

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.24429 of 2016

Arising Out of PS.Case No. -44 Year- 2007 Thana -ARA MUFFSIL District- BHOJPUR

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Rajan Mishra, Son of Parsa Nath Mishra, Resident of Village- Bela, P.S.
Ara (Mufassil), Dhobhan, O.P. District Bhojpur.

.... Petitioner/s

Versus

1. The State of Bihar
2. Dinesh Mishra Son of Ramprabesh Mishra
3. Urmila devi Wife of Dinesh Mishra
4. Chutar Mishra Son of Dinesh Mishra
5. Mutur Mishra Son of Dinesh Mishra
6. Gunga@Chotak Mishra Son of Dinesh Mishra
7. Amarnath Mishra, Son of Dinesh Mishra, Opposite Party No. 2 to 7 are
Resident of Village -Bela, PS Ara Muffasil Dhobhan, OP. District
Bhojpur.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Madan Jeet Kumar
For the Opposite Party/s : Mr. Binod Kumar(App)

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
ORAL ORDER

2 23-05-2017 Heard learned counsel for the petitioner and learned
APP for the State.

The present application has been filed for quashing of
the order dated 11.08.2015, passed by the learned Sessions Judge,
Bhojpur at Ara, in Sessions Trial No.88 of 2015, arising out of Ara
(Muffasil) Dhobhana O.P. P.S. Case No.44 of 2007, whereby, it



has been held that the case is not exclusively triable by the Court of Sessions and the record has been transmitted to the learned CJM, Ara for framing charge and disposal of the case in accordance with law.

For considering the issue whether the learned court below was justified in exercising jurisdiction under section 228(1)(a) of the Code of Criminal Procedure (hereinafter referred to as the 'Code'), it is necessary to deal with the prosecution case in brief. The prosecution case got initiated on the written report dated 05.03.2007 of Rajan Mishra (petitioner), addressed to the Officer-In-charge, Ara (Mufassil) Police station, which is to the effect that on the same day at about 8 PM, some persons raised alarm whereupon the informant came outside the house and saw the accused O.P. Nos. 2 to 7 fighting with the father of the informant. When the informant/petitioner tried to save his father and inquired about the reason for fight, then accused Dinesh Mishra (OP No. 2) pushed the informant, thereafter, his two sons namely Chutar Mishra (O.P. No. 4) and Amarnath Mishra (O.P. No. 7) dragged the informant. Thereafter, again the informant tried to save his father, whereupon O.P. No. 3, Urmila Devi and O.P. No. 5, Mutur Mishra and O.P. No. 6, Gunga alias Chhotak Mishra, instigated to assault the father of the informant and thereupon



assaulted the father of the informant as well as the informant. In the meantime, Chutar Mishra and Amarnath Mishra assaulted with khanti on the head of the informant, as a result of which the informant fell down and thereafter, Amarnath and Chutar assaulted him with lathi. The father of the informant continued raising alarm. The accused Dinesh happens to be the uncle of the informant petitioner.

On conclusion of investigation, vide Final Form No. 217 of 2007, chargesheet was submitted against the O.P. Nos. 2 to 7, under sections 341,323,504 and 307/34 of the IPC and consequently, the learned Magistrate took cognizance of the offence under sections 341,323,504 and 307/34 of the IPC and directed for issuance of process.

O.P. Nos. 2 to 7 filed an application on 10.6.2015, under section 228(1)(a) of the Code with a prayer that the case is not exclusively triable by the Court of Sessions as the only offence triable by the Court of Sessions is under section 307 of the Indian Penal Code, which is not made out in view of the injuries of the informant and his father which have been found to be simple and superficial in nature.

