

**HIGH COURT OF ALLAHABAD****Bench: Hon'ble Mrs. Manju Rani Chauhan, J.****Date of Decision: 31st May 2024**

Case No.:

CRIMINAL REVISION No. 5872 OF 2023

**APPELLANT(S): UMESH SINGH .....Revisionist****VERSUS****RESPONDENT(S): STATE OF U.P. AND ANOTHER .....Opposite Party****Legislation:**

Sections 307, 427, 34 of the Indian Penal Code (IPC)

Sections 2(d), 161, 173, 190, 200, 202, 397, 401 of the Code of Criminal Procedure (Cr.P.C.)

Sections 11 of the Indian Evidence Act, 1872

**Subject:** Criminal revision arising out of the rejection of a protest petition against a final report submitted by the Investigating Officer, challenging the discharge of the accused based on alibi evidence and procedural propriety in the investigation.

**Headnotes:**

Criminal Law – Protest Petition – Revisionist challenged the rejection of his protest petition against the final report exonerating accused on grounds of insufficient evidence – Trial Magistrate accepted the final report noting no specific flaws in the investigation were cited in the protest petition – High Court held that Magistrate had applied judicial mind in accepting the final report, with proper consideration of all collected material and evidences [Paras 1-44].

Procedural Law – Final Report Acceptance – Revisional Court's jurisdiction limited – Court emphasized the discretionary power of Magistrate to accept or reject final reports – Revision allowed as revisional court exceeded its jurisdiction by re-appreciating evidence and substituting its view [Paras 45-57].

Investigation – Role of Magistrate – Magistrate can independently assess final reports and material collected by Investigating Officer – Not bound by conclusions of Investigating Officer – Protest petition can be treated as complaint if it satisfies requirements under Section 2(d) Cr.P.C. [Paras 25-36].

Decision – Revision Allowed – Held – Order by Additional Sessions Judge setting aside Magistrate’s acceptance of final report is unsustainable – Informant has the option to file a fresh complaint [Para 61].

**Referred Cases:**

- Vishnu Kumar Tiwari vs. State of U.P. (2023) SCC Online SC 841
- Munna Devi vs. State of Rajasthan (2001) 9 SCC 453
- India Carat Private Ltd. v. State of Karnataka (1989) 2 SCC 132
- Abhinandan Jha v. Dinesh Mishra AIR 1968 SC 117

Representing Advocates:

Mr. Mohd Raghieb Ali, Sr. Advocate for the revisionist

Mr. Satya Priya Mishra, Advocate for Opposite Party No. 2

Mr. Amit Singh Chauhan, learned AGA-I assisted by Mr. Mayank Awasthi, Advocate for the State

Order:

Hon'ble Mrs. Manju Rani Chauhan,J.

1. Heard Mr. Saghir Ahmad, learned Senior Advocate assisted by Mr. Mohd Raghieb Ali, learned counsel for the revisionist, Mr. Satya Priya Mishra, learned counsel for the opposite party no.2 and Mr. Amit Singh Chauhan, learned AGA-I assisted by Mr. Mayank Awasthi, learned counsel for the State and perused the record.

2. This criminal revision under section 397/401 Cr.P.C. has been preferred by the revisionist against the impugned order dated 30.09.2023 passed by the learned Additional Sessions Judge/Special Judge, P.C. Act (U.P.S.I.B.), Gorakhpur in criminal revision no.130 of 20221, arising out of . Case Crime No. 60 of 2016, F.R. No.20010/2017, under Sections 307, 427, 34 IPC, Police Station-Uruwa Bazar, District-Gorakhpur.

**BRIEF FACTS OF THE CASE**

3. The facts in brief which are essential to be stated for adjudication of this revision are that:-

(i) An FIR was lodged on 26.05.2016 by the informant; Nanhe Lal Yadav, under Sections 307, 427, 34 IPC, which was registered as Case Crime No.0060 of 2016 against two named accused, namely, Umesh Singh, Vivek

Singh and three unknown persons with the allegations that on 25.05.2016, the informant was returning from Rambada to his home with his uncle B.R.Yadav in his Bolero No. UP 53 BK 8201, at around 11:00 pm, his vehicle reached near culvert and the speed of the vehicle was slow due to the height of the culvert, due to prior enmity, the accused Umesh Singh and Vivek Singh along with three unknown persons were present on two motorcycles and they came from the front and started firing at the informant and his uncle with the intention of killing them, due to which the glass of the Bolero broke, the informant's uncle was shot on his right shoulder and neck, whereas the informant was shot on his chest and stomach. As he had a mobile phone in the left pocket of his shirt, the aforesaid firearm gunshot hit the mobile screen due to which the glass of the mobile was broken. Seeing this unfortunate incident, the informant started driving the vehicle speedily to save his life. Seeing this, the accused fired from behind and chased them till the petrol pump. Due to the said gunshot, the front and rear glass of the vehicle was broken. The informant informed the police by dialing 100 in the control room from his mobile number 9956562664. The police reached there with an ambulance and seeing the condition of the informant's uncle, he was taken to the District Hospital, Gorakhpur for treatment in the said ambulance. Seeing the serious condition of informant's uncle, he was referred to the Medical College, Gorakhpur, where he was admitted for treatment. The informant saw the accused in the light of the headlights. Rambrichh s/o Ludur was also sitting with the informant in his vehicle and had witnessed the above incident.

