2022:APHC:39119

IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

***

Crl.P.No.8471 of 2022

Between:

1.Shaik Mohammed Shabuddin, S/o.S.M.Tajuddin,
aged 62 years, D.No.17-8-41, 5th Lane, Arandalpet,
Guntur, Guntur District.

2. Patan Mallik Khan, S/o.Jani Khan, aged 33 years,
D.No.18-18-77, Guntur, Guntur District.

3. Patan Jani Khan, S/o.Subhan Khan, aged 64 years,
D.No.18-18-77, Guntur, Guntur District.

4. Shaik Karimullah, S/o.Moulali, aged 64 years,
D.No.26-30, 3rd lane, A.T.Agraharam, Guntur,
Guntur District.

... **Petitioners/A.1 to A.4**

And

$ 1. The State of Andhra Pradesh,
through the Station House Officer,
Peddakakani Police Station,
Rep.by its Public Prosecutor,
High Court of Andhra Pradesh,
Amaravathi, Guntur District. **...Respondent**

2. Abid Hussain Biyani, S/o.Iqbal Hussain Biyani,
aged 47 years, D.No.14-4-234, 3rd lane,
Pothuruvari Lane,
Guntur Town, Guntur District.

... **Respondent/De facto complainant**

Date of Judgment pronounced on : 22 -11-2022

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

1. Whether Reporters of Local newspapers May be allowed to see the judgments? : Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals: : Yes/No

3. Whether the Lordship wishes to see the fair copy of the Judgment? : Yes/No

IN THE HIGH COURT OF ANDHRA PRADESH AT AMARAVATI

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

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! Counsel for petitioner : Sri D.S.N.V.Prasad on behalf of Md.Saleem Pasha

^Counsel for Respondent No.1 : Learned Public Prosecutor

^Counsel for Respondent No.2 : ----

<GIST :

>HEAD NOTE:

? Cases referred:

[1] . 2019(8) SCC 27
[2]. (1985) 2 SCC 537

THE HON'BLE SRI JUSTICE R.RAGHUNANDAN RAO

CRIMINAL PETITION No.8471 of 2022

ORDER:

The petitioners are arrayed as accused Nos.1 to 4 in S.C.No.177 of 2017 on the file of the IV Additional Assistant Sessions Judge, Guntur for offences under Sections 307 & 326 read with 34 of Indian Penal Code.

2. The background of the case is as follows:

The de facto complainant had filed a complaint before the Pedakakani Police Station of Guntur Urban in Crime No.234 of 2012 against the petitioners herein for an offence under Section 307 r/w 34 of Indian Penal Code. The complaint of the de facto complainant was that there were certain disputes relating to a property between the de facto complainant and others during which the petitioners herein are said to have sought to evict the de facto complainant and his wife from the disputed property which was in the possession of the de facto complainant. The further complaint was that after attempting to intimidate the de facto complainant into vacating the house, an attack was carried out on the life of the de facto complainant by the petitioners who had assaulted the de facto complainant by stabbing him with a knife.

3. After completion of investigation, the investigating officer had filed a final report under Section 173 of Cr.P.C stating that no incident has taken place and that, it was at best a case of self injury caused by the de facto complainant.

4. The Magistrate after considering the final report, recording the sworn statement of the Complainant and after hearing the argument of the learned counsel for the de facto complainant had come to the conclusion that the final report was not acceptable and correct.

5. The Magistrate, in his order dated 01.10.2016 recorded that a surgery was conducted on the de facto complainant and a statement of the de facto complainant had been recorded by the Station House Officer, Outpost, Government General Hospital, Guntur District where the de facto complainant was being treated. The magistrate took the view that these facts would show that the de facto complainant had sustained grievous injuries and that the statement of the de facto complainant and his wife, which was recorded by a Magistrate, under section 164 of Cr.P.C., made out a prima facie case that petitioners 1 and 2 had stabbed the de facto complainant with the assistance of petitioners 3 and 4 in order to kill him.