The impugned order reflects that the prosecution did not file any rejoinder to the petition filed by the O.P. Nos. 2 to 7,



seeking remedy under section 228(1)(a) of the Code and the learned Sessions Judge, Bhojpur at Ara, vide order dated 11.8.2015, passed in Trial No. 244 of 2015, came to the conclusion that the case is not exclusively triable by the Court of Sessions as the injuries have been found to be simple in nature, which does not suggest that the O.P. nos. 2 to 7 had any intention to kill, hence, no case under section 307 of the IPC is made out and the O.P. Nos. 2 to 7 are liable to be charged only for the offences under sections 341, 323 and 324 of the IPC and, accordingly, the case was transferred to the Court of the learned C.J.M., Bhojpur at Ara for framing of charge and disposal of the case in accordance with law. Being aggrieved by the said order, the present application has been filed by the petitioner being informant of the case.

Learned counsel for the petitioner submits that though injury has been found to be simple on the skull of the informant/petitioner, hence the case was not found to be triable by the Court of Sessions. But, for constituting an offence under section 307 of the IPC, there is no pre-condition of causing any injury. It is only the intention which matters. The informant and his father were brutally assaulted by O.P. Nos. 2 to 7, hence the case ought not to have been transferred to the Court of C.J.M.



rather it ought to have been tried by the learned Sessions Judge.

Learned APP, appearing on behalf of the State, submits that after perusing the material on record, the learned Sessions Judge has come to a finding that the case was not triable by the Court of Sessions, hence, the impugned order does not require any interference by this Court.

Having heard learned counsel for the parties, the nature of order this Court intends to pass, does not require issuance of notice to O.P. Nos. 2 to 7.

Chapter XVIII of the Code deals with the trial before the Court of Sessions. Section 226 of the Code stipulates the opening of the case of prosecution, when the accused appears or is brought before the court in pursuance to commitment of the case and the prosecutor shall describe the charge brought against the accused by stating the evidence on which he proposes to prove the case. Sections 227 and 228 deal with the discharge and framing of charge which read as follows:

“Section 227 - Discharge - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record



his reasons for so doing.

Section 228 - Framing of charge (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate³[or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under Clause (b) of Sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

From perusal of the aforementioned provisions, it



appears that at the stage of section 227, the Court has to consider the records of the case, documents submitted along with the police report under section 173(2) of the Code and after hearing the submissions of the prosecution and the accused, if the court considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record the reasons for doing so. If after such consideration, the court declines to discharge and is of the opinion that there is ground for presuming that the accused has committed an offence, which is not exclusively triable by the Court of Sessions, he may frame a charge against the accused and by order, transfer the case to the Court of C.J.M. for being transferred to any other Magistrate, whereupon, the Magistrate shall try the offence, but under section 228(1)(b) of the Code, if the Judge comes to the opinion that the case is exclusively triable by the Court of Sessions, he shall directly frame charge in writing.

It is not mandatory for the Sessions Court to try only those cases which are exclusively triable by the Court of Sessions. Section 26 of the Code stipulates the trial of any offence under the IPC to be tried by the Court of Sessions. Hence, the discretion lies with the Sessions Judge under section 228(1)(b) of the Code, either to try the case himself or to transfer it to the Court of a



Magistrate, as has been held by the Apex Court in the case of Sudhir and Ors. Vs. State of M.P. and analogous cases (2001) 2 Supreme Court Cases 688. Paragraph 15 reads as follows:

“In this context, we may point out that a Sessions Judge has the power to try any offence under the Indian Penal Code. It is not necessary for the Sessions Court that the offence should be one exclusively triable by a Court of Session. This power of the Sessions Court can be discerned from a reading of Section 26 of the Code. When it is realised that the Sessions Judge has the power to try any offence under the Indian Penal Code and when a case involving offence not exclusively triable by such court is committed to the Court of Session, the Sessions Judge has to exercise a discretion regarding the case which he has to continue for trial in his court and the case which he has to transfer to the Chief Judicial Magistrate. For this purpose we have to read and understand the scope of Section 228(1) in the light of the above legal position.....”

