

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.11164 of 2016

Arising Out of PS.Case No. -46 Year- 2011 Thana -DUMRIAGHAT District-
EASTCHAMPARAN(MOTIHARI)

- =====
1. Ashok Kumar @ Ashok Kumar Yadav, Son of Avinash Kumar Yadav
 2. Umashankar Yadav, Son of Thakur Prasad
 3. Piyush Kumar, Son of Umashankar Yadav
 4. Ram Pukar Patel, Son of Banka Patel
 5. Robin Pandey, Son of Late Gagandeo Pandey
 6. Krishna Pandey, Son of Robin Pandey
 7. Birendra Rai, Son of Baijnath Rai
 8. Mahesh Mahto, Son of Gagandeo Mahto
 9. Mukurdhun Rai @ Mukurdhun Yadav, Son of Suraj Yadav,
 10. Tapasya Mahto @ Tapeswar Mahto, Son of Late Ram Lagan Mahto
 11. Harendra Thakur, Son of Jagarnath Thakur
 12. Baiju Rai, Son of Jharman Rai
 13. Sukar Rai @ Suken Rai, Son of Rameshwar Rai
 14. Jai Chandra Rai @ Jai Chandra Yadav, Son of Late Anurag Yadav
 15. Indal Rai @ Indal Yadav, Son of Jeut Raut
 16. Bhala Rai, Son of Babulal Rai, All are residents of village- Hussaini Dih
Mangalpur, P.S. Dumariaghat, District- East Champaran

.... Petitioner/s

Versus

1. The State of Bihar

.... Opposite Party/s

=====

Appearance :

For the Petitioner/s : Mr.

For the Opposite Party/s : Mr.

=====

CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
ORAL JUDGMENT

Date: 18-07-2017

Heard learned counsel for the petitioners and Mr.

J.N. Thakur for the State.

The present application has been filed for
quashing the order dated 10.02.2016, passed by learned Ist Assistant
Sessions Judge—cum-Ist A.C.J.M., Motihari, East Champaran in



Sessions Trial No. 234 of 2014, arising out of Dumariaghat P.S. Case No. 46 of 2011, whereby petitioners' application for transferring the case to the Magistrate for trial under section 228(1)(a) of the Code of Criminal Procedure (hereinafter referred to as the 'Code') has been rejected.

On the basis of the written report dated 8.6.2011 of one Rajnath Pandey i.e., the informant, it was alleged therein that on 8.6.2011, there was marriage in the house of the informant and the family members were waiting for Barat, in the meantime, at 6 P.M., the accused persons named in the FIR and 50-60 persons including, the petitioners came variously armed. Petitioner no. 1 Ashok Yadav ordered for robbing the articles, upon which all the accused persons started assaulting the informant. The accused persons entered into the house of the informant and took away the articles kept for the occasion of marriage. The accused persons also resorted to firing and ultimately they snatched ornaments of the ladies. During the incident, ten persons received injury, which consequently led to registration of Dumariaghat P.S. Case No. 46 of 2011, under sections 147,148,149,341,323,324,307,380,452 and 504 of the IPC and section 27 of the Arms Act.

On conclusion of investigation, final form (chargesheet) was submitted under sections



147,148,149,341,323,324,307,380,452 and 504 of the IPC and section 27 of the Arms Act against the accused persons including the petitioners. Consequently, the learned C.J.M. took cognizance under the aforementioned provisions of the IPC.

The petitioners filed an application on 15.5.2014, under section 228(1)(a) of the Code before the learned Ist Assistant Sessions Judge–cum-Ist A.C.J.M., Motihari, East Champaran claiming that no offence under section 307 IPC is made out as due to some hot exchange of words during Panchayat election, the FIR was lodged with false accusation. Hence, the prayer was made for transferring the case to the Court of the learned CJM. The learned Ist Assistant Sessions Judge–cum-Ist A.C.J.M., Motihari, East Champaran dismissed the petition dated 15.5.2014, filed under section 228 of the Code vide order dated 10.2.2016, and fixed the next date on 2.3.2016, for framing of charge. The said order is under challenge in the present proceeding.

Learned counsel for the petitioners submits that except offence under section 307 of the IPC, all the offences alleged are triable by the Magistrate and no offence under section 307 of the IPC is made out. There is no accusation of repetition of blow, hence, it does not appear that the accused persons including the petitioners had any intention to kill.



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. No.2.

The petition dated 15.5.2014, under section 228 of the Code filed before the learned trial Court has not been brought on record to enable this court to appreciate the issue properly.

Chapter XVIII of the Code which deals with the trial before the Court of Sessions. Section 226 stipulates the opening of the prosecution case, when the accused appears or is brought before the Court in pursuance 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) 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 forms an opinion that the case is exclusively triable by the Court of Sessions, he shall directly frame the charge in writing.

It is not necessary 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 under section 228(1)(a) of the Code 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:

“15. 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 Sessions. 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 Sessions, 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.”

The provision under section 228(1)(a) of the Code stipulates that if 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 that there is ground for presuming that the case is exclusively triable by the Court of Sessions, then he may frame charge against the accused and transfer the case to the Court of learned CJM or any other Magistrate, while in the present case the learned Sessions Judge has come to a conclusion that the charges must be framed under sections 341,323,307,325,379 and 504/34 IPC. At this stage, the learned Sessions Judge has only to form an opinion to find whether prima facie case is made out or not. Moreover, under section 26 of the Code the Court of Sessions has the jurisdiction to try



any offence under the IPC.

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.”

At the stage of sections 227 and 228 of the Code, the court is required to weigh the materials and documents on records only for the limited purpose to see that prima facie case is made out against the accused or not.



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 of the Code 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.”

Now advertng to the present case, it appears that the FIR was registered with the accusation under sections 147,148,149,341,323,324,307,380,452 and 504 of the IPC and section



27 of the Arms Act. The police found the case true under sections 147,148,149,341,323,324,307,380,452 and 504 of the IPC and section 27 of the Arms Act and consequently, the order of cognizance was also passed under the aforementioned provisions of the IPC.

Section 307 of the IPC deals with the offence of attempt to murder which reads as follows:

“307. Attempt to murder - Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to ¹⁰⁴[imprisonment for life], or to such punishment as is here in before mentioned.

Attempts by life convicts- ¹²⁰[When any person offending under this section is under sentence of ¹⁰⁴[imprisonment for life], he may, if hurt is caused, be punished with death.]”

The above provision suggests that any act done with intention or knowledge and under such circumstance that if he by that act caused death, he would be guilty of murder, then, the offence of attempt to murder is made out.



Moreover, the impugned order was passed on 10.2.2016, but there is nothing on record to suggest the present stage of the trial. The impugned order further suggests that the date of framing of charge was fixed on 2.6.2016, hence, this Court is not inclined to interfere in the matter.

Since this court finds no infirmity in the order impugned, this application is dismissed. However, any observation made in this order may not prejudice the case of either party at the trial.

(Dinesh Kumar Singh, J)

DKS/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.07.2017
Transmission Date	22.07.2017