(ii) During investigation, the statement of injured; Budhiram Yadav was recorded under Section 161 Cr.P.C. on 04.06.2016 in which he reiterated the version of the FIR.

(iii) The field unit has inspected Bolero car No.UP53 BK 8201 and prepared the memo, which is evident from case dairy dated 08.06.2016. From the aforesaid, it is clear that no other witness or any accused person was found at the place of incident.

(iv) The case was transferred from Police Station Uruwa Bazar to Police Station Khajni by order dated 07.07.2016. The same finds place at Parcha No.X dated 07.07.2016 in the case dairy.

(v) The second Investigating Officer interrogated the witness Ram Das and Ramai Bind on 04.08.2016 and recorded their statements u/s 161 Cr.P.C. Both the witnesses have supported the FIR version and Ram Das has stated

that he was sitting in the back seat along with Ramai Bind and Rambrichh. He also said that three bullets were fired from the front and two from the rear of the vehicle.

(vi) In pursuant of the order dated 28.09.2016 passed by Superintendent of Police (crime), the case was again transferred from the police station Khajni to Crime Branch.

(vii) On 24.11.2016, the third Investigating Officer recorded the statement of the informant, Budhiram, Rambrikchh and hearsay witness; Ramai. The injured Budhiram and witness; Ram Brikchh have reiterated their earlier statement. The hearsay witness; Ramai has also repeated his earlier statement. On 28.12.2016, the statement of Ram Das has been recorded, who has supported the prosecution story.

(viii) An application alongwith affidavit of Smt. Suddha Singh wife of Umesh Kumar Singh addressed to D.I.G., Gorakhpur Range Gorakhpur for fair investigation has been given on 01.02.2017. The same finds place at parcha no.29 in the case dairy.

(ix) Thereafter, on 10.02.2017, Umesh Kumar Singh has given an application alongwith affidavit referring to the earlier application given by his wife, which is also addressed to the D.I.G., Gorakhpur Range Gorakhpur requesting for fair investigation.

(x) Smt. Sudha Singh wife of Umesh Singh has given an affidavit stating therein that at the date and time of incident, Umesh Singh is not present. The same has been supported by the Chandra Kant, Dinesh Chaubey, Vijay Pratap Singh, Ram Agrawal and statement of Suddha Singh, Doctor Virendra Kumar Gupta, statement of Dig Vijay Singh, Ajay Sharma, Rakesh, Ashok Yadav, Arun Bahadur Pal, by means of affidavits filed before the Investigating Officer, which is part of case dairy.

(xi) Taking into consideration the aforesaid, the Investigating Officer, on the basis of evidence collected during course of investigation under Section 2(h) Cr.P.C. arrived at a conclusion that a there is no evidence against the named accused, therefore, they have been exonerated from all charges and final report no.2/2017, dated 14.02.2017 has been submitted.

(xii) The aforesaid final report has been placed before learned Additional Chief Judicial Magistrate, Bansaon, Gorakhpur and on 19.11.2018, the

opposite party no.2 filed protest/objection in connection with the above referred final report.

(xiii) On 05.05.2022, learned Additional Chief Judicial Magistrate, Bansaon, Gorakhpur rejected the protest petition and accepted the final report. The aforesaid order dated 05.05.2022 was challenged by the opposite party no.2/complainant by means of filing criminal revision no.130 of 2022 on 05.07.2022.

(xiv) On 30.09.2022, the learned Additional Sessions Judge/Special Judge, P.C. Act (U.P.S.I.B.), Gorakhpur has heard and allowed the revision in part by setting aside the order dated 05.05.2022 and remitting the matter to the learned Chief Judicial Magistrate, Bansaon, Gorakhpur to decide the same afresh in the light of observations made by the revisional court after providing an opportunity to both the parties. Hence the present criminal revision has been filed.

#### REVISIONIST'S SUBMISSION

4. Learned counsel for the revisionist, while challenging the order impugned, has submitted that:-

(i) the Revisional Court has passed unjust, improper and illegal order and exceeded his jurisdiction, therefore, the same is not sustainable in the eye of law.

(ii) the finding given and conclusion arrived by the Revisional Court is perverse on record and the very assumption has not been supported by any cogent, clinching and admissible evidence collected by the Investigating Officer during course of investigation according to section 2(h) Cr.P.C.

