Rahul Singh vs State Of U.P. Thru. Prin. Secy. Home ... on 2 January, 2025

Author: Saurabh Lavania

Bench: Saurabh Lavania

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

Neutral Citation No. - 2025:AHC-LKO:37

Court No. - 12

Case :- APPLICATION U/S 482 No. - 11650 of 2024

Applicant :- Rahul Singh

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home Deptt. Lko. And Another

Counsel for Applicant :- Kaushal Kishore Tewari,Shakti

Counsel for Opposite Party :- G.A.

Hon'ble Saurabh Lavania,J.

1. Heard learned Counsel for the parties and perused the records.

2. The present application has been filed for the following main relief:-

> "Therefore it is most respectfully prayed that this Hon'ble court may kindly be pleased to set aside the orders dated 26-11-2024 passed by the Learned Session Judge Court No.- 3, Hardoi in criminal revision no-4 of 2022 (Rahul Singh Vs State of U.P. & Another) and also order dated 18-12-2020 passed by the Learned Chief Judicial Magistrate, Hardoi in Case no. 30 of 2017 (Brijesh Kumar Singh -Vs- Rahul Singh & Others) whereby the applicant for summoned for facing trial. (Annexure no-1 & 2).

It is further prayed that during pendency of this application proceedings against the applicant arising out of case crime City no. 278 of 2016 u/s 302/147 I.P.C. at P.S. Kotwali City, District Hardoi be stayed."

3. To impeach the orders in issue, the learned Counsel for the applicant, based upon the pleadings and documents on record, indicated following facts:-

(i) The FIR in issue, was registered as Case Crime No. 278 of 2016 on 25.05.2016 under Sections 302/147 IPC at Police Station Kotwali City, District Hardoi.

(ii) The FIR was lodged against the present applicant and other co-accused namely Amrish Bajpai, Anshu Shukla, Manoj Mishra and Sanju. According to FIR, the incident occurred on 15.05.2016. The FIR indicates that applicant and other co-accused called deceased/Amit Singh, son of informant namely Brijesh Kumar Singh/opposite party no.2, on 15.05.2016 at about 4:30 PM for swimming at Company Garden and their the accused persons murdered Amit Singh(deceased).

(iii) The postmortem was carried out on 20.05.2016. According to postmortem report the cause of death is 'Coma' due to 'Antimortem Head Injury' (Right Temporal Bone Found Fractured and Subdural Hematoma present).

(iv) The autopsy surgeon also found, while carrying out the postmortem of the body of the deceased, Second injury i.e. contusion on right elbow joint.

(v) The Investigating Officer (in short 'I.O.') during investigation recorded the statement(s) of persons concerned including the statement of informant and the statement of the present applicant.

(vi) According to the statement of the present applicant, before I.O., the deceased was called upon by him and both consumed liquor and thereafter the deceased wanted to swim in the swimming pool, which was opposed by one Bhaiya Lal Bajpai and despite this the deceased entered into the swimming pool and ultimately expired.

(vi) Considering the entire evidence available including the expert report, the I.O. submitted final report. The expert report reads as under:-

