

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 344 OF 2007

1. Vishnupanth S/o Appasaheb Bedre,
Age. 50 years, Occ. Government Service,
working as Police Inspector, Police
Welfare at Head Quarter, Parbhani,
Taluka & District: Parbhani,
R/o. Saraswati Nagar, Parbhani,
Taluka & District: Parbhani.
2. Dhannusingh S/o Shrichand Dangre,
Age. 40 years, Occ. Government Service,
working as Police Constable, at present
with Madvi Police Station, Taluka: Kinwat,
District: Nanded.
3. Balaji S/o Laxman Mahagaonkar,
Age. 30 years, Occ. Government Service,
working as Police Constable (Bakkal No. 1111)
with Mudkhed Police Station,
Taluka: Mudkhed, District: Nanded.
4. Vinod S/o Punjaji Padilwar,
Age. 25 years, Occ. Private Service,
i.e. Driver on private vehicle,
R/o. Village Malwada, Taluka: Mahur,
District: Nanded. **...PETITIONERS**

VERSUS

1. The State of Maharashtra,
Through Police Inspector,
Police Station, Mahur,
Taluka: Mahur, District: Nanded.
2. Sumanbai W/o Mohanlal Jaiswal,
Age. 60 years, Occ. Household,
R/o. Village Digdi, Taluka: Mahur,
District: Nanded. **...RESPONDENTS**

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Advocate for Petitioners : Mr Rajendra Deshmukh
APP for Respondents: Mr S P Tiwari
Advocate for Respondent 2 : Mr P P Mandlik h/f Amol S
Gandhi.

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CORAM : V.K. JADHAV, J.
Dated: November 28, 2016

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ORAL JUDGMENT :-

1. Being aggrieved by the order passed below Exh.1 in RCC No.105/2003 passed by Judicial Magistrate First Class, Kinvat dated 17.4.2003 thereby issuing process against the present applicant-accused for the offence punishable under section 451, 395, 504 read with 34 of I.P.C. and the judgment and order passed by the Sessions Judge, Nanded 23.5.2007 in Criminal Revision No.101/2003 confirming thereby the order passed by the learned Magistrate and dismissed the revision petition, the petitioner-applicants original accused preferred this writ petition.

2. Brief facts, giving rise to the present

The respondent no.2-complainant has filed the complaint before J.M.F.C Kinvat alleging therein that, on 15.3.2003 at about 12.30 p.m. accused nos. 1 to 5

came to her house in a private jeep bearing registration No.MH-29/G-355. The applicant accused no.5 was driving the jeep and sitting in the jeep and the applicants accused 1 to 4 who are the police men attached to Police Station Mahur entered in the bed room of the daughter in law of respondent complainant. it has also alleged in the complaint that, the applicant-accused no.1 was under the influence of liquor and was unable to take care of himself. It has further alleged that in the complaint that, applicant-accused no.2 abused complainant in filthy language the applicant accused no.1 scattered the bed sheet and the mattress. It has also alleged the applicant accused no.1 took the cash amount of Rs.9,000/- and also took the cordless telephone kept on the table and put it in the pocket. The learned Magistrate had directed the respondent-complainant to produce all the witnesses. The complainant has examined herself and also examined two more witnesses. Respondent-complainant has also placed on record certified copy of FIR of crime no.12/2003. She has also produced on record certified copy of the plea recorded by the court in SCC

No.1030/2001. She has also produced on record certified copy of Exh.13 of the order sheet of SCC No.1030/2001. The learned J.M.F.C. Kinvat by its order dated 17.4.2003 after considering the aforesaid evidence and the documents placed on record issued process against the present applicants-accused for the offence u/s 451, 395, 504 r/w 34 of Indian Penal Code.

3. The applicant accused preferred criminal rev. No. 105/2003 before the Sessions Judge, Nanded and the learned Sessions Judge, Nanded by its impugned judgment and order dated 23.5.2007 dismissed the revision by confirming the order passed by the Magistrate. Hence this criminal writ petition.

4. The learned counsel for the petitioner-original accused submits that, on 15.3.2003 the applicants 1 to 4 went to village Digadi by private vehicle for effecting the raid. On that day, applicant no.1 had received a secret information about the gambling at village Digadi and accordingly, in a private vehicle left the police station for the said village Digadi, for effecting raid.

Learned counsel submits that, entry to that effect was taken in the station diary and, the extract of the station diary is placed on record which is marked as annexure 'A' page 19 of the writ petition. By referring the extract of the station diary, learned counsel for the petitioner has further pointed out that, on that day as per entry no.18 senior P.I. has left the police station at about 09.00 am in a official jeep for investigating crime No.20/2003.