(iii) the Revisional Court has passed the impugned order without application of judicial mind and without considering that learned Additional Chief Judicial Magistrate, Bansaon, Gorakhpur has legally taken into consideration of facts and circumstances as enumerated in the material collected by the Investigating Officer as well as protest petition and has reasonably arrived at conclusion to accept the final report passing the order dated 05.05.2022 in just, proper and legal manner.

(iv) the opposite party no.2 has completely failed to point out any error in the investigation and has also not rebutted the conclusion arrived at by the Investigating Officer while submitting final report. No ground has been taken in the memo of revision regarding illegality or infirmity in the order impugned

05.05.2022 passed by the concerned Magistrate, which has not been considered by the Revisional Court in its order dated 30.09.2023. Thus, the same is illegal.

(v) To sum up, the impugned order dated 30.09.2023 has been challenged merely on three grounds; firstly, the opposite party no.2 has been completely failed to point out any error in above referred Final Report No.2/17, dated 14.02.2017 in its protest petition dated 19.11.2018; secondly, the opposite party no.2 has not rebutted the finding recorded by the concerned Magistrate in its order dated 05.05.2022 in the memo of revision dated 05.07.2022; thirdly, the innocence of the revisionist has been fortified firstly by the Investigating Officer vide Final Report No.2/17 dated 14.07.2022 and secondly by the concerned Magistrate vide its order dated 05.05.2022.

6. Learned counsel for the revisionist has relied upon the judgment of Apex Court in the case of Vishnu Kumar Tiwari vs. State of U.P. and another. Relevant paragraph nos.25, 26 & 41 of the aforesaid judgment are as under:-

“25. In Rakesh Kumar and another v. State of Uttar Pradesh and another, on the basis of a First Information Report lodged by the Police after investigation, a final report came to be filed. The Magistrate accepted the final report. He, simultaneously, directed the case be proceeded with as a complaint case. Statements under Section 200 and 202 of the Code were recorded. The High Court turned down the plea of the accused to whom summons were issued. It was the contention of the accused that having accepted a negative final report, the court could not take action on the basis of the protest petition filed by the complainant. This Court refers to the judgment in H.S. Bains (supra). The principles of law laid down in paragraph 12 of Mahesh Chand (supra), 6 2014 (13) SCC 133 which we have also referred to earlier, came to be approved. The order of the High Court was approved.

26. This is a case where following the First Information Report, the Investigating Officer conducted an investigation. Statements were taken from the complainant, his wife and his son. This is apart from the statements which were taken from the Doctors who treated the daughter of the second respondent/complainant. The Investigation Officer concluded that there is no material which would warrant the accused being sent for trial. When such a report is filed before the court, it is beyond the shade of doubt that the Magistrate may still choose to reject the final report and proceed to take cognizance of the offences, which in his view, are seen committed. He may,



on the other hand, after pondering over the materials, which would include the statements of witnesses collected by the Investigating Officer, decide to accept the final report. He may entertain the view that it is a case where further investigation by the Officer is warranted before a decision is taken as to whether cognizance is to be taken or not.

41. In Rakesh Kumar (supra), the final report was filed which was accepted by the Magistrate but he simultaneously directed the case to be proceeded as a complaint case and statements under Sections 200 and 202 of the Code came to be recorded.”

7. On the cumulative strength of the aforesaid submissions, learned counsel for the revisionist submits that the Revisional Court has illegally passed the order impugned dated 30.09.2023 allowing the revision of the opposite party no.2 without assigning any cogent reason, which is not justifiable in the eye of law, therefore, the impugned order is liable to be set aside.

#### SUBMISSION OF OPPOSITE PARTY NO.2

8. On the other hand, learned counsel for the opposite party no.2 submits that there is no illegality in the order impugned dated 30.09.2023 as the same has been passed after considering the principal as laid down by judgment of Apex Court in Vishnu Kumar Tiwari (supra). The concerned Magistrate while passing the order dated 05.05.2023 has confirmed the final report ignoring the statement of injured witness and eye witness. The investigating officer while submitting the final report has not collected live location of such witnesses, who have supported the plea of alibi as taken by the revisionist and without taking the same into consideration, the concerned Magistrate has passed the order dated 05.05.2023, which is illegal.

9. He further submits that the opposite party no.2/informant has not mentioned an additional ground in the revision and only such ground, which is recorded by the Investigating Officer during investigation and it's part of case dairy, has been ignored and final report has been submitted, which has been accepted by the concerned Magistrate without verifying the evidence as placed by the accused persons.

10. Relying upon the judgment of Apex Court in the case of Munshi Prasad vs. State of Bihar<sup>3</sup>, he submits that the plea of alibi was not accepted when the accused had stated that he was present in the meeting held near about 400-500 meters way from the place of incident as considered the accused must have joined meeting after committed the incident. The aforesaid fact has

not been considered by the Investigating Officer while submitting the Final Report nor the concerned Magistrate while accepting the final report and passing the order dated 05.05.2023.

