

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

SB:- Hon'ble Shri Justice G. S. Ahluwalia

MCRC 14091/2016

Dipti Kushwah

Vs.

Vijay Shankar Tiwari and Others

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Shri A.K. Jaiswal, counsel for the applicant.

Shri Ajeet Kumar Sudele, counsel for the respondents No.1 and 2.

None for the respondents No. 3 and 4.

Shri RK Awasthi, Public Prosecutor for the respondents No.5 and 6/ State.

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ORDER

(Passed on 11/04/2018)

This application under Section 482 of CrPC has been filed against the order dated 24/10/2016, passed by JMFC, Gwalior in Criminal Complaint (unregistered) No...../2016, by which the trial Court has dismissed the complaint after passing the order under Section 156(3) of CrPC.

(2) The necessary facts for the disposal of the present application in short are that the applicant filed a complaint against the respondents No.1 to 4 for offence under Sections 420, 467, 468, 471, 31 of IPC. It appears that the Magistrate by order dated 02/05/2016 directed the SHO, Police Station Bahodapur, District Gwalior to register the FIR and thereafter, to file the charge sheet/ closure report, in accordance with the outcome of the investigation. Thereafter, on 24/10/2016, the case was taken up and it was adjourned because the police had

not filed the Final Report (Either Charge sheet or Closure Report). However, after signing the order sheet, later on, the trial Court passed another order, mentioning that since the FIR under Sections 420, 467, 468, 471, 31 of IPC has already been registered in Crime No.258/2016 by Police Station Bahodapur, District Gwalior in compliance of the order passed under Section 156(3) of CrPC, therefore, now no proceeding is left in the complaint and accordingly, the complaint was dismissed.

(3) It is submitted by the counsel for the applicant that the order which was passed on 24/10/2016 thereby dismissing the complaint, is bad for the following two reasons:-

(i) The order dated 24/10/2016 amounts to review of the order dated 05/02/2016, by which the police was directed to file Final Report (either charge sheet/closure report) and the matter was adjourned awaiting the final report.

(ii) In case, if, the police decides to file the Closure Report, then the applicants still can proceed further with their complaint after examining themselves or their witnesses and the complaint cannot be dismissed merely on the ground that the Police has filed the Closure Report.

(4) *Per contra*, the order is supported by counsel for respondents.

(5) The counsel for the State has submitted that the police has filed the status report and has come to a *prima facie* opinion that there is a lack of evidence against the respondents No.1 to 4 warranting the filing of charge sheet against them, however, the investigation is still pending.

(6) Heard the learned counsel for the parties.

(7) In the present case, the following two important questions of law arise, which are as under:-

(i) Whether the Criminal Court has power to review its own order ?

(ii) Whether the complaint can be dismissed only on the

ground that an order under Section 156(3) of CrPC has been passed and the F.I.R. has been lodged ?

(8) Section 362 of CrPC provides as under:-

"362. Court not to alter judgment- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

Thus, it is clear that in absence of any provision for review, the Criminal Court cannot review its own order. Recall of an order or review of an order are two different things. In the present case, by order dated 02/05/2016, the Magistrate had passed an order under Section 156(3) of CrPC and had directed the police to register the F.I.R. and then to file the Final Report and the case was adjourned to the next date awaiting the Final Report (either the charge sheet or the Closure Report). However, by order dated 24/10/2016, the Magistrate dismissed the complaint by mentioning that since the order under Section 156(3) of CrPC has been passed and the FIR has been registered, therefore, now, there is no need to proceed further with the complaint. In the considered opinion of this Court, the order dated 24/10/2016 amounts to review of order dated 02/05/2016, which could not have been done by the Magistrate.

(9) Further, in the present case, the undisputed fact is that the police has registered the FIR against the respondents No.1 to 4 in compliance of the order dated 02/05/2016, by which an order under Section 156(3) of CrPC was passed. It is well-established principle of law that whenever an order under Section 156(3) of CrPC is passed, it is mandatory on the part of the Police to register the FIR because the investigation starts with the registration of the FIR. However, the registration of the FIR, does not mean that the Police has to file the charge sheet only. If the Police after conclusion of investigation, comes to an opinion that the allegations made in the FIR do not *prima facie* make out

an offence against the respondents No.1 to 4/accused, then the police is well within its right to file the Closure Report. Whenever a Closure Report is filed, the complainant is required to be heard. The Supreme Court in the case of **Bhagwant Singh Vs. Commissioner of Police**, reported in **(1985) 2 SCC 537** has held as under :-

"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 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."

