

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO.130 OF 2015**

- 1 Mr. Joao C. Pereira
S/o. Ligorio Pereira,
Indian National,
Major of age,
R/o. H.No.40, Axona,
Utorda, Salcete, Goa.
- 2 Mr. Jervasio Pereira
S/o. Ligorio Pereira,
Indian National,
Major of age,
R/o. H.No.40, Axona,
Utorda, Salcete Goa. Petitioners
V/s
- 1 State of Goa,
Through Police
attached to Colva Police
Station, Colva Salcete, Goa.
- 2 Shri Uttam Y. Raut Dessai,
major, Presently Police
Inspector, having office at
Crime Branch, Margao. ...deleted
- 3 Hemant G. Gaude,
major, Head Constable,
B.No.5836,
Colva Police Station. ...deleted
- 4 Diago Pereira,
major, R/o. H.No.10/4(1),
Firguem Bhat, Utorda, P.O.,
Majorda, Salcete Goa.
- 5 Shri Aleixo Arnolfo Pereira,
major, R/o. H.No.150,

Utorda, P.O. Majorda,
Salcete, Goa.deleted

6 Public Prosecutor
High Court of Bombay at
Goa, Panaji-Goa. ...deleted Respondents

Shri G. Teles, Advocate for the Petitioners.

Shri M. Amonkar, Additional Public Prosecutor for Respondent No.1.

Shri S. Vales, Advocate for Respondent No.4.

**CORAM : C.V. BHADANG &
NUTAN D. SARDESSAI, JJ.**

Reserved on : 5th MAY, 2016

Pronounced on : 10th JUNE, 2016

JUDDGMENT : (*Per C.V. BHADANG, J.*)

Rule. Rule made returnable forthwith. Learned Counsel appearing for the respondents waive service. Heard finally by consent of the parties.

2. By this petition, the petitioners, who are original accused nos.2 & 3, before the learned Magistrate are seeking quashing of the said charge sheet/proceedings.

3. On 20/05/2014, respondent no.4 lodged a complaint. According to the complainant the incident had occurred on 19/05/2014 at

around 20.30 hrs. It was reported that the complainant was knowing Mr. Sairaj Naik @ Sona (accused no.1) resident of Majorda, Salcete Goa. The said Sona was supposed to give a carpet to the complainant on 19/05/2014. At around 20.30 hrs., the complainant met Mr. Sona and asked him about the carpet, however, Sona refused to give the same. Subsequently, the complainant and Sona went on the motorcycle of the complainant bearing no.GA-02-0596 to Pacheco Wine Shop at Pacheco Wado, Majorda to see the owner of the said shop as he was present at the time of the deal between the complainant and Sona. It was stated that after reaching near the Pacheco Wine Shop, Sona started arguing with the complainant, suddenly became aggressive and hit the complainant with empty beer bottles, on his head. As a result of the same the complainant sustained injuries on the head. He fell down on the ground. He was shifted to Hospicio hospital, Margao and then to Goa Medical College, Bambolim where the aforesaid complaint was reduced into writing by Head Constable Hemant Gaude of Colva Police Station.

4. It appears that the respondent no. 4/complainant Diago Pereira obtained discharge against medical advice on 21/05/2014 and was recuperating at home. It was only on 11/06/2014 that the complainant Diago gave a supplementary statement to the police in which he alleged that alongwith the said Sona the present petitioners and one Xavier

Pereira alias Pako (accused no.4) had also assaulted him. The reason for not disclosing the name of the present petitioners and Xavier Pereira alias Pako earlier, was that the complainant had grievous head injuries with internal bleeding and was thus unable to recollect the entire incident and thus had failed to name the present petitioners and Xavier Pereira alias Pako in his complaint.

5. During the course of investigation, one Aleixo Arnolfo Pereira also produced “typewritten statement” with the Investigating Officer, on 13/06/2014 stating that he had witnessed the incident dated 19/05/2014 in the “full beam of the head lights of his car” and while sitting in his car. A perusal of the statement shows that while the said witness was proceeding in his car from Utorda to Majorda and when he had arrived close to Pacheco Wine store–Godinho Wado, Majorda he had witnessed a fight going on the road as a result of which he was unable to proceed further. He stated that in the full beam of the headlights he saw that one person was being assaulted by four persons whose name he gave as Joao Pereira, Jervasio Pereira (petitioners herein) and one Pako. He stated that he could not recognise the 4th assailant. After the person who was being assaulted fell down, the attackers went away and thereafter the said witness sitting in the car went near the person lying on the ground, lowered his window glass and saw that it was Diago Pereira from

Utorda, who was lying in a pool of blood. This witness neither reported the incident to the police nor his statement was recorded by the Investigating Officer, as such, much less, with any promptitude.