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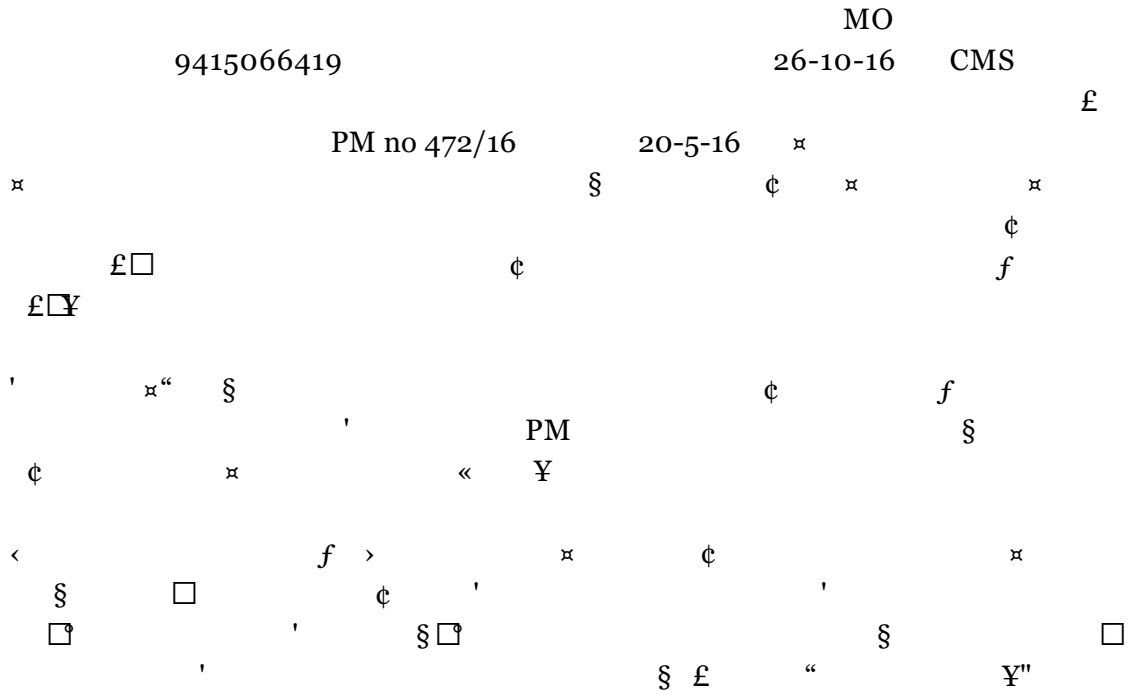
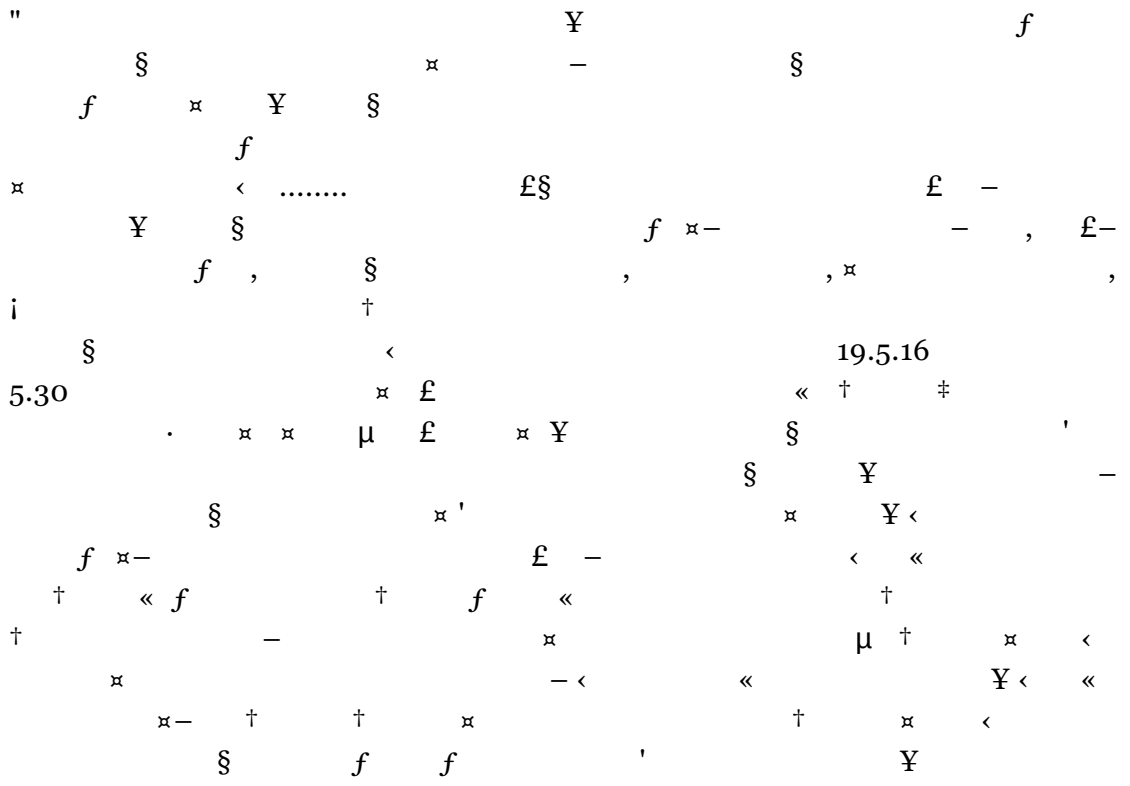


(vii) Upon receiving of notice, a protest petition was preferred by the opposite party no.2.

(viii) The Magistrate thereafter taking note of entire material available before it, treated the protest petition as State Case vide order under challenge dated 18.12.2020 and summoned the present applicant and other co-accused to face criminal proceedings under Section 147/302 IPC. The relevant portion of order dated 18.12.2020 reads as under:-



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(ix) The applicant being aggrieved by the order dated 18.12.2020, filed criminal revision no. 4 of 2022 (Rahul Singh Versus State of U.P. and another). The Additional Judge, Court No. 3, Hardoi (in short 'Revisional Court'), affirmed the order of Magistrate Hardoi dated 18.12.2020 and dismissed the revision vide its order dated 26.11.2024. The relevant portion of order dated 26.11.2024 reads as under:-

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Pakhando and others vs State of U.P. and another, 2001 (43) ACC 1096, a Division Bench of this Court after considering Section 190 Cr.P.C. has held that if upon investigation Police comes to conclusion that there was no sufficient evidence of any reasonable ground of suspicion to justify forwarding of accused for trial and submits final report for dropping proceedings, Magistrate shall have following four courses and may adopt any one of them:

