

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 444 OF 2016

1. Bhagwan Laxman Borade,
Age:- 33 years, Occu:- Agril.
2. Ravindra Kakasaheb Jagtap,
Age:- 29 years, Occu:- Agril.
3. Sudhir Kakasaheb Jagtap,
Age:- 32 years, Occu:- Agril.
4. Hanumant Ramesh Jagtap,
Age:- 30 years, Occu:- Agril.

All R/o. Kuldharan, Tq. Karjat,
Dist. Ahmednagar.

...Petitioners

versus

1. The State of Maharashtra,
(Copy to be served on A.P.P. High
Court of Bombay Bench at Aurangabad).
2. Satish @ Satyawar Chandrakant Kale,
Age:- 40 years, Occu:- Labourer,
R/o. Kuldharan, Tq. Karjat,
Dist. Ahmednagar.

...Respondents

.....
Mr. N.V. Gaware, Advocate h/f Mr. A.H. Mahajan Advocate for Petitioners.
Mr. S.G. Karlekar, APP for Respondent No. 1 State.
Mr. S.A. Gaikwad, Advocate for Respondent No. 2
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 05.08.2016**

**Date of pronouncing
the Order: 16.08.2016**

PER COURT :-

1. By consent of learned counsel for the parties, heard finally.
2. This petition is filed against the order dated 12.02.2016 passed by the learned Sessions Judge, Ahmednagar below Exh.71 in Sessions Case No. 212 of 2012.
3. Brief facts giving rise to the present writ petition are as follows:-
 - a) Respondent No.2 herein had lodged a complaint in Karjat police station against the present petitioners for having committed murder of his brother Somnath. On the basis of said complaint, crime No. 25 of 2011 for the offences punishable under Sections 302, 324 r.w. 34 of I.P.C. came to be registered. However, during the course of investigation, it was revealed that present respondent No.2 had committed murder of his brother Somnath and not the present petitioners. Thus, after completion of investigation, concerned police have filed charge sheet against respondent No.2 herein before the Court. In due course, the case was committed to the Court of Sessions, as the offence, alleged to have been committed by present respondent No.2, was exclusively triable by the Court of Sessions. Consequently, respondent No.2 is being tried

in Sessions Case No. 212 of 2012 for the offences punishable under Sections 302 and 324 of I.P.C. After completion of prosecution evidence, when the matter was posted for recording statement of respondent No.2 under Section 313 of Cr.P.C., respondent No.2 had filed an application Exh.56 under Section 319 of Cr.P.C. contending therein that, it appears from the evidence that the present petitioners not being the accused have committed an offence of murder and requested the court to proceed against the petitioners by issuing non bailable warrant. Learned Sessions Judge, Ahmednagar by its order dated 4.9.2015 below Exh.56 rejected the said application.

b) On completion of recording of evidence and statement of respondent No.2 under section 313 of Cr.P.C., respondent No.2 has examined himself and also examined two other witnesses. Thereafter, respondent No.2 again filed an application Exh.71 under Section 319 of Cr.P.C. contending therein that in the light of defence evidence, there is sufficient material against the present petitioners, who are actually involved in the commission of murder of Somnath and thus, they need to be added in the array of accused and put on trial for having committed an offence of murder punishable under section 302 of I.P.C. Learned Sessions Judge, Ahmednagar by impugned order dated 12.2.2016 below Exh.71 allowed the said application and directed to issue summons to the present petitioners

under Section 302, 324 r.w. 34 of I.P.C. Hence, this writ petition.