6. The Magistrate after recording further facts had taken the view that there is a prima facie case in respect of the act committed by the petitioners with an intention to kill the de facto complainant. The Magistrate had directed that the case be taken on file under Sections 307 and 327 read with Section 34 of I.P.C against the petitioners and the case be numbered as PRC.No.31 of 2016. Thereafter, the Magistrate by an order dated 04.02.2017 had committed the case to the Court of Session under Section 209 (c) of Cr.P.C upon which the case was numbered as S.C.No.177 of 2017. The petitioners moved Crl.M.P. No. 52 of 2017, under section 227 of Cr.P.C., for discharging the petitioners on the ground that, the magistrate could not have taken cognizance of the complaint by recording the sworn statement of the complainant, without the complainant filing a complaint and proceeding under section 200 of Cr.P.C. This petition was dismissed by the trial judge on 12.12.2018. Aggrieved by the said order, the petitioners moved this court, under section 482 of Cr.P.C., by way of Crl.P.No. 1617 of 2019. This petition was withdrawn by the petitioners on 22.09.2022, without seeking leave and the present petition has been filed to quash the proceedings pending before the trial court in S.C. No. 177 of 2017.

7. Sri D.S.N.V.Prasad Babu, the learned counsel appearing on behalf of Sri Md.Saleem Pasha, learned counsel for the petitioners would submit that the procedure under taken by the Magistrate is clearly in violation of Section 173 (8) read with Section 200 of Cr.P.C. He submits that once a final report is filed by the police under Section 173 of Cr.P.C, the de facto complainant would have to file a Protest Petition and it is only upon as such a Protest Petition being filed that the Court would look into these issues.

8. He submits that as no Protest Petition had been filed at all in the case, the Magistrate could not have taken cognizance of the offence nor directed numbering of the case and further the Magistrate could not have committed the matter to a Sessions Court.

9. Sri D.S.N.V.Prasad Babu, relies upon the Judgment of the Hon'ble Supreme Court of India in the case of **Sri Vishnu Kumar Tiwari vs. State of Uttar Pradesh**[1] and more particularly on paragraph No.46 of the said Judgment. He also relies upon an order of a learned single Judge of this Court dated 16.01.2018 in Criminal Petition No.5803 of 2013.

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[1] **2019(8) SCC 27**

10. The Learned Public Prosecutor submits that the Magistrate has ample power under Section 190 of Cr.P.C to differ with the finding given by the investigating officer in the final report and to take up further steps.

Consideration of the Court:

11. In the present case, the de facto complainant had filed a complaint before the Station House Officer, Pedakakani police station under Section 154 of Cr.P.C. Thereafter, the investigating officer, after completion of investigation, had filed a report under Section 173 of Cr.P.C stating that no incident had taken place at all. This conclusion was rejected by the Magistrate who took cognizance of the complaint. It also appears that the magistrate recorded the sworn statement of the de facto complainant apart from hearing the objections of the counsel of the *de facto* complainant.

12. Sri D.S.N.V.Prasad contends that the Magistrate has effectively initiated the process under Section 200 of Cr.P.C by recording the sworn statement of the complainant and hearing the learned counsel of the *de facto* complainant and as such, the Magistrate ought to have followed the procedure set out in section 200 of Cr.P.C. and examined witnesses, taken sworn statements etc., before taking cognizance of the case. As this procedure was not followed, the order of cognizance requires to

be quashed. The said contentions cannot be raised at this stage. The petitioners had already raised these contentions before the trial judge, who rejected them and dismissed the discharge petition. The petition filed against the said order was withdrawn by the petitioners and the same has become final. It also does not appear that the petitioners have a case on merits.

13. In **Sri Vishnu Kumar Tiwari Vs State of Uttar Pradesh,** the Hon'ble Supreme Court, after considering the various judgements, pronounced on the ambit and contours of Sections 156, 190 and 200 of Cr.P.C., had reiterated the settled principles set out in these judgements.