11. Relying upon Section 11 of Evidence Act, learned counsel for the opposite party no.2 submits that the plea of alibi has taken by the accused has to be seen as to whether the same is inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts it makes the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

12. Thus, probability of committing the offence and they going for treatment of his wife as has been stated by the revisionist and supported by the other persons appears to be highly improbable as the fact that the revisionist has committed the offence and has gone for the treatment of his wife as there are chances that the revisionist would have committed the offence and then had gone for treatment of his wife. Thus, there is no illegality in the order impugned.

#### SUBMISSION OF STATE COUNSEL

13. While assisting the Court, learned counsel for the State submits that the Magistrate after receiving the final report has the following options:-

(i) he could have accepted the report and, closed the case;

(ii) he could have taken cognizance of offence on the basis of evidence available in the case diary against the accused, if he was satisfied that the conclusion arrived at by the investigating officer was not correct;

(iii) he could have ordered for further investigation, if he was satisfied that the investigation was made in a perfunctory manner; and

(iv) he could have treated the protest petition as a complaint and adopted the procedure under Chapter XV of the code.

14. He further submits that in the present case as the Magistrate has initiated to consider the options available, he after considering the record, issued notice to the first informant, before accepting the police report in the light of judgment of Apex Court in the case of Bhagwant Singh Vs Commissioner of Police<sup>4</sup>, as there is no provision of protest petition in the Code. As such it is explicit that the Magistrate was of the opinion to opt for the option (a) of accepting the Final Report after considering material collected by



investigating agencies. Thus notice was issued to the complainant to raise objection against the same if any.

15. Here, the protest petition has to satisfy the ingredients of complaint before the Magistrate taking cognizance u/s 190 (1) (a) CrPC. Where the informant brought to the notice of the Magistrate the infirmities in the investigation and investigating process, a refusal of the Magistrate on the ground that he does not have the power to review can be totally wrong. Further Magistrate is not debarred from taking cognizance of a second complaint mere on the ground that earlier he had declined to take cognizance. In support of his submission, he has relied upon the followings judgements:-

- (i) H.S. Bains, Director, small saving-cum-Deputy Secretary, Punjab, Chandigarh<sup>5</sup>;
- (ii) M/s India Carat Pvt Ltd Vs State of Karnataka & another<sup>6</sup>;
- (iii) Union Public Service Commission Vs S Papaiah<sup>7</sup>;
- (iv) Vishnu Kumar Tiwari Vs State of UP<sup>8</sup>;

16. The Magistrate after considering the protest petition finds that protest petition is devoid of necessary requirements which may call for questioning the investigation and while concurring with the opinion of I.O. filed in CD Parcha No. 31 accepted the final report vide its order dated 05.05.2022.

17. He further submits that against the order dated 05.05.2022, the revision was filed by the O.P./first informant as revision no. 130 of 2022 and the same was allowed and case was remitted back for re-adjudication by the learned Additional Sessions Judge, Gorakhpur vide its order dated 30.09.2023.

18. The aforesaid order dated 30.9.2023 was passed by the learned Additional Sessions Judge after observing that learned Magistrate has passed the order dated 5.5.2022 without going through the aspect that I.O. didn't find the incident as untrue and accepted the final report against the accused on the ground that there is evidence of alibi of the accused and that complicity of the accused was wrongly mentioned.

19. He has relied upon the judgment of Apex Court in the case of Vishnu Kumar Tiwari vs The State of Uttar Pradesh<sup>9</sup>. The relevant paragraph no.26 is as under:-

“26. It is undoubtedly true that before a Magistrate proceeds to accept a final report u/s 173 and exonerate the accused, it is incumbent upon the Magistrate

to apply his mind to the contents of the protest petition and arrive at a conclusion thereafter. While the Investigating Officer may rest content by producing the final report, which according to him, is the culmination of his efforts, the duty of the Magistrate is not one limited to readily accepting the final report. It is incumbent upon him to go through materials, and after hearing the complainant and considering the contents of the protest petition, finally decide the future course of action to be whether to continue with the matter or to bring the curtain down.”

20. While reiterating the aforesaid observation made by the Apex Court in Vishnu Kumar Tiwari (Supra), the Revisional Court erred in examining the order dated 05.05.2022 which is clearly in the light of its ambit, as the concerned Magistrate has explicitly mentioned that protest petition doesn't mention any infirmities in the investigation nor it specifically points out any such evidence which satisfy for the summoning of accused or rejected the final report. Moreover order dated 05.05.2022 reveals that Magistrate has gone thought the material available and had pointed out the evidence collected by I.O. which exonerate the accused person from the complicity of offence.

21. Further, it is well settled that it is within the discretionary power of the Magistrate to accept or reject the final report submitted to him by the police officer.