4. Learned counsel for the petitioners submits that application below Exh.71 is not maintainable at all, as present respondent No.2 original accused has also filed an application Exh.56 which has been rejected by the learned Sessions Judge, Ahmednagar on merits by order dated 4.9.2015 with observation that after closure of evidence by the prosecution and when case was adjourned for recoding statement of accused under Section 313 of Cr.P.C. application cannot be considered. Merely respondent No.2 original accused has examined two witnesses by way of defence, who happened to be his brother and wife, in addition to his own testimony, that cannot be said to be the change in the circumstances as observed by the learned Sessions Judge in the impugned order below Exh.71. Even though respondent No.2 has lodged F.I.R. making allegations against the petitioners, however, during the course of investigation, it was revealed that respondent No.2 had committed murder of his brother Somnath and accordingly charge sheet came to be submitted against him only. Accordingly, charge for the offence punishable under Section 302 of I.P.C. came to be framed against respondent No.2 original accused and trial was also commenced. The prosecution has examined in all 11 witnesses to substantiate the charges levelled against respondent No.2 accused. There is nothing

in the evidence of prosecution witnesses indicating involvement of the present petitioners in the alleged crime for which they could be tried for the offence punishable under section 302 of I.P.C. Learned counsel submits that merely on the basis of the defence evidence, respondent No.2 original accused, who is examined himself and two other witnesses, i.e. his wife and brother, filed an application at Exh.71 contending therein that there is evidence against the petitioners showing their participation in crime and therefore, they could be tried for having committed offence of murder, in the said Sessions Case. Learned counsel submits that defence evidence, as aforesaid, is nothing but to seek revenge against the petitioners. There does not exist evidence to proceed against the petitioners. Though the petitioners are named in the F.I.R., after due investigation charge sheet came to be filed against respondent No.2 alone. There are no compelling circumstances to exercise the powers under Section 319 of Cr.P.C. Learned counsel also submits that respondent No.2 original accused never challenged his prosecution on the ground that even though the petitioners have been named in the F.I.R. lodged by him, charge sheet has been submitted by the police against him falsely for extraneous consideration.

Learned counsel for the petitioners in order to substantiate his

contentions places reliance on the following judgments:-

- I) Michael Machado vs. Central Bureau of Investigation, 2000 (3) SCC 262,
- ii) Sohan Lal vs. State of Rajasthan, 1990 (4) SCC 580,
- iii) Hardeep Singh vs. State of Punjab and others, 2014 (3) SCC 92.

5. Learned counsel for respondent No.2 submits that there is material change in the circumstances to entertain application Exh.71 though application Exh.56 came to be rejected on earlier occasion by the learned Sessions Judge. Learned Sessions Judge while deciding application Exh.56 has observed that evidence of P.W.1 to P.W.8 is not against the petitioners named in the F.I.R. and mere reiteration of certain facts, as stated in the F.I.R. through cross examination of investigation officer, does not sufficient to persuade that it is new material or evidence unravel the complicity of present petitioners. Learned Judge has also observed that evidence of all prosecution witnesses i.e. P.W. 1 to P.W.10 nowhere convey any direct or circumstantial role against the petitioners so as to take cognizance against them. Learned Sessions Judge in the light of the said observations rejected application Exh.56. However, respondent No.2 accused has examined two witnesses by way of defence In

addition to his own testimony. The position is therefore, changed. Learned counsel submits that the position which was existing at the time for deciding application Exh.56 was different than while deciding application Exh.71. The brother and wife of respondent No.2 accused though have been cited as prosecution witnesses in the charge sheet, they were not examined by the prosecution and as such, respondent No.2 constrained to examine them in order to bring on record the participation and involvement of the present petitioners in the commission of murder of deceased Somnath. Besides, defence evidence, there is material on record which corroborates defence evidence and thus unerringly points out participation of present petitioners in the commission of serious crime, like murder. Learned counsel submits that the details given in the F.I.R. are sufficiently indicating participation and involvement of present petitioners in the crime. However, the Investigating Officer has not bothered to arrest the petitioners and to conduct investigation in the light of allegations made in the F.I.R. lodged by respondent No.2. The Investigating Officer did nothing and after a gap of 16 months, arrested respondent No.2 for having committed murder of his brother Somnath. Learned counsel submits that the evidence of respondent No.2, who was eye witness to the incident is material evidence and his evidence cannot be discarded merely on the basis that charge sheet has been filed against him and he is named as accused in the

case. There is prima facie evidence on record showing involvement of the petitioners in the crime. Learned counsel submits that learned Sessions Judge has therefore, rightly allowed application Exh.71. No interference is required. There is no substance in the writ petition and the writ petition is thus, liable to be dismissed.