6. The only other witness is Brian Rodrigues, who is running the Pacheco Wine shop. The statement is recorded on 23/06/2014. Although the said witness has stated about the incident between the complainant Diago Pereira and Sairaj Naik alias Sona (accused no.1) he has not named the present petitioners.

7. On completion of the investigation a charge sheet has been filed against the petitioners and two others under Section 326 r/w Section 34 of the Indian Penal Code before the learned Judicial Magistrate First Class at Margao. The petitioners are seeking quashing of the same.

8. We have heard the learned Counsel for the petitioners as also the learned Additional Public Prosecutor for the respondent no.1 and the learned Counsel appearing for the fourth respondent. The respondents no.2,3,5 & 6 have been deleted from the array of respondents.

9. The learned Counsel for the petitioners places reliance on the decision of the Hon'ble Supreme Court in the case of ***State of Haryana & Ors. V/s. Ch. Bhajan Lal and others*** reported in ***AIR 1992 SC 604***. It is submitted that the prosecution case in so far as the present petitioners are concerned, would be “highly improbable”, and would fall under clause 5 of the guidelines laid down by the Hon'ble Apex Court in the decision in the case of ***Bhajan Lal*** (supra). The learned Counsel has pointed out to the information received on 29/06/2015 under the Right to Information Act by the petitioners in which on behalf of the Investigating Agency it has been stated that a “computer typed” statement was prepared and submitted by Aleixo Pereira to the Investigating Officer, Mr. Hemant Gawde. He thus submits that this is not a case in which the Investigating Officer has recorded the statement of the witnesses Aleixo Pereira. He also points out to the inordinate delay in giving the additional statement of the complainant and the statement of Mr. Aleixo Pereira. He pointed out that Brian Rodrigues does not name the petitioners. He submits that the petitioner no.2 Jervasio Pereira had lodged a complaint against the respondent no.4 Diago on the basis of which Diago and others are facing prosecution under Section 307, 341, 324 and 427 r/w Section 34 of the Indian Penal Code. He submits that the additional statement of the complainant as

also Aleixo Pereira are motivated with a view to wreak vengeance.

10. The learned Additional Public Prosecutor submits that at this stage there is material in the form of the supplementary statement of the complainant as also witness Aleixo Pereira which show the involvement of the petitioners.

11. The learned Counsel appearing for the fourth respondent has vehemently opposed the prayer. The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of *State of Maharashtra & Ors. V/s. Ishwar Piraji Kalpatri & Ors.* reported in *1995 STP (LE) 20811 SC, Mosiruddin Munshi V/s. MD. Siraj & Anr.* reported in *2014 STPL 8148 SC, M/s. Medchi Chemicals & Pharma Pvt. Ltd. V/s. M/s. Biological E. Ltd. & Ors.* reported in *2000 SAR (Criminal) 409*, in order to submit that the power under Section 482 of Criminal Procedure Code has to be sparingly exercised for exceptional reasons where the allegations made in the complaint and the material produced along with the charge sheet, “even if taken on their face value”, do not make out any offence as alleged. He submits that this Court may not examine or appreciate the material in order to find out whether the same is acceptable or one inspiring confidence which can only be done at the trial. He submits that no case for quashing of the

charge sheet is made out.

12. We have given our anxious consideration to the rival circumstances and the submissions made. The principles applicable to the exercise of jurisdiction under Article 226 of the Constitution of India and/or Section 482 of the Criminal Procedure Code for quashing of a complaint/FIR or criminal proceedings are no longer res integra. The Hon'ble Apex Court in the case of ***Bhajan Lal*** (supra) has laid down the following guidelines for exercise of such power which read thus:

1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
4. Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

(Emphasis supplied)

13. In the case of State of *Maharashtra and Ors. V/s. Inshwar Piraji Kalpatri & Ors.* reported in *1995 STPL (LE) 20811 SC*, it has been held in para 22 that question of malafides in a given case may not be relevant at all if the ingredients which establish the commission of the offence or the misconduct (as that case arose out of a prosecution under Section 5(2) r/w Section 5(1)(a) of the Prevention of Corruption Act, 1947) exist and in that case the prosecution cannot fail merely because there was animus of the complainant or the prosecution, against the

accused. It has been held that the power under Section 482 Criminal Procedure Code has to be used sparingly and only when extraordinary circumstances and exceptional case for the exercise of such power is made out.

14. In *R. Kalyani V/s. Janak C. Mehta & Ors.* reported in (2009) 1 SCC 516, again, similar principles have been reiterated. In the case of *M/s. Medchi Chemicals & Pharma Pvt. Ltd. V/s. M/s. Biological E. Ltd. & Ors.* reported in 2000 SAR (Criminal) 409, it has been held that in the matter of exercise of High Court's inherent powers the only requirement is to see whether continuance of the proceeding would be “a total abuse of the process of Court”. The Hon'ble Apex Court has considered its earlier decision in the case of *L.V. Jadhav V/s. Shankarrao Abasaheb Pawar* reported in AIR 1983 SC 1219 in which it has been held that such powers are meant to be exercised sparingly and with circumspection, when there is reason to believe that the process of law is being misused to harass a citizen.