However, where the complaint is pending, then the complainants, in the case of filing of Closure Report by the police can, not only raise an objection but can also examine his/her witnesses in support of the complaint and the Magistrate can take cognizance of the complaint in spite of the fact that a Closure Report has been filed by the Police Station, stating lack of evidence warranting prosecution of the accused/respondents No.1 to 4.

The Supreme Court in the case of **B. Chandrika Vs. Santhosh** reported in **(2014) 13 SCC 699** has held as under :-

"4. On the basis of the abovementioned report, the police referred the case as not proved. Reference report was submitted to the Judicial Magistrate, First Class, Cherthalay for appropriate action. Later, the respondent claimant filed a protest complaint before the abovementioned court for cancellation of the reference report and for taking cognizance of the case, on which, as already stated, the Magistrate passed an order dated 22-11-2011, which reads as follows:

"Heard the counsel for the petitioner. Perused the evidence adduced and other case records, prima facie case alleged is made out. Hence, case is taken on file as CC No. 154810 for offence under Section 420 and 34 IPC. Issue summons to both the accused. Take steps by 28-1-2012."

5. The power of the Magistrate to take cognizance of an offence on a complaint or a protest petition on the same or similar allegations even after accepting the final report, cannot be disputed. It is settled law that when a complaint is filed and sent to police under Section 156(3) for investigation and then a protest petition is filed, the Magistrate after accepting the final report of the police under Section 173 and discharging the accused persons has the power to deal with the protest petition. However, the protest petition has to satisfy the ingredients of complaint before the Magistrate takes cognizance under Section 190(1) (a) CrPC.

6. This Court in *Gopal Vijay Verma v. Bhuneshwar Prasad Sinha* [(1982) 3 SCC 510] held that the Magistrate is not debarred from taking cognizance

of a complaint merely on the ground that earlier he had declined to take cognizance of police report. The judgment was followed by a three-Judge Bench judgment of this Court in *Kishore Kumar Gyanchandani v. G.D. Mehrotra [(2011) 15 SCC 513]*.

The Supreme Court in the case of **Madhao Vs. State of Maharashtra** reported in **(2013) 5 SCC 615** has held as under :-

"21. Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 of the Code.

22. The above principles have been reiterated in *Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy [(1976) 3 SCC 252]* and *Tula Ram v. Kishore Singh [(1977) 4 SCC 459]*."

Thus, it is clear that where an order under Section 156(3) of Cr.P.C., is passed by a Magistrate, then the police is under obligation to register the F.I.R.. However, the order under Section 156(3) of Cr.P.C., does not necessarily mean, that the police has to file the charge sheet. The police after investigating the matter, may file the closure report also. When the closure report is filed, the Magistrate, in the light of judgment passed in the case of **Bhagwant Singh (Supra)**, is under obligation to give an opportunity to the complainant to file his protest petition, and after recording the statements under Sections 200 and 202 of Cr.P.C. may take cognizance of the offence, in spite of the fact that the police might have given an opinion, that no offence is made out. Therefore, in the considered opinion of this Court, the Magistrate was wrong in holding that once the FIR has been lodged in compliance of order under Section 156(3) of CrPC, then nothing survives in the complaint. Therefore, on that ground also, the order dated 24/10/2016 is bad.

(10) Accordingly, the later part of the order dated 24/10/2016 passed by JMFC, Gwalior in Unregistered Criminal case No. of 2016, by which the complaint filed by the applicant was dismissed on the ground that as the FIR in Crime No.258/2016 has been registered by Police Station Bahodapur, District Gwalior in compliance of the order under Section 156(3) of CrPC, therefore, nothing survives in the complaint, is hereby set aside. At present, it is not known that whether the Police has filed the charge sheet or has filed the Closure Report or the matter is still under investigation. Therefore, the Magistrate is directed to proceed further in accordance with law after receiving the Final Report from the Police.

(11) With the aforesaid observations, this application is **allowed.**

(G.S. Ahluwalia)
Judge