The word ‘may’ used in the first sentence and the word ‘shall’ in the second sentence of the said section has been interpreted by the Apex Court in the case of Sudhir (supra). Paragraph Nos. 16 and 17 read as follows:

“16. The employment of the word "may" at one



place and the word "shall" at another place in the same sub-section unmistakably indicates that when the offence is not triable exclusively by the Sessions Court it is not mandatory that he should order transfer of the case to the Chief Judicial Magistrate after framing a charge. In situations where it is advisable for him to try such offence in his court there is no legal obligation to transfer the case to the Chief Judicial Magistrate. One of the instances for not making the transfer is when a case and counter case have been committed to the Sessions Court and one of those cases involves an offence exclusively triable by the Sessions Court and the other does not involve any such offence. 17. In the present case, the Sessions Judge ought not have transferred the second case to the Chief Judicial Magistrate as he did, but he himself should have tried it in the manner indicated in Nathi Lal (supra). To facilitate such a procedure to be adopted we have to set aside the order passed by the Sessions Judge in the second case. We do so.”

For exercise of jurisdiction under section 228(1)(a) of the Code, the Judge after such consideration, as stipulated under section 227 of the Code, of the records of the case and the documents submitted therewith and hearing of the prosecution and



the defence, forms an opinion whether there is ground for presuming that the accused has not committed an offence exclusively triable by the Court of Sessions. The word 'presumption' has not been defined in the Code, however, the word 'presume' has been elaborated by the Apex Court in the case of State of Maharashtra Vs. Som Nath Thapa (1996) 4 Supreme Court Cases 659. Paragraph 31 reads as follows:

“Let us note the meaning of the word "presume". In Black's Law Dictionary it has been defined to mean "to believe or accept upon probable evidence". (Emphasis ours). In Shorter Oxford English Dictionary it has been mentioned that in law "presume" means "to take as proved until evidence to the contrary is forthcoming", Stroud's Legal Dictionary has quoted in this context a certain judgment according to which "A presumption is a probable consequence drawn from facts (either certain, or proved by direct testimony) as to the truth of a fact alleged." (Emphasis supplied). In Law Lexicon by P. Ramanath Aiyer the same quotation finds place at page 1007 of 1987 edition.”

In view of the above definition the Apex Court held that the word 'presume' means – if on the basis of materials on record, a court could come to a conclusion that commission of the



offence is a probable consequence, a case for framing of charge exists. Meaning thereby, in exercise of jurisdiction under section 228(1)(a) of the Code the court has only to see that a prima facie case exclusively triable by the Court of Sessions is made out or not, as has been held in the case of Soma Chakravarty Vs. State through CBI (2007) 5 Supreme Court Cases 403. Paragraph 10 reads as follows:

“It may be mentioned that the settled legal position, as mentioned in the above decisions, is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial.”

The Apex Court, in the case of Amit Kapoor Vs.



Ramesh Chander & Anr. (2012) 9 Supreme Court Cases 460 has laid down the parameters for exercise of power under section 482 of the Code for quashing the order passed under section 227 of the Code, refusing to discharge or for quashing the order passed under section 228 of the Code framing charge, where it has been held that power for quashing criminal proceeding, particularly, charge framed in terms of section 228 should be exercised very sparingly with circumspection and that too in rarest of the rare cases. Paragraph Nos. 27.1, 27.9, 27.10, 27.12, 27.13, and 27.14 read as follows:

“27.1 Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.

27.9 Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will



constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10 It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.12 In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

27.13 Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

27.14 Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.”



Hence, at the stage of sections 227 and 228, the court is required to weigh the material and documents on records only for the limited purpose to see whether a prima facie case is made out against the accused or not.