15. It can thus be seen that the principles on the basis of which powers under Section 482 of Criminal Procedure Code can be exercised to quash a complaint/FIR or a prosecution are fairly well settled. The difficulty, however, arises in the application of these principles to the

facts and circumstances of an individual case. The human ingenuity and the myriad nature of circumstances in which an offence can be committed or alleged to have been committed, further compound the difficulty, in applying these principles in order to find out whether a case for quashing is made out. It is trite that the powers for quashing an FIR or criminal prosecution are by way of an exception and normally as a rule, the investigating agency would be allowed to act independently and law is allowed to take its own course.

16. The principles as set out by the Hon'ble Apex Court in the case of ***Bhajan Lal*** (supra) are illustrative in nature. The existence of one or more of the circumstances/ground will have to be considered in order to find out whether a case for quashing is made out or not. The weight which an individual circumstance or a combination thereof, would assume, would also depend upon facts and circumstances of each case. Thus, the Court has to carefully examine the contentions raised in the context of the prosecution case and then come to a conclusion whether or not a case for quashing is made out.

17. Coming back to the present case, it appears that the incident had allegedly occurred on 19/05/2014 at a public place, i.e. on the road in front of Pacheco Wine Shop at Pacheco Wado, Majorda. The

complainant was discharged from the hospital within less than three days and was said to be recuperating at home. He, however, did not lodge any supplementary statement/report except on 11/06/2014 implicating the present petitioners being the assailants along with Sairaj Naik alias Sona. The delay in making this supplementary statement and/or failure to name the present petitioners, earlier, is tried to be explained on the specious ground that the petitioner had sustained a head injury and an internal bleeding and due to this medical condition was unable to properly narrate the incident. In short, according to the fourth respondent he was “in a stressful health condition” and, as such, the correct fact of the incident were not reflected in the said statement. The only other material collected by the Investigating Officer, (in fact not collected, but produced by the witness of his own accord) is a computer typed statement, produced by Aleixo Pereira that too on 13/06/2014. A bare perusal of the said statement (if we can call it one, as strictly speaking it is not recorded as such under Section 161 of the Criminal Procedure Code by the Investigating Officer) shows that the said witness by chance whilst passing by the same road had witnessed the incident of assault sitting in his car and after the assailants had fled away had just taken the car near the victim/complainant, who was stated to be lying on the road in a pool of blood, lowered the window glass and found that it was

Diago Pereira and proceeded further without giving any assistance to the injured or lodging a complaint of the incident. Indisputably, Brian Rodrigues has not named the petitioners. The question in such circumstances is whether the prosecution and the charge sheet can be quashed, qua the present petitioners, on the ground that the prosecution case is so absurd and improbable as no prudent person acting on the said circumstances would ever reach a just conclusion, that there is just ground for proceeding against the accused. We are conscious of the fact that the jurisdiction to quash an FIR/complaint or prosecution can be exercised in exceptional circumstances and for compelling reasons and such power has to be exercised sparingly. We are also conscious of the fact that whilst doing so, this Court would not be justified in appreciating the evidence as such which can be done at the trial. However, would that mean that this Court cannot consider the material at all in any manner whatsoever and relegate the parties to the trial? In our considered view, the answer has to be in the negative. This is because if one of the circumstances in which the prosecution can be justifiably quashed, is that the Court finds the prosecution case to be inherently improbable and absurd, it necessarily presupposes that the Court can examine the material, albeit, for the limited purpose of finding out whether the improbable prosecution case is so absurd or on the basis of

which no prudent person can ever believe or come to a conclusion about the involvement of the petitioners in the incident. We do not think that even such an examination would stand excused. In our considered view, this is a case which will be covered by clause 5 of para 108 of the judgment in the case of ***Bhajan Lal*** (supra).

18. It is trite that enmity is a double edged weapon and may not always be an appropriate test whilst deciding the prayer for quashing of the complaint/FIR or prosecution. Similar is the case with the allegations about malafides. In a case where the Investigating Agency is successful in collecting independent material showing complicity and involvement of the accused in the offence, the considerations of malafides even if they are shown to exist, are bound to pale into insignificance. Hence, we do not propose to examine these two grounds in the present petition. In our considered view, this case would be clearly covered by clause 5 of para 108 of the judgment in the case of ***Bhajan Lal*** (supra).

19. In the result, the petition is allowed in terms of prayers A & B. Rule is made absolute in the aforesaid terms.

20. It is made clear that the learned Trial Court shall not be influenced by the observations herein, insofar as the prosecution case against the rest of the accused, is concerned.

NUTAN D. SARDESSAI. J.

C.V. BHADANG, J.

NH/-