14. These principles, can be summarized as follows:

1) A private person, can file a complaint before the police under Section 154 of Cr.P.C or before the Magistrate under Section 190(1)(a);
2) The Magistrate, upon receiving a complaint under Section 190(1)(a) would have three options.
    i) He can reject the complaint;
    ii) He can refer the complaint for investigation under Section 156(3) of Cr.P.C to the police;
    iii) He may take cognizance of the complaint, following the procedure set out in Section 200 of Cr.P.C.,

3) Where the complaint is received by the police either under Section 154 of Cr.P.C or referred under Section 156(3) of Cr.P.C, the investigating officer shall take up investigation and file a report under Section 173, before the Magistrate, either stating that a case has been made out for cognizance by the Magistrate or that the case be closed on account of insufficient evidence, complaint being of civil nature etc;

4) The Magistrate, upon receiving the said report, if it makes out a case for prosecution, has three options.

   i) He can accept the report and take cognizance,

   ii) He may direct further investigation under Section 156(3) of Cr.P.C or;

   iii) He may reject the report and close the complaint. However, the Magistrate would have to give notice and opportunity of hearing to the *de facto* complaint, if any, before closing the complaint.

5) In the event the police report states that the complaint requires to be closed, for the reasons set out in the report, the Magistrate again has three options.

   i) He may take cognizance of the case, without accepting the conclusions of the final report. However this report received by the Magistrate would

be a police report under Section 190(1)(b) of Cr.P.C. and the procedure set out in section 200 is not required to be followed by the magistrate for taking cognizance.

ii) The Magistrate may direct further investigation under Section 156(3) of Cr.P.C.,

iii) He may accept the report of the investigating officer and close the case. However, a notice would have to be given to the complainant for setting forth his objections to the closure of the case.

6) The *de facto* complainant, upon receiving a notice that the complaint filed by him is being closed, can set forth his opposition to the said course of action by filing a petition.

7) The said petition which is popularly called a **"protest petition**" would be considered by the magistrate before taking a final decision. If the magistrate arrives at a conclusion that the final report needs to be treated as a complaint under Section 190(1)(a) of Cr.P.C, the procedure set out under Section 200 of Cr.P.C would have to be followed.

15. The above requirement of a notice being given to the complainant is not available in Cr.P.C. This requirement was brought in by judgements of the Hon'ble Supreme Court. The Hon'ble Supreme Court, in **Bhagwant Singh v. Commr. of Police,**[2] took the view that closing the complaint without informing the complainant would prejudice the complainant and that he should be informed about the final report. This principle was stated in the following manner:

> **4.** Now, when the report forwarded by the officer-in-charge of a police station to the Magistrate under sub-section (2)(*i*) of Section 173 comes up for consideration by the Magistrate, one of two different situations may arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may do one of three things: (*1*) he may accept the report and take cognizance of the offence and issue process or (*2*) he may disagree with the report and drop the proceeding or (*3*) he may direct further investigation under sub-section (3) of Section 156 and require the police to make a further report. The report may on the other hand state that, in the opinion of the police, no offence appears to have been committed and where such a report has been made, the Magistrate again has an option to adopt one of three courses: (*1*) he may accept the report and drop the proceeding or (*2*) he may disagree with the report and taking the view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process or (*3*) he may direct further investigation to be made by the police under sub-section (3) of Section 156. Where, in either of these two situations, the Magistrate decides to take cognizance of the offence and to issue process, the informant is not prejudicially affected nor is the injured or in case of death, any relative of the deceased aggrieved, because cognizance of the offence is taken by the Magistrate and it is decided by the Magistrate that the case shall proceed. But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceeding or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding

