

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

CRIMINAL APPLICATION NO. 3988 OF 2007

Mahadeo s/o Namdeo Pathare,
age 55 yrs, Occ. Service,
R/o Kotwali Police Station,
Ahmednagar.

Applicant/
orig accused no.3

VERSUS

1. Gorakshanath s/o Tukaram Badal,
age 26 yrs, Occ. Reporter,
R/o Khatgaon (Takli), Tq. & Dist.
Ahmednagar.
2. Prakash s/o Dadasaheb Nimbhore,
age 28 yrs, Occ. Business,
R/o Ghotwi, Tq. Shrigonda,
Dist. Ahmednagar.
3. Rajesh s/o Ramakant Dhawan,
age 35 yrs, Occ. Reporter,
R/o Old Civil Hospital Colony,
Ahmednagar.
4. Police Station Officer,
Kotwali Police Station,
Ahmednagar.

..Respondents..
(R no.1 is complainant.
& 2,3 are accused 1,2)

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Advocate for Applicant : Mr S L Bhapkar
APP for Respondent State : Mr. S W Munde
Advocate for Respondents : Mr N B Narwade for R No.1,
Mr P B Shirsath For R-2

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CORAM : V.K. JADHAV, J.
Dated: December 19, 2016
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ORAL JUDGMENT :-

1. Being aggrieved by the order of issuance of process dated 27.8.2007 passed by the 8th Judicial Magistrate First Class, Ahmednagar, in R.T.C. No. 359/2007, the original accused no.3 has approached to this Court by filing present criminal application.

2. Brief facts, giving rise to the present criminal application are as follows :-

On 28.2.2006 respondent no.1 had submitted an application to Kotwali Police Station, Ahmednagar alleging therein that, present respondent no.2 had taken his motor cycle Hero Honda bearing registration no.MH-17/B-1070 for his personal use on return basis and thereafter he had not returned the motor cycle to him. On the basis of said application, the in-charge of the police Station has directed the applicant-original accused no.3 to carry out investigation into the allegations made in the said application. Thus, the applicant/original accused no.3 has recorded the statements of respondents no. 1 to 3 and submitted his report in the police station. Respondent no.1 has,

however, approached to the C.J.M. Ahmednagar by filing a private complaint vide RTC No.359/2007 alleging therein that though his statement was recorded by the present applicant, while carrying out investigation into the allegations made by him in his application, subsequently, behind his back tampered with the said statements and inserted one sentence in his statement in order to help other accused persons to the effect that “respondent no.1 had no complaint against anybody.”

3. The learned 8th J.M.F.C., by impugned order dated 27.8.2007 on perusal of the complaint and after recording verification statement and documents filed on record and after hearing counsel for the respondent no.1 complainant, found prima facie case is made out and accordingly issued process against the present applicant-accused no.3 for the offence punishable under sections 203, 217, 218, 464 read with section 34 of I.P.C. and also issued process against the original accused nos. 1 and 2 under different sections. Hence, this criminal application.

4. The learned counsel for the applicant submits that, the applicant was serving as Assistant Police Sub Inspector in Kotwali Police Station at the relevant time and inquiry into the allegations made in the complaint dated 28.2.2006 filed by respondent no.1 in the police station was assigned to him by the P.S.I. of Kotwali Police Station. Thus, during the course of the said inquiry, the applicant-original accused no.3 has recorded statement of respondents no.1 to 3. The applicant has recorded statement of respondent no.3 Rajesh Dhawan on 19.8.2006 and thereafter recorded statement of respondents no.1 and 2 on 20.8.2006. Learned counsel submits that, on 20.8.2006 itself, the applicant has submitted his report in the police station in respect of the said inquiry assigned to him. It has submitted in the said report that since, the original complainant has no complaint, his complaint may be filed. On perusal of the said report, PSI of P.S. Kotwali, Ahmednagar has filed said report and made endorsement to that effect on the report itself under his signature and date i.e. 20.8.2006. Learned counsel submits that, there is a reasonable nexus between the

act complained of and official duties performed by the applicant. The learned counsel for the applicant submits that, even on perusal of the statement of respondent no.1-original complainant, no where it transpires that, addition has been made in the original statement in the manner as alleged in the complaint. On the other hand, above the signatures of respondent no.1 on his statement, it has stated that the contents of his statement were read over to him and further he also read the contents of the same and the same are correct. Learned counsel submits that respondent no.3 original accused no.2 whose statement came to be recorded during the course of inquiry has produced said vehicle in the police station from the possession of one Shri Khaire and since the police station insisted for production of the documents showing his ownership in respect of the said vehicle, respondent no.1-original complainant filed after thought complaint with some ulterior motive. Learned counsel submits that, the learned Magistrate has issued the process mechanically without applying its mind. Previous sanction is precondition for taking cognizance of the offence and the

order of the Magistrate issuing process against the applicant is liable to be quashed and set aside.