> (I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant;
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> (II) He may take cognizance under Section 190 (1) (b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or (III) He may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or (IV) He may, without issuing process or dropping the proceedings decide to take cognizance under Section 190 (I) (b) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

‹ « ¡ ¤ - "where cognizance has been taken under Section 190 (1) (b) Cr.P.C. only on the basis of material, collected during investigation and without taking into account any extraneous material, the Magistrate is not bound to follow the procedure laid down for complaint cases and to such a case provision to Sub-Section (2) of Section 202 Cr.P.C. shall have no application. In the instant case India Carat Pvt. Limited v. State of Karnataka, 1989- AWC- 1-386 Apex Court has held that "it may be seen that on receipt of a complaint a Magistrate has several courses open to him. The Magistrate may take cognizance of the offence at once and proceed to record statements of the complainant and the witnesses present under Section 200. After recording those statements, if in the opinion of the Magistrate there is no sufficient ground for proceeding, he may dismiss the complaint under Section 203. On the other hand if in his opinion there is sufficient ground for proceeding he may issue process under Section 204. If however, the Magistrate thinks fit, he may postpone the issue of process and either inquire into the case himself or direct an investigation to be made by the police officer or such other person as he thinks fit, for the purpose of deciding whether or not there is

sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. Yet another course open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down under Section 200 or Section 202, he may order an investigation to be made by the police under Section 156(3). When such an order is made, the police will have to investigate the matter and submit a report under Section 173 (2). On receiving the police report the Magistrate may take cognizance of the offence under Section 190 (1) (c) and issue process straight away to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complaint and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued.

Gangadhar Janardan Mhatre vs. State of Maharashtra and others 2004 (7) SCC 768,

¡ ¤ - "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, exercise of his powers under Section 190 (1) (b) and direct the issue of process to the accused." (emphasis added)"

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4. Learned Counsel for the applicant submitted that Magistrate committed error of law in passing the detailed and reasoned order, as such the indulgence of this Court is required.

5. In this regard learned Counsel for the applicant has placed reliance on the judgment of Hon'ble Apex Court passed in the case of Jagdish Ram Versus State of Rajasthan; (2004) 4 SCC 432. The relevant portion of the same are reads as under:

> "10. The contention urged is that though the trial court was directed to consider the entire material on record including the final report before deciding whether the process should be issued against the appellant or not, yet the entire material was not considered. From perusal of order passed by the Magistrate it cannot be said that the entire material was not taken into consideration. The order passed by the Magistrate taking cognizance is a well-written order. The order not only refers to the statements recorded by the police during investigation which led to the filing of final report by the police and the statements of witnesses recorded by the Magistrate under Sections 200 and 202 of the Code but also sets out with clarity the principles required to be kept in mind at the stage of taking cognizance and reaching a prima facie view. At this

stage, the Magistrate had only to decide whether sufficient ground exists or not for further proceeding in the matter. It is well settled that notwithstanding the opinion of the police, a Magistrate is empowered to take cognizance if the material on record makes out a case for the said purpose. The investigation is the exclusive domain of the police. The taking of cognizance of the offence is an area exclusively within the domain of a Magistrate. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons. (Dy. Chief Controller of Imports & Exports v. Roshanlal Agarwal [(2003) 4 SCC 139 : 2003 SCC (Cri) 788] .)

11. The High Court has rightly concluded that the order passed by the Magistrate does not call for any interference in exercise of inherent powers under Section 482 of the Code.

12. Mr Jain urged an additional ground for quashing the order. Learned counsel contends that the appellant is facing the criminal proceedings for the last 19 years and, therefore, the proceedings deserve to be quashed on the ground of delay. Support is sought from S.G. Nain v. Union of India [1995 Supp (4) SCC 552 : 1995 SCC (Cri) 889] , Bihar SEB v. Nand Kishore Tamakhuwala [(1986) 2 SCC 414 : 1986 SCC (Cri) 179] and Ramanand Chaudhary v. State of Bihar [(2002) 1 SCC 153 : 2002 SCC (Cri) 114 (cited order)] . In these cases, the criminal proceedings were quashed having regard to peculiar facts involved therein including this Court also entertaining some doubts about the case being made against the accused. In none of these decisions any binding principle has been laid down that the criminal proceedings deserve to be quashed merely on account of delay without anything more and without going into the reasons for delay.

13. It is to be borne in mind that the appellant has been successively approaching the High Court every time when an order taking cognizance was passed by the Magistrate. It is because of the appellant that the criminal proceedings before the Magistrate did not cross the stage of taking cognizance. As earlier noticed, since earlier judgments of the High Court have attained finality, we are not going into correctness of these judgments. When third time the appellant was not successful before the High Court, he has approached this Court and at his instance the proceedings before the trial court were stayed. In fact, from 1986 till date the criminal case has not proceeded further because of the appellant. It would be an abuse of the process of the court if the appellant is now allowed to urge delay as a ground for quashing the criminal proceedings. In considering the question whether criminal proceedings deserve to be quashed on the ground of delay, the first question to be looked into is the reason for delay as also the seriousness of the offence. Regarding the reasons for delay, the appellant has to thank himself. He is responsible for delay.

