

Qasim and ors. Vs. the State of ors.

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Court : Allahabad

Decided On : Apr-12-1984

Reported in : 1984CriLJ1677

Judge : M. Wahajuddin, J.

Appellant : Qasim and ors.

Respondent : The State of ors.

Judgement :

ORDER

M. Wahajuddin, J.

1. The applicants have been summoned under Sections 147, 148, 323, 324 and 307 I.P.C. as per order dt. 19.2.1983, Annexure 4. It would appear that the police submitted a final report in this case. A protest petition was preferred and the Magistrate' then passed the following order:

Perused case diaries, application and other papers. In the cross case the accused have been challaned.

Prima facie offences Under Section 147/148/324/323/307 IPC are made out against accused Qasim @ Fausi, Sukha Asghar, Mohd. Amin, Kamil, Hayat, Liyaqat, Mishtaq. Aalim, Amir, Ahmad, Hanif, Shuukat, Popat Jamil, Shakil Ahmad

and Zafar and there are sufficient grounds to proceed against them.

Issue warrants of arrest against them. Fix 24.3.1983.

sd/ MQ. Siddiqi

J.M.I. 19.2.1983.

2. It is urged that the order is illegal and without jurisdiction and is a non-speaking order and was based mechanically and the Magistrate was bound to follow the procedure for a complaint case which the Magistrate has failed to do and there was no provision for issuing warrant and the Magistrate could only direct a further investigation and police was right in submitting a final report. It was also stated that there is a cross case initiated at the instance of some of the opposite parties with a cross version in which charge sheet was submitted.

3. This Court cannot enter into the question of facts which are to be considered by the Magistrate. Simply because there is a cross case also, any prosecution would not be barred. It is for the court to decide during trial the merits of cross cases. The main argument advanced is that the protest petition falls within the definition of Section 2(d) of the Cr.P.C. and on the authority of the case of Abhinandan Jha v. Dinesh Misra : 1968 CriLJ97 the procedure under Sections 200 and 202 Cr.P.C. should have been followed. It is further urged that in the case reported in : [1964]1SCR639 also the same view was taken. A number of pronouncements of other, High Courts were cited but this Court will be guided by the Supreme Court pronouncement as well as the earlier pronouncements of this Court.

4. A doubt was created concerning the pronouncement in Abhinandan Jha's case (supra) whether the cognizance taken by the Magistrate falls under Section 190(1) Cr.P.C. This position has been clarified in the case of H. Section Bains v. State : 1980 CriLJ1308 laying down that actually the case of Abhinandan Jha (supra) refers to Sub-clause (b) and not Sub-clause (c) of Section 190 Cr.P.C. and when a court takes cognizance on a police report, even if it is final report cognizance will be under Section 190(b) Cr.P.C. and the procedure for police Chalan cases is to be observed. This is latest pronouncement dealing with the matter.

5. I have quoted the order of the Magistrate. A perusal of that order would go to show that the Magistrate did exercise his mind and while exercising such mind materials in the case diary, which is submitted with the final report, were taken into consideration and weighed with the court. True that the Magistrate has observed that he perused the case diary, the application and other papers. I ascertained during arguments. There were no papers furnished with the protest petition so whatever papers were perused were those in the case diary when produced at the stage of investigation. As regards application it would be found that apart from the protest petition there were two applications preferred during investigation as a part of the case diary and the Magistrate may have perused any one of them. Even if for arguments sake it is assumed that the Magistrate perused protest petition it would not in any way vitiate the proceedings for adopting any wrong procedure. A protest petition may simply say that the case diary itself contains sufficient materials, disclosing a prima facie case and the police have wrongly submitted a final report instead of charge-sheet. It is not unusual for any party who gets aware that any final report is submitted to apply to the court that such final report may not be accepted and cognizance may be taken on the materials in the case diary. When that is the position every protest petition cannot be a complaint. Apart from that the Magistrate himself also has not treated the protest petition as a complaint. This is obvious when the Magistrate did not adopt the procedure of a complaint case, examining the complainant and any witnesses in support. In the case of *Abhinandan Jha* 1968 Cri LJ 97 (SC) (supra) also what was observed was 'it is not very clear as to whether the Magistrate has chosen to treat the protest petition as complaint.' This observation would not mean that every protest petition must necessarily be treated as & complaint whether it satisfies the conditions of the complaint or not. A private complaint is to contain a complete list of witnesses to be examined. A further examination of complainant is made under Section 200 Cr.P.C. If the Magistrate did not treat the protest petition as a complaint, the protest petition not satisfying all the conditions of the complaint to his mind, it would not mean that the case has become a complaint case. In fact, in majority of cases when a final report is submitted, the Magistrate has to simply consider whether on the materials in the case diary no case is made out as to accept the final report or whether case diary discloses a prima facie case as to take

cognizance. The protest petition in such situation simply serves the purpose of drawing Magistrate's attention to the materials in the case diary and invite a careful scrutiny and exercise of the mind by the Magistrate so it cannot be held that simply because there is a protest petition the case is to become a complaint case. I am fortified with this view by a number of pronouncements of this Court. In the case of Phulgend v. State 1978 All Cri C 380 this Court held that the Magistrate is not bound to treat the protest petition as a complaint. In this pronouncement the observations in the case of Abhinandan Jha 1968 Cri LJ 97 (SC) (supra) were explained. In the case of Gajadhar Singh v. Mahesh Chandra 1981 All Cri R 218 : AIR 1981 NOC 206 it was held that where the Magistrate differed from conclusion arrived at by the police and the main basis for taking cognizance was the F.I.R. and other materials in the case diary simply because a protest application was given or affidavit was filed would not render the cognizance to be one under Section 190(a) because they are simply subsidiary and ancillary and the main basis is case diary. In the case of Basudeo v. State of U.P. 1983 All Cri R 513 : 1984 All LJ 364 it is held that even assuming that the protest petition filed fulfilled the requirements of the definition of word 'complaint', the mere fact that the Magistrate applied his mind to the contents of the protest petition would not render the cognizance to be one under Section 190(1)(a) Cr.P.C. which provides for a procedure of a complaint case. Apart from that the very circumstances that the Magistrate rejected the final report and took cognizance without further resorting to any procedure under Sections 200 and 202 Cr.P.C. would clearly indicate that the Magistrate has not taken cognizance on any complaint as a complaint case but has taken cognizance on a final report under Section 190(1)(b) Cr.P.C. and for such cognizance the procedure of police cases is to be observed as has been done. I may observe that in the case of Abhinandan Jha 1968 Cri LJ 97 (SC) (supra) the Magistrate directed (he police to submit a charge sheet which the Magistrate could not do and whatever observations have been made in that case are in such context. The facts of the other Supreme Court case reported in : [1964]1SCR639 are also distinguishable. I must follow the consistent view taken by this Court as quoted earlier. The case was a warrant case and one of the offences is under Section 307 I.P.C. so issuing of warrant cannot be considered to be bad. Any interference is further not to be made simply because the number of

accused persons figuring is large. The matter has to be considered by the Magistrate and if some persons are aged so forth and so on they can seek exemption from appearance at the discretion of the Magistrate except on dates on which their presence is required by the Magistrate. This is not a proper case for exercise of inherent powers at this stage. There is no lack of jurisdiction or want of exercise of mind. The petition under Section 482 Cr.P.C. is therefore dismissed.

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