22. Moreover, the Revisional Court can not touch the factual aspects of the matter and re-appreciate the evidence unless it is shown / found that the court below failed to exercise the jurisdiction which they are supposed to or have committed a patent illegality. It is further well settled that Revisional Court can not substitute its opinion simply because another view is possible and unless there is patent illegality on the face of record which may lead to miscarriage of justice, the Revisional Court will not exercise its diligence over the matter.

23. With consent of the counsel for the parties, this revision is decided finally at this stage without calling for counter affidavit as legal question is involved.

#### OBSERVATION OF THE COURT

24. Before entering into merits of the case, the facts of the brief are:-

(a) An FIR was registered as Case Crime No.60 of 2016, under Sections 307, 427, 34 IPC against the revisionist and others at P.S.-, District-Gorakhpur on 26.05.2016 by opposite party no.2-Nanhe Lal Yadav. Subsequently, after

investigation, the Investigating Officer submitted final report no.2/17 dated 14.02.2017. The said investigation was conducted by Police Station-Uruwa Bazar then it was transferred to Police Station-Khajni and then it was transferred to crime branch.

(b) The Investigating Officer while submitting final report took into consideration the statement of informant, all the witnesses including injured witness, injury reports, spot inspection report and affidavits filed by person from side of revisionist, thus arriving at a conclusion that the involvement of revisionist-Umesh Singh and Vivek Singh in the incident was not found, efforts were put in to find the real accused persons but nothing could be found. There being no chances in near future to find the real culprits and as the investigation was pending since ten months, therefore, it was not appropriate to keep it pending. Hence, final report was submitted on 14.02.2017.

(c) On the evidence collected by the Investigating Officer, he has to form his opinion as to whether it discloses any offence or it does not disclose any offence and accordingly, he is duty bound to report the result of his investigation in the prescribed form to the jurisdictional magistrate. In the present case on the basis of evidence collected by the Investigating Officer, thus finally submitted a final report on 14.02.2017.

25. While dealing with the merits of the case two aspects are involved; firstly, the power of Magistrate as to what exercise is to be done after receiving such a report; secondly, jurisdiction of the Sessions Judge/ Revisional Court while deciding the revision.

26. While dealing with the first aspects, i.e. the power of Magistrate as to what exercise has to be done after receiving such a report. After receiving the police report, the learned Magistrate has following options;-

(a) The Magistrate may agree with the conclusion of the police report and accept the final report and drop the proceedings;

(b) The Magistrate may take cognizance under Section 191(b) Cr.P.C. and issue process straightway to the accused without being bound by the conclusion of the Investigating Agency where he is satisfied that upon the fact discovered by the police, there is sufficient ground to proceed;

(c) He may order for further investigation, if he is satisfied that the investigation was made in perfunctory manner;

(d) He may treat the protest, if any, as complaint without issuing process and dropping the proceedings under Section 190(1)(a) Cr.P.C. and proceed to record statement under Sections 200 and 202 Cr.P.C. and, thereafter, decide whether the complaint should be dismissed or process should be issued.

27. When a report, i.e. charge-sheet or final report, is submitted, what the learned Magistrate has to do has been stated in Section 190 Cr.P.C. It runs as under:-

“190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence.

(b) Upon its police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.”

28. In the present case, where a Final Report has been submitted, what the learned Magistrate has to do, has been stated in several cases. The Apex Court in the case of Abhinandan Jha and others vs. Dinesh Mishra<sup>10</sup> had occasion to deal with the question as to what the Magistrate has to do when a final report is filed before him by the Investigating Officer. The Apex Court in aforesaid case while referring to section 190 Cr.P.C., which is the first section in the group of sections headed ‘conditions requisite for initiation of proceedings’, was of the opinion that the use of word, ‘may take cognizance of any offence’, in Sub-section (1) of Section 190 Cr.P.C., imports the exercise of a ‘judicial discretion’ and the Magistrate, who receives the report, under Section 173, will have to consider the said report and judicially take a decision, as to whether to take or not to take cognizance of the offence.

29. Thus, from the aforesaid judgment, it follows that it is not as if, that the Magistrate is bound to accept the opinion of the police that there is a case for placing the accused, on trial. It is open to the Magistrate to take the view that the facts disclosed in the report do not make out an offence for taking cognizance or he may take the view that there is no sufficient evidence to justify an accused being put on trial. On either of these grounds, the Magistrate will be perfectly justified in declining to take cognizance of an offence, irrespective of the opinion of the police.

30. To be more clear, it can be said that if the Magistrate agrees with the Final Report, he may accept the Final Report and close the proceedings. But there may be instances when the Magistrate may take the view, on a consideration of the final report, that the opinion formed by the police is not based on a full and complete investigation, in which case, the Magistrate will have ample jurisdiction to give directions to the police under Section 156(3) Cr.P.C. to make a further investigation. It may also be so, that if the Magistrate feels, after considering the final report, that the investigation is unsatisfactory or incomplete or that there is scope for further investigation, it will be open to the Magistrate to decline to accept the final report and direct the police to make further investigation under 156(3).