Learned counsel for respondent No.2 in order to substantiate his contentions places reliance on the following judgments:-

- i) Judgment of the Supreme court in the case of Suman vs. State of Rajasthan and Anr, (Criminal appeal No. 2120 of 2009 (arising out of S.L.P. (Cri.) No. 2972 of 2009) decided on 13.11.2009,
 - ii) Judgment of the Supreme court in the case of Joginder Singh and Anr. vs. State of Punjab and Anr. (Criminal appeal No. 501 of 1977) decided on 16.11.1978,
6. I have also heard the learned A.P.P. for respondent No.1 State.
7. Section 319 of Cr.P.C. reads as under:-

“319. Power to proceed against other persons appearing to be guilty of offence:-

- 1) Where, in the course of any inquiry into, or trial of, an offence,

it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

4) Where the Court proceeds against any person under sub-section (1) then (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard (b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.”

Section 319 of Cr.P.C. applies to all courts including the Sessions Court. It empowers the Court to add any person not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried. Plain reading of sub-section (1) of Section 319 of Cr.P.C. makes it clear that the persons appearing to be guilty of offence can be proceeded against, if in the course of

any inquiry into or trial of, an offence, it appears from the evidence that such person has also committed offence and deserves to be tried with the other accused. There is nothing in the provisions of Section 319 of Cr.P.C. so as to infer that the person, who is named in the F.I.R. but against whom charge sheet is not filed by the police, cannot be proceeded against even though in the course of enquiry into or trial of any offence, the court finds such person has committed any offence for which he could be tried together with other accused.

8. It is well settled that entire effort as contemplated under Section 319 of Cr.P.C. is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial. This is an extraordinary power and should be used by the Court very sparingly and only if compelling reasons exist for taking cognizance. The power is discretionary and such discretion must be exercised judiciously having regard to the facts and circumstances of the case.

9. In the case of **Hardeep Singh vs. State of Punjab and others** (supra), the Supreme Court has decided the reference on the scope of extent of powers of the Court under criminal justice system to arraign any person as an accused during the course of enquiry or trial as contemplated under Section 319 of Cr.P.C. In the said reference question No. V is answered by the Bench as under:-

“Q. V. Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not chargesheeted or who have been discharged?

A. A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned, the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.”

10. In the case in hand, the application Exh.56 filed under the provisions of section 319 of Cr.P.C. came to be rejected by the Sessions Judge on the ground that evidence of prosecution witnesses nowhere conveys any direct or circumstantial role of present petitioners so as to take cognizance against them. The learned Sessions Judge has further observed that the FIR lodged by respondent No.2 was considered by the police and after investigation they concluded that respondent No.2 is the culprit and filed charge sheet against him by excluding four suspects (present petitioners). The said matter cannot be revived by re-agitating the old cause that FIR was lodged against them. Learned Sessions Judge has also observed that it does not appear from the record and evidence that

suspects have committed an offence so as to resort Section 319 of Cr.P.C. Thus order below Exh.56 came to be passed when the prosecution evidence was completed and the Sessions Case was posted for recording statement of respondent No.2 under Section 313 of Cr.P.C. Respondent No.2 accused has examined two witnesses by way of defence in addition to his own testimony. Learned Sessions Judge while deciding application Exh.71 has therefore, rightly observed that there has been material change in the circumstances and position is now changed. Learned Sessions Judge has therefore rightly observed while deciding application Exh.71 that in view of change in the circumstances and in view of the evidence adduced by the accused by way of defence, the application Exh.71 under the provisions of Section 319 of Cr.P.C. is maintainable and it needs to be decided on its own merits without influencing by the observations made earlier while deciding similar application Exh.56.