> Regarding the seriousness of the offence, we may notice that the ill of untouchability was abolished under the Constitution and the Act under which the complaint in question has been filed was enacted nearly half a century ago. The plea that the complaint was filed as a result of vindictiveness of the complainant is not relevant at this stage. The appellant would have adequate opportunity to raise all pleas available to him in law before the trial court at an appropriate stage. No case has been made out to quash the criminal proceedings on the ground of delay.
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> 14. Having regard to the enormous delay, we direct the trial court to expedite the trial and dispose of the case within a period of six months. For the reasons aforestated, the appeal is dismissed."

6. Learned Counsel for the applicant has also placed reliance on the judgment of Hon'ble Apex Court passed in the case of Nupur Talwar v. CBI, (2012) 11 SCC 465 The relevant paragraphs of the same are reads as under:-

> "27. The facts noticed in the foregoing paragraph and the impressions drawn thereupon by the Magistrate, are based on statements recorded under Section 161 of the Code of Criminal Procedure (and in a few cases, under Section 164 of the Code of Criminal Procedure), as also, on documents and other materials collected during the course of investigation. Neither the aforesaid statements, nor the documents and materials taken into consideration, can at the present juncture be treated as reliable evidence which can be taken into consideration, for finally adjudicating upon the guilt or innocence of the accused. It is only when the witnesses appear in court, and make their statements on oath, and their statements have been tested by way of cross-examination; and only after the documents and other materials relied upon are proved in accordance with law, the same would constitute evidence which can be relied upon to determine the controversy. It is on the basis of such acceptable evidence, that final conclusions can be drawn to implicate the accused. That stage has not yet arisen.
>
> 28. At the present juncture, the Magistrate was required to examine the materials collected by the investigating agencies, and thereupon, to determine whether the proceedings should be dropped (as was suggested by the investigating agency, through its closure report dated 29-12-2010), or whether, a direction should be issued for further investigation (as was suggested in the protest petition filed by Dr Rajesh Talwar), or whether, there was sufficient ground for proceeding further, by issuing process (as has been done in the present case).
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> 29. Having examined the material on the record, the Magistrate having taken cognizance issued process on 9-2-2011, and while doing so, recorded the following observations in the penultimate paragraphs of the summoning order dated 9-2-2011:

"From the analysis of evidence of all the abovementioned witnesses prima facie it appears that after investigation, on the basis of evidence available in the case diary when this incident occurred at that time four members were present in the house--Dr Rajesh Talwar, Dr Nupur Talwar, Aarushi and servant Hemraj; Aarushi and Hemraj, two out of the four were found dead.

In the case diary there is no such evidence from which it may appear that some person had made forcible entry and there is no evidence regarding involvement of the servants. In the night of the incident, internet was switched on and off in the house in regard to which this evidence is available in the case diary that it was switched on or off by some person. Private parts of deceased Aarushi were cleaned and deceased Hemraj was dragged in injured condition from the flat of Dr Rajesh Talwar up to the terrace and the terrace was locked. Prior to 15-5-2008 terrace was not locked.

According to the documents available in the case diary, bloodstains were wiped off on the staircase, both the deceased were slit with the help of a surgical instrument by surgically trained persons and shape of injury on the head and forehead was V shaped and according to the evidence available in the case diary that appeared to have been caused with a golf stick. A person coming from outside, during the presence of Talwar couple in the house could have neither used the internet nor could have taken the dead body of deceased Hemraj to the terrace and then locked when the Talwar couple was present in the house.

On the basis of the evidence available in the case diary footprints stained with blood were found in the room of Aarushi but outside that room bloodstained footprints were not found. If the assailant would go out after committing murder then certainly his footprints would not be confined up to the room of Aarushi and for an outsider it is not possible that when Talwar couple were present in the house he would use liquor or would try to take the dead body on the terrace. The accused after committing the offence would like to run away immediately so that no one could catch him.

On the basis of the evidence of all the above witnesses and circumstantial evidence available in the case diary during investigation it was expected from the investigating officer to submit charge-sheet against Dr Rajesh Talwar and Dr Nupur Talwar. In such type of cases, when offence is committed inside a house, there direct evidence cannot be expected.

Here it is pertinent to mention that CBI is the highest investigating agency of the country in which the public of the country has full confidence. Whenever in a case if any one of the investigating agencies of the country remained unsuccessful then that case is referred to CBI for investigation. In such circumstances, it is expected of CBI that applying the highest standards, after investigation it should submit such a report before the Court which is just and reasonable on the basis of evidence collected in

investigation, but it was not done so by CBI which is highly disappointing.