31. It may also be so, that, in case the Magistrate on receiving the final report forms the opinion that the fact, set out in the final report, constitute an offence, he may take cognizance of the offence under Section 190 (1)(b) Cr.P.C. notwithstanding the contrary opinion of the police expressed in the final report.

32. The same question as to the powers of Magistrate while accepting the final report has been dealt in the case of *Tata Iron and Steel Co. Ltd. vs. Inspector of Police, CCB, Egmore, Madras*<sup>11</sup>. The Apex Court observed as under:-

“6. Thirdly, the contention of the Revision Petitioner is that the Magistrate should not blindly accept the report of the Police Officer, and that he should, on the contrary, apply his mind and come to an independent conclusion whether to take the case on file or not under S.190, Cr.P.C. In fact, when the Magistrate gets a negative report under S.173, Cr.P.C., he should chose between one of the four causes: (1) to accept the report and drop the proceedings. (2) to direct further investigation to be made by the police, (3) to investigate himself or order for the investigation to be made by another Magistrate under S.159, Cr.P.C. (4) to take cognizance of the offence under S.200, Cr.P.C., as a private complaint, when the materials are sufficient in his opinion and if the complainant is prepared for that course.”

33. In *Dr. Mrs Nupur Talwar vs. C.B.I, Delhi*<sup>12</sup>, the Hon'ble Apex Court has held as under:-

“18. Section 190 of the Code lays down the conditions which are requisite for the initiation of a criminal proceeding.

19. At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him. In doing so, the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion irrespective of the views expressed by the Police in its report and may prima facie find out whether an offence has been made out or not.

20. The taking of cognizance means the point in time when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed.

21. At the stage of taking of cognizance of offence, the Court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record.”

34. Be that as it may, the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him on receiving the Final Report and in doing so, he is not bound by the opinion of the Investigating Officer and he is competent to exercise his discretion irrespective of the views expressed by the police in its report and may prima facie find out whether an offence has been made out or not. Thus, taking of cognizance means the point in time when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed.

35. At the stage of taking of cognizance of offence, the Court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record.

36. Reference in this connection may be made to a three Judge Bench decision of the Apex Court in the case of India Carat Private Ltd. v. State of Karnataka<sup>13</sup>. In the aforesaid case, the Apex Court has explained the position so brevity, which is as under:-

“The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 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 conclusion 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 under Section 190(1)(b) and direct the issue of process to the accused.....”

37. In the present case, first information report was lodged, the Investigating Officer conducted the investigation taking into consideration statements of all concerned, spot inspection report, affidavits filed on behalf of the revisionist taking plea of alibi, concluded that the involvement of revisionist was not found in the incident, therefore, submitted a final report.

38. As it is well settled and beyond shed of doubt that the Magistrate irrespective of the opinion found by the Investigating Officer may choose to reject the Final Report and proceed to take cognizance of the offence which in his view are seen or he may after considering the material which would include the statement of the witnesses collected by the Investigating Officer decide to accept final report. He thus for accepting the final report has to issue notice to the first informant/complainant, which has been done in the present case and a protest petition has been filed.

39. The protest petition dated 19.11.2018 was rejected and accepting the Final Report vide order dated 05.05.2022 as the learned Magistrate found that no specific ground or specific basis was taken in the protest petition which could point out the flaw in the investigation. It was also found by the learned Magistrate that no issues or points were mentioned on which a proper investigation was not done.

40. Short question arises for consideration in the present case is whether the protest filed by the informant after notices issued to him, may be treated as complaint.

41. The protest petition could have been treated as complaint case for taking cognizance under Section 190(1)(a) Cr.P.C. but for the protest petition to be treated as complaint, the Magistrate has to satisfy that the ingredients of complaint as defined under 2(d) Cr.P.C. are fulfilled.

42. In the present case, the contents of the protest petition were only that the Investigating Officer has not carried out investigation in a proper manner though the statements and evidences to that effect were collected by him.



The protest petition did not mention the specific ground, points or basis on which the investigation was not conducted.

43. It is undoubted that the Magistrate can treat the protest petition as complaint provided that the protest petition fulfills the requirements of a complaint. It can be treated as a complaint only after considering the facts and circumstances of the case and the material, which is made available before him by the complainant in the protest petition. The Magistrate cannot be compelled to treat the protest petition as complaint in the absence of any ground and in case, ingredients of complaint as defined in Section 2(d) Cr.P.C. are not there.