11. It appears from the record that respondent No.2 had lodged the FIR Exh.36 and on perusal of the same, it appears that he has disclosed the incident in detail which occurred on 25.1.2011. It is alleged in the said FIR that when he alongwith his brother Somnath was proceeding on M-80 Moped towards Kuldharan, near Dhaba of Pintu Sheth, the present petitioners came across and out of them,

petitioner No.1 Bhagwan Borade, who was armed with Sattur, gave a blow by means of Sattur on the head of deceased Somnath. It is further alleged in the complaint that said petitioner No.1 Bhagwan Borade gave second blow of said weapon on the person of respondent No.2, which landed on his right hand. Respondent No.2 has disclosed in the said FIR as to how he himself and his brother deceased Somnath were beaten by petitioners. It further appears from the allegations made in the FIR that deceased Somnath was lying by the side of road after that incident and his moped was also lying there. It further appears from the contents of FIR that respondent No.2 became unconscious because of the said attack and he regained consciousness when he was brought to the house of his mother-in-law and he has disclosed entire incident to his family members. It is also a part of record that the investigating Officer has not effected any arrest nor conducted any investigation in the light of F.I.R. lodged by respondent No.2 and after a gap of 16 months, arrested respondent No.2 for having committed murder of his brother Somnath. It is to be mentioned here that neither the investigating officer has sent any summary against the petitioners who are named in the FIR nor has submitted any report before the Court under the provisions of Section 169 of Cr.P.C.

12. In this backdrop respondent No.2 has examined himself on

oath and also examined two more defence witnesses in support of his case. On careful perusal of evidence of respondent No.2 alongwith two defence witnesses examined by him, it appears that respondent No.2 though reiterated the allegations made in the FIR, deposed about the role played by each of the petitioners in the crime.

13. I have carefully gone through the testimony of respondent No.2 and his defence witnesses by keeping in mind that whether respondent No.2 has given such defence evidence to seek revenge against the petitioners or for any other extraneous consideration. In order to ascertain the same, though prima facie, I have carefully gone through the evidence led before the Sessions Court by the prosecution, it is necessary to repeat here that respondent No.2 has deposed before the Court that his brother deceased Somnath was assaulted by the petitioners and petitioner No.1 Bhagwan gave a blow of Sattur on the head of deceased Somnath. He has deposed that petitioner No.1 Bhagwan also gave a blow of Sattur on his person, however, it was missed and landed on his right hand. He has also deposed that all the petitioners beaten him and his brother Somnath. The prosecution has examined P.W.8 Dr. Dayanand Pawar, who had examined deceased Somnath when brought to Sub District Hospital, Karjat. He had noted following three injuries on the

person of deceased Somnath.

- i) Incised wound on left partieto-temporo region vertical behind left ear, size 10 x 2 x 2 cm.
- ii) Abrasion above left eye, size 4 x 2 cm.
- lii) CLW on left ear lobe, size 3 x 1 cm.

According to him, all these injuries were on head and face of injured and the head injury was incised wound on left partito-temporal region. He had sutured the injury, which was on left ear lobe. He had further made it clear that the incised wound is possible by sharp cutting weapon like knife, sword etc. and ruled out possibility of sustaining the said injuries by accidental fall.

14. The prosecution has examined P.W.7 Dr. Smt. Nirmala Palekar, who has conducted post mortem examination on the dead body of Somnath. She had noted surface wounds on the dead body and on internal examination, found following injuries:-

- I) Head – Injuries under the scalp – sub-scalp hematoma 5 x3 cm on left temporo-occipital region.
- II) Skull-Incised wound on left temporal-parietal region 15 x 2x bone deep with fracture temporo parietal bone

underline 12 x 1 cm. With laceration of brain on temporo-parietal region.

All injuries were ante-mortem nature. According to her, the cause of death was "shock due to traumatic cranio cerebral injury". She has further made it clear that incise wound on temporal-parietal region has bone deep and it has cut the brain. The said injury was possible by forceful stroke by sharp and hard object. All injuries are sufficient to in ordinary course of nature to cause death.

P.W. 7 Dr. Nirmala Palekar has also examined respondent No.2 in Karjat Sub District Hospital on the same day. On examination she had noted the following injuries on the person of respondent No.2:-

- I) Abrasion on lower 1/3rd of right leg. 3 cm x 1 cm. Caused by hard and blunt object, within 24 hours, it was simple injury.
- II) Diffuse contusion over right knee, 3 cm x 5 cm caused by hard and blunt object within 24 Hrs it was grievous.
- III) Incise wound on right forearm (antero-lateral upper 1/3rd) size 2 x 1 cm, caused by hard and sharp object, within 24 Hrs and it was simple.
- IV) Abrasion on left knee size 2 x 1 hard and blunt object,

within 24 Hrs, it was simple.