If I draw a conclusion from the circumstances of case diary, then I find that in view of the facts, the conclusion of the investigating officer that on account of lack of evidence, case may be closed; does not appear to be just and proper. When offence was committed inside a house, on the basis of evidence received from case diary, a link is made from these circumstances, and these links are indicating prima facie the accused Dr Rajesh Talwar and Dr Nupur Talwar to be guilty. The evidence of witness Shoharat that Dr Rajesh Talwar asked him to paint the wooden portion of a wall between the rooms of Aarushi and Dr Rajesh Talwar, indicates towards the conclusion that he wants to tamper with the evidence. From the evidence ... so many in the case diary, prima facie evidence is found in this regard.

Therefore in the light of the above evidences, conclusion of the investigating officer given in the final report deserves to be rejected and there is sufficient basis for taking prima facie cognizance against Dr Rajesh Talwar and Dr Nupur Talwar for committing murder of deceased Aarushi and Hemraj and for tampering with the proof. At this stage, the principle of law laid down by the Hon'ble Supreme Court in Jagdish Ram v. State of Rajasthan [(2004) 4 SCC 432 : 2004 SCC (Cri) 1294] is very important wherein the Hon'ble Supreme Court held that investigation is the job of police and taking of cognizance is within the jurisdiction of the Magistrate. If on the record, this much of evidence is available that prima facie cognizance can be taken then the Magistrate should take cognizance. The Magistrate should be convinced that there is enough basis for further proceedings rather for (sic than being convinced that there is) sufficient basis for proving the guilt."

30. In order to canvass the primary ground raised for assailing the order of the Magistrate dated 9-2-2011, it was submitted that the Magistrate would have arrived at a conclusion different from the one drawn in the order dated 9-2-2011, if the matter had been examined in its correct perspective, by taking a holistic view of the statements and materials recorded during the investigation. It is sought to be canvassed that a perusal of the impugned order reveals that too much emphasis was placed on certain incorrect facts, and further, certain vital and relevant facts and materials were overlooked. In sum and substance it was submitted that if the factual infirmities were corrected and the facts overlooked were given due weightage, the conclusions drawn by the Magistrate in the order dated 9-2-2011 would be liable to be reversed.

31. To appreciate the instant contention advanced at the hands of the learned counsel for the petitioners, I am summarising hereunder, the factual aspects highlighted by the learned counsel for the petitioner during the course of hearing:

31.1. Firstly, it was submitted, that the inference drawn by the Magistrate to the effect, that there was no outsider other than Dr Rajesh Talwar, Dr Nupur Talwar, Aarushi Talwar and Hemraj in House No. L-32, Jalvayu Vihar, Sector 25, Noida, on the fateful day, is erroneous. It was submitted, that the said inference was drawn

under the belief, that there was no forceful entry into the premises in question. To canvass the point, the learned counsel drew the attention of this Court to the site plan of the flat under reference, which had been prepared by U.P. Police (during the course of investigation by U.P. Police), and compared the same with, the site plan prepared by CBI (after CBI took over the investigation). It was pointed out, that a reference to the correct site plan would reveal, that there could have been free access, to and from the residence of Talwars, through Hemraj's room.

31.2. Secondly, it was pointed out, after extensively relying upon the statement of Bharti, that the grill and mash door latched from the outside clearly evidenced, that after committing the crime the culprits had bolted the premises from outside. The absurdity in the inference drawn by the Magistrate, it was submitted, was obvious from the fact, that the actual perpetrator of the murders, while escaping from the scene of occurrence, had bolted the Talwars from outside. It was also pointed out, that the iron mashing/gauze on the door which was bolted from outside, would make it impossible for an insider, to bolt the door from outside.

31.3. Thirdly, according to the learned counsel, the impression recorded in the investigation carried out by CBI reveals, that the stairway leading to the terrace was from inside the flat (of the Talwars), was erroneous. This inference was sought to be shown to have been incorrectly recorded, as the stairs leading to the terrace were from outside the flat i.e. from the common area of the apartment complex beyond the outermost grill door leading into House No. L-32, Jalvayu Vihar, Sector 25, Noida. It was therefore submitted, that under no circumstances Dr Rajesh Talwar or Dr Nupur Talwar could be linked to the murder of Hemraj, since the body of Hemraj was found at a place, which had no internal connectivity from within the flat of the Talwars.

31.4. Fourthly, as noticed above, since the flat of the Talwars was bolted from the outside, neither Dr Rajesh Talwar nor Dr Nupur Talwar could have taken the body of Hemraj to the terrace, even if the inference drawn by CBI, that the murder of Hemraj was committed at a place different from the place from where his body was found, is to be accepted as correct. It is sought to be suggested, that the accused cannot, in any case, be associated with the murder of Hemraj. And since both the murders were presumably the handiwork of the same perpetrator(s), the accused could not be associated with the murder of Aarushi Talwar as well.

