jagdish Ram v. State of Rajasthan and Anr. 2004 SCC (Cri)

1294 in which it has been held that where there is sufficient material in the case diary against the accused, they can be summoned.

7. I have carefully gone through both these rulings. It has been laid down in the case of Prakhando(*supra*) as under:

10, ****If upon investigation the police came to the conclusion that there was no sufficient evidence or any reasonable ground of suspicion to justify the forwarding of accused for trial and submitted final report for dropping the proceedings, following courses are open to the Magistrate and he may adopt any one of them as the facts and circumstances of the case may require:

(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;

(II) He may take cognizance u/s 190(l)(b) and issue process straight away 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;

(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.

8. It is to be seen that in the present case , the police after investigation, submitted a final report alleging that no case was made out against the accused persons. Aggrieved with that final report the complainant filed a protest petition and on that protest petition the Magistrate obtained an additional report from the police. On receipt of the additional report, the Magistrate , after hearing the complainant, passed order on 22.11.04 in which it has been stated that the complainant in his statement had corroborated the prosecution case but his son S.J. Husain (bridegroom) had stated that the marriage had not been settled. The I.O. had recorded the statements of Atmaram and Subhash also who too had stated that the marriage had not been settled. The same assertion was made by witnesses Jakkho and Nargis. The learned Magistrate has pointed out that the I.O. had not written the parentage of Jakkho in the case diary and in the same way in the address of Nargis and Jakkho the police station had not been mentioned. The Magistrate had also pointed out that if the statements of these witnesses had actually been recorded, he would have mentioned the parentage of Jakkho and police station of Nargis and Jakkho. He was, therefore, of the view that the statements of these witnesses were

actually not recorded. He, therefore, passed order summoning the accused persons u/s 420 I.P.C.

9. The law on the point as enunciated in the above rulings is that whenever a final report is submitted by the I.O. in the case, the Court has to ascertain, after going through the case diary, as to whether there is any sufficient evidence for summoning the accused or not. If there was sufficient evidence against the accused in the case diary and the I.O. had erroneously submitted a final report in the case, then in that case where there is sufficient evidence in the Case Diary to summon the accused, the accused can be summoned on the basis of that evidence in the case diary and that case shall proceed as a State case. But when he reaches a conclusion that there is no sufficient evidence against the accused and further investigation by the police is required, he may direct the police for further investigation into the matter; or in the alternative if the Magistrate reaches a conclusion that the evidence in the case diary was not sufficient to summon the accused persons and the complainant desires to examine some more witnesses to substantiate his allegation, then in that case the Magistrate can treat the protest petition as a complaint and in that case the summoning order can be passed only after recording statements of the complainant and witnesses.

10. The position in the present case is that the learned Magistrate was of the view that the police had not properly investigated the case. He has pointed out in his order dated 23.12.04 that the I.O. had not actually statements of Jakkhoo and Nargis and had not their fictitious statements. Under these circumstances, when all other witnesses from the side of the complainant namely Jakkhoo, Nargis, Atmaram, Subhash and each bridegroom S.J. Husain had denied the factum of settlement of marriage with the daughter of the accused No. 1 and 2, there was no sufficient evidence in the case diary to summon the accused. Under these circumstances, the proper course for the Magistrate was to send back the case to the I.O. for further investigation or in the alternative he could also pass an order for registration of the protest petition as complaint u/s 190(i) Cr.P.C. and then to take statements of complainant and other witnesses under sections 200 and 202 Cr.P.C. He did not do so, and in view of aforesaid circumstances when there was no sufficient evidence against the accused persons in the case diary, the order dated 23.12.04 passed by the learned Magistrate summoning the "accused can not be upheld and the same deserves to be set aside.

11. The application u/s 482 Cr.P.C. is, accordingly, allowed. The order dated 23.12.04 passed by the learned Magistrate u/s 420 I.P.C. in Criminal case No. 274 of 2004, State v. Aun Mohammad and Ors. pending before the C.J.M. Varanasi, is hereby set aside. The learned Magistrate, after looking into the record, may exercise his discretion either by sending back the case to the police for further investigation or he may, in the alternative, after taking cognizance u/s 190(i) Cr.P.C. proceed to take statements of the complainant and the witnesses u/s 200 and 202 Cr.P.C. and then

he may pass a suitable order in the matter.