- V) Contusion on forehead (right side oven) size 2 x 2 cm, caused by hard and blunt object within 24 Hrs, it was simple.

15. It appears from the description of injury No.3 that respondent No.2 had sustained injury incise wound on the right forearm and as per the opinion given by the Medical Officer the same was caused by hard and sharp object.

16. It is to be noted here that the prosecution evidence is silent about the injuries sustained by respondent No.2. On the other hand, the prosecution has examined witness No.2 Sujit Dalimbkar. Though he has not supported the prosecution story, he has deposed that he saw respondent No.2 accused and his brother deceased Somnath standing by the side of road and talking with each other. The portion marked A of his statement duly proved through the Investigating Officer marked at Exh. 45. As per portion mark "A" Exh.45, he has only stated that respondent No.2 was in standing position while deceased Somnath was lying and he was saying to respondent No.2 not to beat. No other portion marked from the statement of this witness shown to him nor the prosecution alleged that respondent No.2 had used the sharp weapon in assaulting his deceased brother

Somnath. As per the record placed before this court, no weapon is recovered at the instance of respondent No.2.

17. The prosecution has examined P.W.2 Investigating Officer Vikas Kohak, who has deposed about drawing of scene of offence panchnama and seizure of clothes of respondent No.2 and collection of his blood sample. He had also obtained blood sample of respondent No.2 by issuing letter to the Medical Officer. On the basis of this part of investigation, he has deposed that it was revealed through investigation that respondent No.2 Satish is a culprit. He has admitted in cross examination that respondent No.2 Satish belongs to Pardhi community and the persons named by him in the F.I.R. (present petitioners) belong to higher caste. He has further admitted in his cross examination that wife of respondent No.2 had filed a private complaint in the court of J.M.F.C. Karjat alleging that the present petitioners had outraged her modesty. He has further admitted in his cross examination that respondent No.2 Satish was having other injuries on his person.

18. The prosecution has examined P.W.11 second Investigating Officer, Dnyaneshwar Rohkale. He has stated in his cross examination that first Investigating Officer has recorded statements of certain witnesses and it was transpired from the statements of

those witnesses that their statements were not relating to real culprit. He has further stated in his cross examination that there is no direct writing by the first Investigating Officer about the fact that respondent No.2 Satish gave false complaint. According to him, the same is transpired from investigation papers. He has further admitted that no crime is registered under Section 188 of I.P.C. against respondent No.2 Satish for lodging false complaint. The second Investigating Officer was specifically asked as to on what basis he is saying that respondent No.2 Satish had committed offence under Section 302 of I.P.C. the said question was disallowed by the court.

19. I do not want to make any further observation because the trial is yet to be concluded. In view of above evidence coupled with the defence evidence, including the testimony of respondent No.2 Satish original informant and eye witness to the incident, in my considered opinion, there exist compelling circumstances to exercise the powers as provided under Section 319 of Cr.P.C. It is not the case that respondent No.2 original accused, in order to seek revenge, made allegations while examining himself as defence witness and also examined two more defence witnesses in support of his contention, but from the evidence as discussed above, it *prima facie*, appears that there is case against the petitioners to invoke the powers under Section 319 of Cr.P.C. In view of this, I do not find any error in the

impugned order passed by the learned Sessions Judge below Exh.71. There is no substance in the writ petition. The writ petition is liable to be dismissed. Hence, the following order:-

O R D E R

- I. Writ petition is hereby dismissed.

Needless to say that the observations made in the order are restricted and to the extent of invoking powers as provided under Section 319 of Cr.P.C. and learned Sessions Judge shall dispose of the Session Case No. 212 of 2012 on its own merits, in accordance with law, uninfluenced by the observations made herein above.

(V. K. JADHAV, J.)

rlj/