31.5. Fifthly, substantial material was placed before the Court to suggest that the purple-coloured pillow cover belonging to Krishna Thadarai was found smeared with the blood of Hemraj. In order to substantiate the instant contention reference was made to the seizure memo pertaining to Krishna Thadarai's pillow cover, and thereupon, the report of the CFSL dated 23-6-2008, as also, the report of the CFSL (Bio Division) dated 30-6-2008 depicting, that the blood found on the pillow cover was of human origin. It was the vehement contention of the learned counsel for the petitioner, that Krishna Thadarai could not have been given a clean chit when the

blood of Hemraj was found on his pillow cover. It is necessary to record that a similar submission made before the High Court was turned down by the High Court, on the basis of a letter dated 24-3-2011 (even though the same was not a part of the charge papers). It was submitted that the aforesaid letter could not have been taken into consideration while examining the veracity of the inferences drawn by the Magistrate. In order to support the instant contention, it was also vehemently submitted that during the course of investigation, neither U.P. Police nor CBI, found blood of Hemraj on the clothes of either Dr Rajesh Talwar or Dr Nupur Talwar. The presence of the blood of Hemraj on the pillow cover of Krishna Thadarai and the absence of the blood of Hemraj on the apparel of Dr Rajesh Talwar and Dr Nupur Talwar, according to the learned counsel for the petitioners, not only exculpates the accused identified in the Magistrate's order dated 9-2-2011, but also reveals, that the investigation made by U.P. Police/CBI besides being slipshod and sloppy, can also be stated to have been carried on without due application of mind.

31.6. Sixthly, in continuation of the preceding issue canvassed on behalf of the petitioners, it was submitted, that the finding recorded by CBI in its closure report, that DNA of none of the servants was found on any of the exhibits collected from the scene of crime, was wholly fallacious. The Magistrate having assumed the aforesaid factually incorrect position, exculpated all the servants of blame, in respect of the twin murders of Aarushi Talwar and Hemraj. It was submitted, that as a matter of fact, scientific tests shorn of human considerations, clearly indicate the involvement of Krishna Thadarai with the crime under reference. In this behalf the Court's attention was also drawn to the narcoanalysis, brain mapping and polygraph tests conducted on Krishna Thadarai.

31.7. Seventhly, the investigating agency, it was contended, was guilty of not taking the investigative process to its logical conclusion. In this behalf it was submitted, that fingerprints were found on a bottle of Ballantine Scotch Whiskey, found on the dining table, in the Talwar flat. The accused, according to the learned counsel, had requested the investigating agency to identify the fingerprints through touch DNA test. The accused had also offered to bear the expenses for the same. According to the learned counsel, the identification of the fingerprints on the bottle, would have revealed the identity of the perpetrator(s) to the murders of Aarushi Talwar and Hemraj. It is therefore sought to be canvassed, that the petitioner Dr Nupur Talwar and her husband Dr Rajesh Talwar, had unfairly been accused of the crime under reference, even though there was material available to determine the exact identity of the culprit(s) in the matter.

31.8. Eighthly, it was submitted, that footprints were found in the bedroom of Aarushi Talwar i.e. from the room where her dead body was recovered. These footprints according to the learned counsel, did not match the footwear impressions of shoes and slippers of Dr Rajesh Talwar and Dr Nupur Talwar. This according to the learned counsel for the petitioners also indicates, that neither Dr Rajesh Talwar

nor Dr Nupur Talwar were involved in the murder of their daughter Aarushi Talwar. The murderer, according to the learned counsel, was an outsider. And it was the responsibility of CBI to determine the identity of such person(s) whose footwear matched the footprints found in the room of the Aarushi Talwar. Lack of focused investigation in the instant matter, according to the learned counsel for the petitioners, had resulted in a gross error at the hands of the Magistrate, who has unfairly summoned Dr Rajesh Talwar and Dr Nupur Talwar as the accused, rather than the actual culprit(s).

31.9. Ninthly, the learned counsel for the petitioner also referred to the post-mortem report of Aarushi Talwar dated 16-5-2008, and in conjunction therewith the statement of Dr Sunil Kumar Dhore dated 18-7-2008, the report of the High Level Eight Member Expert Body dated 9-9-2008 (of which Dr Sunil Kumar Dhore was a member), and the further statements of Dr Sunil Kumar Dhore dated 3-10-2008, 30-9-2009 and 28-5-2010. Based thereon, the learned counsel submitted, that in the post-mortem report conducted by Dr Sunil Kumar Dhore, he had expressly recorded NAD (no abnormality detected) against the column at Serial No. 7, pertaining to the private parts of Aarushi Talwar. It was submitted, that the aforesaid position came to be substantially altered by the subsequent oral statements made by Dr Sunil Kumar Dhore. It was submitted that the different factual position narrated by Dr Sunil Kumar Dhore, subsequent to the submission of the post-mortem report, cannot be taken into consideration. Viewed from the instant perspective, it was also submitted, that the investigating agencies utterly failed in carrying out a disciplined and proper investigation. It was also asserted that Dr Sunil Kumar Dhore had been persuaded to turn hostile to the contents of his own document i.e. the post-mortem report dated 16-5-2008. Even though originally Dr Sunil Kumar Dhore found that there was no abnormality detected in the private parts of Aarushi Talwar, after the lapse of two years his supplementary statements depict a number of abnormalities. It was submitted that the Magistrate having referred to the last of such statements dated 25-5-2010, inferred therefrom, that the private parts of Aarushi Talwar had been cleaned after her murder. It was submitted, that the absurdity and improbability of the assumption could be established from the fact, that the white discharge found from the vagina of Aarushi Talwar, was sent for pathological examination, which showed that no spermatozoa was detected therein. The instant inference of the Magistrate, according to the learned counsel, had resulted in grave miscarriage of justice.