5. Learned counsel for the applicant, in order to substantiate his contentions placed his reliance on following cases :-

1. **R. Balakrishna Pillai Vs. State of Kerala and another** reported in **AIR 1996 Supreme Court 901.**
2. Manoj Prabhakar Lohar Vs. Rahemat Bee Mohammad Hasan and another reported in **2016 (1) Bom.C.R. (Cri) 683.**
3. Cri WP 344/2007 Vishnupanth s/o Appasaheb Bedre and ors. Vs. The State of Maharashtra and another) dated 28.11.2016 of this Court.

6. Learned counsel for respondent no.1-original complainant submits that, respondent no.1 has filed his complaint in the police station on 28.2.2006 alleging therein that respondent no.2 herein had taken the said vehicle for his personal use and thereafter did not return it. It has also stated in the said complaint that it was revealed that some third person out of some financial transaction with said Prakash Nimbhore

forcibly taken possession of the said motor cycle. The applicant in making inquiry into the allegations of the said application, recorded statement of the respondents no. 1 to 3. Learned counsel submits that respondent no.1 has given his statement as per the allegations made in his application and, there was no reason for him to state at the end of his statement that he had no complaint. Learned counsel submits that, present applicant in collusion with the other accused persons had inserted that part in his statement and accordingly, closed that inquiry illegally. Learned counsel submits that, there is no nexus between the act complained of and the official duties to be performed by the applicant. Learned counsel submits that respondent no.1-original complainant approached to the Superintendent of Police Ahmednagar by filing the complaints in writing against the applicant, however, no cognizance was taken and therefore, the applicant approached to the Court by filing private complaint. Learned counsel submits that, the learned Magistrate has recorded the verification statement of respondent no.1-original complainant and on perusal of the contents of the complaint and the

documents submitted alongwith the complaint rightly issued the process against the applicant-original accused no.3 for the offence punishable under sections 203, 217, 218, 464 read with section 34 of IPC. No interference is required. There is no substance in the criminal application and criminal application is thus liable to be dismissed.

7. I have also heard the learned counsel for respondent no.2 and the learned APP for respondent no.4-State.

8. Undisputedly, the applicant who is serving as A.S.I was assigned with the inquiry into the allegations made in the complaint filed by the respondent no.1 on 28.2.2006. During the course of the inquiry, the applicant-original accused no.3 has recorded statement of the respondents 1 to 3 herein. It is a matter of record that, after recording of the statement of present respondent no.1-original complainant, the applicant has submitted his report on the same date i.e. 20.8.2006 in the police station alongwith those statements. The

Court can look into the said report to the extent of considering the point of sanction as provided under Section 197 of the Cr.P.C. raised in this application. On perusal of the report, it appears that, the applicant has brought the facts to the notice of the PSI of Kotwali Police Station, Ahmednagar in the light of the statement recorded during the course of inquiry and further concluded in the report that the complaint is thus liable to be filed. It appears that there is a reasonable nexus in the act complained and the official duties performed by the applicant.

9. It has alleged in the complaint filed before the Court by respondent no.1 that, after respondent no.1 put his signature on the said statement recorded during the course of inquiry, present applicant has changed said statement by inserting one sentence in collusion with the respondents no. 2 and 3 herein. On careful perusal of the copy of the statement of respondent no.1-original complainant dated 20.8.2006, there appears no tampering in the statement and even no insertion of sentence as alleged in the complaint. On the other

hand, the disputed sentence appears to have written in continuation with the other contents and thereafter the statement is concluded with the statements that the contents of statement read by the deponent and those are correct and accordingly respondent no.1-complainant put his signature below his statement. Furthermore, the applicant has not submitted his report to the P.S.I of Kotwali Police Station with remark to file the complaint only on the ground that respondent no.1 complainant has stated in his statement that he had now no complaints. It appears that the applicant has given reference to the statement of respondent nos.2 and 3 recorded during the course of the inquiry. The same is also not disputed by respondent no.1-complainant as there is reference in paragraph no.2 of the complaint about recording of the statement of respondents no.2 and 3 during the course of the inquiry and it has further accepted in the complaint that those persons were called in the police station for recording their statements.