44. In the case before this Court, based on material collected by the Investigating Officer and protest petition, the Magistrate came to the conclusion that the protest petition was devoid of necessary requirements, which may call for questioning the investigation as no specific point, ground or basis regarding deficiency in the investigation has been mentioned by the complainant/informant. The Magistrate, thus, agreeing with the opinion of the Investigating Officer filed in CD Parcha No.31, accepted the final report. Thus, he has applied judicial mind while accepting the final report by the order dated 05.05.2022.

45. There cannot be any doubt or dispute that only because the Magistrate has accepted a final report, the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition; but the question which is required to be posed and answered would be as to under what circumstances the said power can be exercised.

46. The Court is concerned with the question as to whether a Magistrate even after accepting final report filed by the police, can take cognizance of offence upon a complaint or the protest petition on same or similar allegations of fact.

47. The Hon'ble Supreme Court in the case of Vishnu Kumar Tiwari v. State of U.P.<sup>14</sup> has held that if the material presented with the protest petition is such which persuade the learned Magistrate to disagree with the conclusion arrived at by the investigating officer, learned Magistrate can take cognizance under Section 190(1)(b) of the CrPC. However, learned Magistrate cannot be forced to treat a protest petition as a complaint, if after considering the final report, statement of the witnesses available in the case diary and material made available in the protest petition he is of the opinion that no case is made

out. A private complaint is to contain complete list of witnesses to be examined. Para 42 to 46 of the aforesaid judgment are extracted under:-

"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.

43. It is true that law mandates notice to the informant / complainant where the Magistrate contemplates accepting the final report. On receipt of notice, the informant may address the court ventilating his objections to the final report. This he usually does in the form of the protest petition. In *Mahabir Prasad Agarwala v. State* [*Mahabir Prasad Agarwala v. State*, 1957 SCC OnLine Ori 5 : AIR 1958 Ori 11] , a learned Judge of the High Court of Orissa, took the view that a protest petition is in the nature of a complaint and should be examined in accordance with the provisions of Chapter XVI of the Criminal Procedure Code. We, however, also noticed that in *Qasim v. State* [*Qasim v. State*, 1984 SCC OnLine All 260 : 1984 Cri LJ 1677] , a learned Single Judge

of the High Court of Judicature at Allahabad, inter alia, held as follows: (Qasim case [Qasim v. State, 1984 SCC OnLine All 260 : 1984 Cri LJ 1677] , SCC OnLine All para 6)

"6.... In Abhinandan Jha [Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117 : 1968 Cri LJ 97 : (1967) 3 SCR 668] 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 a 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 CrPC. 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."

(emphasis supplied)

44. We may also notice that in Veerappa v. Bhimareddappa [Veerappa v. Bhimareddappa, 2001 SCC OnLine Kar 447 : 2002 Cri LJ 2150] , the High Court of Karnataka observed as follows:(SCC OnLine Kar para 9)

"9. From the above, the position that emerges is this: Where initially the complainant has not filed any complaint before the Magistrate under Section 200 CrPC, but, has approached the police only and where the police after investigation have filed the "B' report, if the complainant wants to protest, he is thereby inviting the Magistrate to take cognizance under Section 190(1)(a) CrPC on a complaint. If it were to be so, the protest petition that he files shall have to satisfy the requirements of a complaint as defined in Section 2(d) CrPC, and that should contain facts that constitute offence, for which, the learned Magistrate is taking cognizance under Section 190(1)(a) CrPC. Instead, if it is to be simply styled as a protest petition without containing all those necessary particulars that a normal complaint has to contain, then, it

cannot be construed as a complaint for the purpose of proceeding under Section 200 CrPC."

45. "Complaint" is defined in Section 2(d) of the Code as follows:

"2. (d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.--A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;"

46. If a protest petition fulfils the requirements of a complaint, the Magistrate may treat the protest petition as a complaint and deal with the same as required under Section 200 read with Section 202 of the Code. In this case, in fact, there is no list of witnesses as such in the protest petition. The prayer in the protest petition is to set aside the final report and to allow the application against the final report. While we are not suggesting that the form must entirely be decisive of the question whether it amounts to a complaint or is liable to be treated as a complaint, we would think that essentially, the protest petition in this case, is summing up of the objections of the second respondent against the final report."

48. From perusal of the above opinion of the Apex Court, it is also reflected that the Magistrate had the liberty to reject the protest petition alongwith all other material, which may have been filed in support of the same. In that event the complainant would be at liberty to file a fresh complaint. The right of the complainant to file a petition under Section 200 Cr.P.C. is not taken away even if the Magistrate concerned does not direct that such a protest petition be treated as a complaint.

49. In the present case, the Magistrate has applied his judicial mind and has accepted the final report after taking into consideration the material available in the protest petition as well as the evidence as collected by the Investigating Officer. Thus, there is no illegality in the order dated 05.05.2022.