Now, advertent to the present case, it appears that the informant received four injuries – one over left side of forehead measuring 3"x1/4" which is found to be simple in nature caused by hard and blunt object. Apart from that, the informant received three abrasions and one swelling injury, all found to be superficial in nature. The depth of injury over the skull was found to be 1/4". Neither the injury of the father of the informant has been discussed by the learned Sessions judge nor the injury report has been brought on record by the petitioner, being informant of the case. Causing of injury is not the sine qua non for constituting an offence under section 307 of the IPC. It is only the intention which matters but in the present case, when six persons were alleged to have assaulted the informant and his father and the injury of the informant has been found to be superficial and simple in nature, which prima facie does not suggest any intention of the accused persons to kill the informant or his father. It appears from the impugned order that the learned Sessions Judge, after hearing counsels for the parties and examining the materials on record has



come to the conclusion that offence under section 307 of the IPC is not made out and since, only the offence under section 307 was exclusively triable by the Court of Sessions, hence transferred the case to the court of learned CJM for framing charge. It further appears that the prosecution or the informant failed to file any rejoinder to the application filed by the accused under section 228(1)(a) of the Code.

It appears from the record that the learned C.J.M., vide order dated 2.9.2015, framed charges under sections 341,323 and 324 of the IPC and the matter was adjourned for 6.10.2015 for production of the witnesses.

The said order has neither been challenged by the petitioner nor there is anything on record to suggest the present stage of the case. On this ground also, this court is not inclined to interfere in the matter.

However, the provision under section 209 of the Code provides the mechanism for commitment of the case by the Magistrate when the offence is triable exclusively by the court of Sessions. Section 209 of the Code reads as follows:

209.Commitment of case to Court of Session when offence is triable exclusively by it.- When in a case instituted on a police report or otherwise, the accused appears or is brought



before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) commit , after complying with the provision of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;]

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.”

The other provision for commitment of the case to the Court of Sessions is contained in section 323 of the Code which reads as follows:

"323. Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed. If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment



that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and [thereupon the provision of Chapter XVIII shall apply to the commitment so made.]"

The above provision suggests that after commencement of an enquiry or trial, upon the evidence produced before a Magistrate, may make out two stipulations, firstly a case is exclusively triable by a Court of sessions and secondly, a case though not exclusively triable by the Court of Sessions, but which ought to be tried by the Court of sessions. In both the situations, the Magistrate has the jurisdiction to commit the case to the Court of Sessions.

The first situation arises when during enquiry if it is found that the case is exclusively triable by the Court of Sessions, then the Magistrate commits the case under Section 209 of the Code to the Court of Sessions and second, when the matter is pending before the Magistrate and at any stage of proceeding before signing the judgment if the Magistrate feels that the case is one which ought to be tried by the Court of Sessions, he may commit the same to the Court of Sessions and thereupon the provisions of Chapter XVIII shall apply to the commitment so made.



Hence, in view of this Court, after commitment of the case under section 209 of the Code, if the learned Sessions while considering the framing of charge in exercise of jurisdiction under section 228(1)(a) of the Code, forms an opinion that there is ground for presuming that the case is not triable by the Court of Sessions and transfers it to the Court of CJM or any other Magistrate, that does not mean that in all circumstances, it should be tried only by the Magistrate. If the evidence comes even in the case which has been transferred by the Court of Sessions to the court of Magistrate, the Magistrate has the jurisdiction under section 323 of the Code to commit the case to the Court of Sessions.

The other situation is when the trial starts with the charge of offences, triable by the Court of Magistrate or the case is transferred to the Court of Magistrate by the Court of Sessions in exercise of the jurisdiction under section 228(1)(a) of the Code, but during trial, upon evidence, if it appears to the Magistrate that the case though not exclusively triable by the Court of Sessions, but ought to be tried by the Court of Sessions, the Magistrate can commit it to the Court of Sessions.

The impugned order is dated 11.8.2015, but there is nothing on record to suggest the present stage of the proceeding.



In view of the discussions made above, this court does not find any infirmity in the impugned order. This application is accordingly dismissed. However, any observation made in this order may not prejudice the case of either party at the trial.

(Dinesh Kumar Singh, J)

Ashwini/-Anil/

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