10. On perusal of the statement of respondent no.3 Rajesh Dhawan it appears that, he has stated that respondent no.1-complainant has sold said vehicle to him, however, it was not transferred in his name on the record of the registration authority and since said vehicle was not in good condition he was repeatedly insisting respondent no.1-complainant to take back his vehicle and refund the purchase amount. He has further stated in his statement that respondent no.1-complainant told him to sell that vehicle to any person as he desire and thereafter respondent no.3 Rajesh Dhawan sold the said vehicle to some other person through agent. He has further stated in his statement that, no theft is committed in respect of the said vehicle and that he is ready to produce that vehicle in the police station within three days. Further, respondent no.2 against whom certain allegations have been made in the application submitted to the police station stated that, there was some another transaction between him and respondent no.1 and on account of the said transaction, respondent no.1-complainant has falsely involved him by filing an application against him in the police station

in respect of his vehicle.

11. During the course of the arguments, this court has made a query with the learned counsel appearing for the parties as to where at present that vehicle is lying and both the counsel on instructions submit that said vehicle is lying in the police station. I have made a specific query with the learned counsel appearing for respondent no.1-original complainant as to who has produced that vehicle before the police and thereupon learned counsel for respondent no.1-original complainant on specific instructions from the respondent no.1-original complainant who is present before the Court submitted that said vehicle was sold by respondent no.3 Rajesh Dhawan to one Khaire and thereafter said vehicle was produced before the police by respondent no.3 Rajesh Dhawan.

12. In the light of these statements, it appears that the applicant has correctly recorded statement of respondent no.3 Rajesh Dhawan and as assured by respondent No.3 Rajesh said vehicle was also produced

before the police. It further appears that, the vehicle is still lying in the police station since respondent no.1 complainant has failed to show the original papers showing his ownership of the said vehicle.

13. Respondent no.1-complainant sought time before this Court for producing the papers and accordingly alongwith additional affidavit submitted one 'N.O.C' issued by the Deputy Regional Transport Officer, Shrirampur in favour of the respondent no.1 complainant in respect of the said vehicle. It further appears from the registration particulars of the said vehicle that vehicle is owned by one Sanjay Karbhari. This NOC was given in the year 2001, however, till this date, vehicle is not transferred in the name of respondent no.1-complainant and therefore, no papers such as registration certificate etc., are produced before this Court. Obviously, those papers were also not produced before the police.

14. In the backdrop of this, I find much substance in the report submitted by the applicant after recording

statement of respondents 1 to 3. On careful perusal of the said report and in the backdrop of the above facts, it appears that there is nexus between the act complained and the official duties performed by the applicant.

15. In view of the above discussion, a necessary reference can be given to the observations made by the Supreme Court in the case of ***D.T. Virupakshappa Vs. C. Subash, reported in (2015) 12 SCC 231***. The Supreme Court in para 8 and para 5 of the said judgment, 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, respectively, of the said judgment, which read as under:-

“32. The true 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.”*

16. In the above cited 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.

17. In the instant case, though report submitted by the applicant in the police station can be considered as

his defence during the course of the trial, for the purpose of deciding question of sanction, the same can be looked into and it establishes that the applicant was acting in performance of his official duty.

18. In a case Manoj Lohar (supra) relied upon by the learned counsel for the applicant by relying upon the observations made by the Apex Court in the aforesaid case, learned Single Judge of this court has taken a similar view.

19. In view of the above, without obtaining sanction which is precondition for taking cognizance, the learned Magistrate has issued process against the applicant-accused. There is no requirement that the applicant accused should wait till the charges are framed to raise this plea. 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.”

20. Thus, order of issuance of process passed by the 8th Judicial Magistrate First Class, Ahmednagar, dated 27.8.2007 in R.T.C. No.359 of 2007 does not stand. Hence, following order.

O R D E R

- I. Criminal Application is hereby allowed in terms of prayer clause “C” and the complaint R.T.C. No.359/2007 as against this applicant stands dismissed.
- II. Rule is made absolute in above terms.
- III. Criminal Application accordingly disposed of.

sd/-

(V.K. JADHAV, J.)

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aaa/-