5. Learned counsel submits that, since the official vehicle was not available and further raid was required to be effected in terms of the secret information received by the applicant-accused about the offence of gambling being committed at village Digadi there was no question of proceeding to village Digadi in a official vehicle. At the same time, just to keep secrecy and further for effecting raid, it is rather justified that if the applicants-accused being a police man went to village Digadi for effecting such raid in a private vehicle and in civil clothes. Learned counsel has further pointed out copy of the charge sheet placed on record which is marked as

annexure 'B'. Said charge sheet was filed before the J.M.F.C. on 31.3.2003 in respect of Crime no.12/2003 registered on 15.3.2003. Learned counsel submits that, same is not disputed as complainant has also placed on record copy of FIR of crime no.12/2003 alongwith complaint and same is marked at Exh.11. Learned counsel submits that, on perusal of the said charge sheet, it appears that, one Vinod Jaiswal was the accused in the said case, who happened to be the son of respondent-complainant. Furthermore, on the same day, another crime no.13/2003 came to be registered in respect of another raid effected in the same village wherein nephew of respondent no.2-complainant was shown as accused. Learned counsel has further submits that, respondent no.2 complainant has made specific allegations in the complaint that applicant no.1-original accused took out a cordless phone kept on the table of bedroom of the complainant's daughter in law, however, said cordless phone of Nokia Company is the muddemal property in Crime No.13/2003. Said cordless phone was seized in the aforesaid crime and it was produced before the Court alongwith charge-sheet.

Learned counsel submits that, in both the crimes nos. 12/2003 and 13/2003 respectively, some of the accused persons named therein came to be arrested on the spot itself alongwith cash amount and said cash amount was seized from their possession. Learned counsel submits that, it is thus clear that, applicant-accused were discharging their official duties on 15.3.2003 at about 12.30 p.m. and onwards and respondent-complainant has alleged in her complaint that the applicant-accused on the same date and time entered in the bed room of her daughter-in-law and took away the cash amount and said cordless phone. Learned counsel submits that, there is reasonable nexus between the act complained of and official duties performed by the applicants-accused no. 1 to 4. Learned counsel submits that the courts below have given unnecessary weightage to the fact that son of respondent no.2-complainant was present in the Kinwat Court and on that day his plea was recorded in one another criminal case by the Court. Admittedly, village Digdi is at a distance of 40 kms from Kinwat. It has alleged in the complaint which is subject matter of crime no.12/2003 that said accused Vinod

fled away from the spot. F.I.R. in the said crime was lodged at 12.30 p.m. onwards and before raid was conducted, if the said Vinod Fled away from the spot at the time when raid was commenced, then, it was easy for him to reach to Kinwat and appear in the criminal case. Learned counsel submits that, instead of appreciating this, the Magistrate has observed that the document of crime no.12/2003 is self created document of the defence or the accused showing that at the relevant time they visited the house of the complainant. Learned counsel submits that, the court can look into the documents produced by the accused even at the inception if the documents pointing out unassailable and unimpeachable circumstances on record. Learned counsel submits that the previous sanction is a pre-condition for taking cognizance of the offence and order of the Magistrate issuing process against the applicants-accused without there being any sanction is thus liable to be quashed and set aside.

6. Learned counsel for the petitioner, in order to substantiate his contentions places his reliance on

following cases :-

1. *Criminal appeal No. 722 of 2015, delivered on 27.04.2015 (D.T. Virupakshappa Vs. C. Subash).*
2. Pepsi Foods Limited & Anr. V/s. Special Judicial Magistrate reported in 1998 (1) Mh.L.J. 599.

7. Learned counsel for respondent-complainant submits that, the probable defence of the accused cannot be considered at the time of issuance of process. The learned Magistrate has considered the evidence of the complainant and her witnesses and further on perusal of the documents including F.I.R. of Crime No.12/2003 rightly issued the process against the applicants-accused. The learned counsel submits that, even the learned Additional Sessions Judge has also considered point of sanction raised in the revision. Learned counsel submits that, sanction as provided under section 197 of Cr.P.C. is required only if the act constituting an offence was done by the police officer in their official capacity.

8. In the instant case, admittedly, the applicant-accused went to village Digadi in private jeep at a

private place and subjected the complainant with certain atrocities. Learned counsel submits that grounds raised by the applicants-accused would be relevant during the trial and not for the purpose of passing order of issuance of process. Further, the applicant-accused have committed offence for which sanction is not required.

9. Learned counsel submits that both the courts below have rightly issued process against the applicants-accused for having committed an offence punishable under sections 451, 395, 504 r/w 34 of IPC. No interference is required. Criminal Writ Petition is devoid of any merits. The same is thus liable to be dismissed.

10. I have also heard the learned APP for the State.

11. In the case of **D.T. Virupakshappa Vs. C. Subash**, (supra) relied upon by learned counsel for the petitioners, the Supreme Court in para 6 of the said order has referred the case of **Omprakash and others**

vs. State of Jharkhand, through the Secretary, Department of Home, Ranchi 1 and another and quoted paragraphs 32 and 41 of the said judgment. Paras 32 and 41 read as under:-

“32. The trust test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (K. Satwant Singh). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (Ganesh Chandra Jew). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood. (Emphasis supplied)

41. The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable

and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea. ...”