31.10. Tenthly, it was contended, that the dimension of the injury on the heads of Aarushi Talwar and Hemraj, was stated to match with the dimension of a 5 iron golf club. It was pointed out, that the 5 iron golf club recovered from the premises of the Talwars, did not have any traces of blood. It was submitted, that the said golf club as a possible weapon of offence, was introduced by the second team of CBI in September/October 2009. The Magistrate, according to the learned counsel, had erroneously recorded in the impugned order dated 9-2-2011, that experts had opined

that the injuries in question (on the heads of Aarushi Talwar and Hemraj) were possible with the golf club in question. It was sought to be highlighted, that no expert had given any such opinion during the entire investigative process, and as such, the finding recorded by the Magistrate was contrary to the record.

31.11. Eleventhly, it was asserted, that the Magistrate ignored to take into consideration, the fact that only the clothes of Dr Rajesh Talwar were found with the blood of Aarushi Talwar. But it was noticed, that there was no blood of Aarushi Talwar on the clothes of Dr Nupur Talwar. This fact is also erroneous because the blood of Aarushi Talwar was actually found on the clothes of Dr Nupur Talwar also. According to the learned counsel, the discovery of blood of Aarushi Talwar on the clothes of her parents was natural. What is important according to the learned counsel is the absence of blood of Hemraj on the clothes of the accused. It was submitted that the prosecution had never denied that the blood of Hemraj was not found on the clothes of either Dr Rajesh Talwar or Dr Nupur Talwar. This factual position, for the same reasons as have been indicated at para 31.5 above, establishes the innocence of the accused in the matter.

32. Just as in the case of the reasons depicted in the order of the Magistrate (based on the statements recorded during the course of investigation and the documents and other materials placed before her), the factual submissions advanced at the hands of the learned counsel for the petitioners (noticed in the foregoing paragraph), cannot be placed on the pedestal of reliable evidence. It is only when statements are recorded in defence, which are tested by way of cross-examination, and only after the documents and material relied upon (in defence), are proved in accordance with the law, the same would constitute evidence, which can constitute a basis for determining the factual position in the controversy. It is only on the basis of such acceptable evidence that final conclusions can be drawn. That stage has not arisen.

33. Even though the demeanour of the learned counsel representing the petitioners was emphatic that no other inference beside the one suggested by them was possible, I am of the view that the stage is not yet right for such emphatic conclusions. Just as the learned counsel for the petitioner had endeavoured to find fault with the factual inferences depicted in the order dated 9-2-2011 (which constituted the basis of issuing process), the learned counsel for CBI submitted that the factual foundation raised by the petitioner (details whereof have been summarised above) were based on surmises and conjectures. Even though I have recorded a summary of the factual basis on which the learned counsel for the petitioner have based their contentions, I am intentionally not recording the reasons whereby their veracity was assailed. That then would have required me to further determine which of the alternative positions were correct. I am of the view that such an assessment at the present stage would be wholly inappropriate.

34. My dealing with the factual contours of the present controversy, at a juncture well before evidence has been recorded by the trial court, would have adverse consequences against one or the other party. Even though, while dealing with issues as in the instant case, the High Courts and this Court have repeatedly observed in their orders, that the trial court would determine the controversy uninfluenced by observations made. Yet, inferences and conclusions drawn by superior courts, on matters which are pending adjudication before trial courts (or other subordinate courts) cannot be easily brushed aside. I shall, therefore, endeavour not to prematurely record any inferences which could/would prejudice one or the other side.

35. Having recorded the aforesaid observations in respect of the submissions advanced at the hands of the learned counsel for the petitioner, I shall now proceed to determine the validity of the order passed by the Magistrate on 9-2-2011, as also, the legitimacy of the defences raised by the learned counsel for the petitioner. Although it would seem that there would be a common answer to the propositions canvassed, I am of the view after having heard the learned counsel for the rival parties, that the issue canvassed ought to be compartmentalised under two heads. Firstly, I shall examine the validity of the order dated 9-2-2011, and thereafter, I will deal with the substance of the defences raised at the hands of the petitioner. That is how the matter is being dealt with in the following paragraphs.