[2] **(1985) 2 SCC 537**

against others mentioned in the first information report, the informant would certainly be prejudiced because the first information report lodged by him would have failed of its purpose, wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the first information report lodged by him is clearly recognised by the provisions contained in sub-section (2) of Section 154, sub-section (2) of Section 157 and sub-section (2)(*ii*) of Section 173, it must be presumed that the informant would equally be interested in seeing that the Magistrate takes cognizance of the offence and issues process, because that would be culmination of the first information report lodged by him. There can. therefore, be no doubt that when, on a consideration of the report made by the officer-in-charge of a police station under sub-section (2)(*i*) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(*i*) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. It was urged before us on behalf of the respondents that if in such a case notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty of effecting service of the notice on the informant. But we do not think this can be regarded as a valid objection against the view we are taking, because in any case the action taken by the police on the first information report has to be communicated to the informant and a copy of the report has to be supplied to him under sub-section (2)(*i*) of Section 173 and if that be so, we do not see any reason why it should be difficult to serve notice of the consideration of the report on the informant. Moreover, in any event, the difficulty of service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time when the report is considered by the Magistrate.

16. There is also an alternative view that protest petitions, which do not meet the requirements of a complaint under

Section 200 of Cr.P.C, can still be considered and orders could be passed on that basis. The Hon'ble Supreme Court in **Sri Vishnu Kumar Tiwari vs State of Uttar Pradesh** had noticed this alternative view, in paragraphs 36 and 43 of the said Judgment. The Hon'ble Supreme Court had also considered the manner in which the protest petition of a complainant is to be dealt with, in the following passage:

> **42.** In the facts of this case, having regard to the nature of the allegations contained in the protest petition and the annexures which essentially consisted of affidavits, if the Magistrate was convinced on the basis of the consideration of the final report, the statements under Section 161 of the Code that no prima facie case is made out, certainly the Magistrate could not be compelled to take cognizance by treating the protest petition as a complaint. The fact that he may have jurisdiction in a case to treat the protest petition as a complaint, is a different matter. Undoubtedly, if he treats the protest petition as a complaint, he would have to follow the procedure prescribed under Sections 200 and 202 of the Code if the latter section also commends itself to the Magistrate. In other words, necessarily, the complainant and his witnesses would have to be examined. No doubt, depending upon the material which is made available to a Magistrate by the complainant in the protest petition, it may be capable of being relied on in a particular case having regard to its inherent nature and impact on the conclusions in the final report. That is, if the material is such that it persuades the court to disagree with the conclusions arrived at by the investigating officer, cognizance could be taken under Section 190(1)(*b*) of the Code for which there is no necessity to examine the witnesses under Section 200 of the Code. But as the Magistrate could not be compelled to treat the protest petition as a complaint, the remedy of the complainant would be to file a fresh complaint and invite the Magistrate to follow the procedure under Section 200 of the Code or Section 200 read with Section 202 of the Code. Therefore, we are of the view that in the facts of this case, we cannot support the decision of the High Court.

17. In the present case, the magistrate after receiving the final report had issued notice to the complainant who

appeared before the magistrate and his sworn statement was recorded by the magistrate, without a protest petition being filed. As can be seen from the observations of the Hon'ble Supreme court, in **Bhagwant Singh v. Commr. of Police,** the concept of a protest petition arose out of the directions of the Hon'ble Supreme court, that notice and opportunity should be given to the complainant before his complaint is closed.

18. In the present case, the magistrate after going through the report filed by the investigating officer had decided to take cognizance of the case. Recording the sworn statement of the complainant and hearing the counsel for the complainant at the stage of making up his mind, prima facie, as to whether the report should be accepted or not, and whether cognizance should be taken or not, cannot be equated with the requirement of issuing notice and awaiting a protest petition, after the magistrate had taken a prima facie view that the case should be closed. In any event, the requirement of recording the sworn statement of the complainant, under section 200 of Cr.P.C., was complied with.

19. On merits, the Magistrate took the view that the record shows a serious stab injury and identification of the culprits by the complainant and that the report cannot be

accepted. This court does not find any reason to interfere with the order of cognizance taken by the magistrate.

20. Accordingly, this petition is dismissed.

Miscellaneous petitions, pending if any, shall stand closed.

JUSTICE R.RAGHUNANDAN RAO

Date :22.11.2022

RJS

THE HON'BLE SRI JUSTICE R.RAGHUNANDAN RAO

CRIMINAL PETITION No.8471 of 2022

Date : 22.11.2022

RJS