50. The Revisional Court while setting aside the order passed by the Magistrate has remitted back the matter to be heard again by the concerned Magistrate by order dated 30.09.2023, holding that the Magistrate has not

passed the order after application of judicial mind as while accepting the final report and exonerating accused – revisionist, the concerned Magistrate should have looked into the case diary, the grounds mentioned in the protest petition and should have passed a reasoned order for coming to the conclusion of accepting the final report.

51. The Revisional Court while passing the order impugned dated 30.09.2023 has presumed that the concerned Magistrate while accepting the final report has not applied his judicial mind as on one hand the Investigating Officer while placing the final report before the concerned Magistrate has submitted that the real accused could not be found and considering the affidavits of the witnesses on the point of alibi, their involvement in the incident was found to be incorrect. In the incident, injured and eyewitness have named the accused persons and have supported the prosecution version as narrated in the FIR. The Investigating Officer did not believe the complainant's version and the evidence as produced before him, however, relying upon the call details and the averments made in the affidavits given by the witnesses has found the involvement of accused persons to be incorrect and expressed his inability to divulge the real accused persons. A protest petition has been filed against the submission of final report. The material collected from the place of incident, thus, proves that the incident took place, however, without analyzing the aforesaid fact, the concerned Magistrate has accepted the final report. In the order, impugned herein, dated 30.09.2023, the Additional Sessions Judge/Special Judge, P.C. Act (U.P.S.I.B.), Gorakhpur has also considered the judgment of the Apex Court in Vishnu Kumar Tiwari (supra).

52. In the opinion of the Court, the revisional court has committed manifest error in examining the order dated 05.05.2022 which has been passed in the light of observations made by the Apex Court in Vishnu Kumar Tiwari (supra), whereas learned Magistrate has clearly mentioned that the protest petition filed by the complainant raising objection against the final report after notices issued to him, the complainant could not mention any infirmity or illegality in the investigation nor has showed any basis, ground or specific point to support any such evidence in his favour, which might satisfy summoning of the accused or rejection of the final report.

53. This Court finds that the concerned Magistrate has not committed any error in applying the judicial mind he has gone through the material as collected and placed by the Investigating Officer before him and has accepted the final report not finding the complicity of the revisionist in the incident as

narrated in the FIR. As stated in the preceding paragraphs, in view of the settled position, the Magistrate is independent to form his opinion considering the evidences collected by the Investigating Officer and is free to accept or reject the report submitted by the Investigating Officer U/s 173 (2) of Cr.P.C. applying his judicial mind, without being influenced by the opinion expressed by the Investigating Officer.

54. This Court feels that in case any additional evidence is to be given by the complainant in the protest petition, the same cannot be taken into consideration by the concerned Magistrate, however, the complainant is always at liberty to file a fresh complaint therefor. The right of the complainant to file petition under Section 200 Cr.P.C. is also available, if the Magistrate concerned does not direct such a protest petition to be taken as a complaint.

55. As regards the second points with respect to jurisdiction of Revisional Court/Sessions Court, in the case of Munna Devi Vs. State of Rajasthan and another<sup>15</sup>, the Apex Court has held as under:-

"The revision power under the Code of Criminal procedure cannot be exercised in a routine and casual manner. While exercising such powers the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the First Information Report even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged."

56. In the case of Km. Phooldali vs. State of U.P. and another<sup>16</sup>, the Single Bench of this Court has held that while exercising the revisional jurisdiction, any court cannot sit in appeal and re-appreciate the evidence.

57. In the present case, relying upon the material evidence placed before him, the Magistrate has duly recorded his satisfaction comprehensively that it was a case where the complicity of the revisionist was not found in the incident, therefore, the revisional court has committed error in setting aside the order dated 05.05.2022 remitting the matter back to the Magistrate to decide it afresh. It is settled law that the revisional jurisdiction should be exercised by any court in exceptional cases only when there is some glaring defect in the procedure or a manifest error on a point of law resulting in flagrant miscarriage of justice. In the present case, the Revisional Court has committed error in

passing the order impugned while it cannot sit in appeal and re-appreciate the evidence as per the settled position of law.

#### CONCLUSION

58. Having gone through the above proposition of law, I find that the jurisdiction of Revisional Court is severely restricted and it cannot embark upon a re-appreciation of evidence as has been done by the Revisional Court in the present case while passing the order impugned dated 30.09.2023. The court concerned has not been able to show that the order passed by the concerned Magistrate is contrary to record or perverse or that any material evidence has been ignored or misread.

59. Considering the submissions advanced by the learned counsel for the parties and law as settled on the issue, enumerated above, the order impugned dated 30.09.2023 passed by the Additional Sessions Judge/Special Judge, P.C. Act (U.P.S.I.B.), Gorakhpur is unsustainable. Thus, it is set aside.

60. However, this Court observes that the informant will have opportunity to file a complaint afresh, if so advised, in accordance with law.

61. The criminal revision stands allowed, accordingly.

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