36. The basis and parameters of issuing process, have been provided for in Section 204 of the Code of Criminal Procedure. Section 204 aforementioned is extracted hereunder:

"204.Issue of process.--(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be--

(a) a summons case, he shall issue his summons for the attendance of the accused, or

(b) a warrant case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not

paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of Section 87."

38. The same issue was examined by this Court in India Carat (P) Ltd. v. State of Karnataka [(1989) 2 SCC 132 : 1989 SCC (Cri) 306] wherein this Court held as under: (SCC pp. 139-40, paras 16-17) "16. 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. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

17. The fact that in this case the investigation had not originated from a complaint preferred to the Magistrate but had been made pursuant to a report given to the police would not alter the situation in any manner. Even if the appellant had preferred a complaint before the learned Magistrate and the Magistrate had ordered investigation under Section 156(3), the police would have had to submit a report under Section 173(2). It has been held in Tula Ram v. Kishore Singh [(1977) 4 SCC 459 : 1977 SCC (Cri) 621] that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with."

(emphasis supplied)

37. The criteria which need to be kept in mind by a Magistrate issuing process, have been repeatedly delineated by this Court. I shall therefore, first examine the declared position of law on the subject. Reference in this behalf may be made to the decision rendered by this Court in Chandra Deo Singh v. Prokash Chandra Bose [AIR 1963 SC 1430 : (1963) 2 Cri LJ 397] wherein it was observed as under: (AIR p. 1433, para 8) "8. Coming to the second ground, we have no hesitation in holding that the test propounded by the learned Single Judge of the High Court is wholly wrong. For determining the question whether any process is to be issued or not, what the Magistrate has to be satisfied is whether there is 'sufficient ground for proceeding' and not whether there is sufficient ground for

conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. A number of decisions were cited at the Bar in which the question of the scope of the enquiry under Section 202 has been considered. Amongst those decisions are: Parmanand Brahmachari v. Emperor [AIR 1930 Pat 30] , Radha Kishun Sao v. S.K. Misra [AIR 1949 Pat 36] , Ramkisto Sahu v. State of Bihar [AIR 1952 Pat 125] , Emperor v. J.A. Finan [AIR 1931 Bom 524] and Baidya Nath Singh v. Muspratt [ILR (1887) 14 Cal 141] . In all these cases, it has been held that the object of the provisions of Section 202 is to enable the Magistrate to form an opinion as to whether process should be issued or not and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath. The courts have also pointed out in these cases that what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant and not whether the evidence is sufficient to warrant a conviction. The learned Judges in some of these cases have been at pains to observe that an enquiry under Section 202 is not to be likened to a trial which can only take place after process is issued, and that there can be only one trial. No doubt, as stated in sub-section (1) of Section 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant."

(emphasis supplied)

38. The same issue was examined by this Court in India Carat (P) Ltd. v. State of Karnataka [(1989) 2 SCC 132 : 1989 SCC (Cri) 306] wherein this Court held as under: (SCC pp. 139-40, paras 16-17) "16. 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. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him."

7. At this stage, on being asked, the learned Counsel for the applicant fairly stated that primary causes of death from drowning are laryngospasm and pulmonary injury, which lead to hypoxemia and acidosis.

8. Sri S.P.Tiwari, learned A.G.A. opposed the present application and submitted that no illegality has been committed by the Magistrate and Revisional Court, while passing the order(s) dated 18.12.2020 and 26.11.2024 as the concerned court took note of the facts and evidence available on record including the statement of applicant and the postmortem report and therefore, no interference is required in this matter, by this Court.

9. Considered the aforesaid and perused the records.

10. This Court upon due consideration facts of the case, indicated above, and the material on record as also the observations made by Hon'ble Apex Court in the judgment referred above, as also in the judgment(s) passed in the case of Sunil Bhartiya Mittal Versus CBI; AIR 2015 SC 923 and The State of Gujarat Versus Afroz Mohd Hasanfatta; AIR 2019 SC 2499, is not inclined to interfere in the order(s) impugned dated 18.12.2020 and 26.11.2024 passed by the Magistrate and Revisional Court. It is for the following facts/reasons:-

(i) According to the statement of applicant, the deceased was called by him and both together consumed liquor and went to swimming pool i.e. the place of incident.

(ii) The deceased entered into swimming pool despite being opposed by one Bhaiya Lal Bajpai and on account of consuming liquor and entering into the swimming pool, the deceased expired.

(iii) The postmortem report indicates that the cause of death is 'Antimortem Head Injury' and if the case of the applicant is taken on its face value then it ought to have been a case of drowning and in the postmortem report Autopsy Surgeon has not indicated any fact from which it could be inferred that it is a case of drowning.

11. The instant application for the reasons aforesaid, is accordingly, dismissed. No order as to costs.

Order Date :-02.01.2025 Jyoti/-