12. In the said case, the question of sanction whether is necessary or not arise at the inception and there were unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of Cr.P.C. It has also observed in para 41 that it is not possible for the Court to hold that in such a case, the Court cannot look into any documents produced by the accused or the public servant concerned at the inception.

13. In the instant case, on perusal of the extract of the station diary, it is clear that on receiving secret

information, applicants 1 to 4 left the police station on 15.3.2003 in a private jeep to village Nigadi. It further appears from the entry at sr.No.18 that P.I. of the said police station, who is in-charge of the police station took official jeep with him at about 09.00 a.m. on the said date for investigating the crime No.20/2003 for the offence punishable under section 420 r/w 34 of I.P.C. It further appears from the perusal of charge sheet submitted in respect of crime No.12/2003 that, raid was effected on 15.3.2003 at about 12.30 p.m. and certain accused persons found at village Digadi gambling Milan Matka. Some of them came to be arrested on the spot itself alongwith relevant articles and cash and some accused persons fled way from the spot including son of respondent no.2-original complainant. It is also a matter of record that, on the same day, at village Dighadi another raid was effected and accordingly, crime No.13/2003 came to be registered under section 12-A of Prevention of Gambling Act. In both the crimes accused persons arrested on the spot alongwith cash amount and other articles required for the gambling purpose. Furthermore, the accused and properties

seized under the said crime were produced before the Court and after due investigation charge sheet was submitted on 31.3.2003.

14. Respondent No.2-complainant has filed complaint before the Court on 3.4.2003. On the backdrop of these facts, learned Magistrate, while issuing process in paragraph No.7 of the order has observed that, so far as Exh.11 F.I.R. in crime No.12/2003 is concerned, it is self created document of the defence/accused showing at the relevant time they visited the house of the complainant. It is quite difficult to digest these observations because in terms of the said raid effected by the applicants-accused at village Digdi two crimes bearing crime no.12/2003 and 13/2003 came to be registered and certain accused persons alongwith cash amount and other articles required for gambling purpose were arrested on the spot itself. Even, cordless phone which was seized in the said crime no.13/2003, respondent no.2-complainant has alleged in the complaint filed on 3.4.2003 that applicant no.1 took out said cordless phone which was kept on table placed in

the bed room of her daughter in law. It further appears from the orders passed by the courts below that, they have given unnecessary weightage to the plea of son of the complainant recorded by the Court at Kinwat on the same day. Respondent no.2-complainant has filed the complaint before the court 18 days after the incident. She has filed said complaint with the copies of F.I.R. of crime No.12/2003 and also copy of the plea recorded by the Court of her son Vinod on 15.3.2003. It appears that it was a plan move to file complaint against the applicants-accused before the Court. It is not clear from the said record as to at what time plea of son of the complainant was recorded by the court of Kinwat on that day. Learned Magistrate has apparently made haste in observing while issuing process against present applicants that, if the plea of the son of the complainant was recorded on the same day in the Kinwat Court, entire registration of the crime nos. 12/2003 and 13/2003 are the self created documents by the accused showing that at the relevant time they had visited the house of the complainant.

15. In the given set of facts and circumstances of the case, I am of the opinion that, there is a reasonable nexus between the act complained of and discharging of the official duties by the applicants-accused for which sanction under section 197 of the Cr.P.C. is required. The applicants-accused brought on record unassailable and unimpeachable circumstances which establishes at the outset that the applicant-accused were acting in performance of their official duties. The Court can very well look into the documents. The respondent-complainant herself has produced certain documents before the Court.

16. In view of this, without obtaining sanction which is a precondition for taking cognizance the learned Magistrate has issued process against the applicants-accused. The learned Sessions Judge though considered the said grounds failed to appreciate the aforesaid documents placed on record and discarded the said documents on the ground that probable defence of the applicant-accused cannot be considered. There is no requirement that the applicant-accused should wait till

the charges are framed to raise this plea. Furthermore, if the respondent-complainant approaches the court without certain witnesses making wild allegations, and further insisting the court to ignore all the documents such as registration of the crime, charge sheet filed before the Court in the said crime, then observations made by the Supreme Court in case of Pepsi Food (supra) relied upon by learned counsel for petitioners helps the accused. In **Pepsi Foods Ltd. Vs. Special Judicial Magistrate reported (1998) 5 SCC 749**, in paragraph no.28 of the judgment, the Supreme Court has made the following observations:-

“28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that

the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.”

17. In view of the above discussion, the order of issuance of process passed by the Judicial Magistrate First class, Kinwat dated 17.4.2003 in S.C.C. No.105/2003 does not stand. The learned Sessions Judge has not applied his mind and erroneously confirmed the order passed by the Magistrate.

18. In view of the above discussion and ratio laid down by the Supreme Court in the cases cited above, I proceed to pass the following order.

Order

- I. Criminal Writ Petition is hereby allowed in terms of Prayer Clause '**B**'.
- II. Rule is made absolute in above terms.

III. Criminal Writ Petition accordingly
disposed off.

(V.K. JADHAV, J.)

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