

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.25739 of 2016

Arising Out of PS.Case No. -4 Year- 2014 Thana -GORAUL District- VAISHALI(HAJIPUR)

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1. Md. Ishak
2. Md. Yakub Both sons of Late Nathu Mian
3. Md. Mahtab S/o Md. Ishak All residents of Village Chhitrauli P.S. Goraul,
District Vaishali.

.... Petitioner/s

Versus

1. The State of Bihar.
2. Nazmun Khatoon W/o Md. Sahjad Resident of Village Chhitrauli, P.S. Goraul,
District- Vaishali.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Rajeev Ranjan No. II, Advocate
For the Opposite Party/s : Mr. Rajendra Nath Jha, APP

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

ORAL JUDGMENT

Date: 13-04-2017

Heard learned counsels for the petitioners and the State.

The present application has been filed for quashing of the order dated 12.04.2016, passed by the learned Addl. Sessions Judge V, Vaishali at Hajipur in S.Tr. No. 316 of 2015, arising out of Goraul P.S. Case No. 04 of 2014, whereby petitioners' application under Section 228(1)(a) of the Code of Criminal Procedure (hereinafter referred to as the 'Code') for transfer of the case for trial to the court of the Magistrate has been rejected.

The prosecution case would unveil that the O.P. No. 2, Najmun Khatoon, submitted a written report on 5.1.2014 to the SHO



of Goraul Police Station to the effect that the petitioners, namely, Md. Ishak, Md. Yakub and Md. Mahtab assaulted the informant and her old mother-in-law, Khodaija Khatoon, with lathi, danda for a dispute over a goat and also snatched a gold chain. The informant had earlier filed informatory petition, bearing Informatory Petition no. 4011 of 2013, in the court of the learned C.J.M. to the effect that the petitioners used to give life threat to the informant.

On conclusion of investigation, initially the case was found to be true only under sections 341,323 and 504/34 of the IPC and final form was submitted, but on the basis of application subsequently submitted by the informant, to the Superintendent of Police, the Inspector mechanically submitted chargesheet under sections 341,323,504/34 and 307 of the IPC and consequently, the learned CJM took cognizance under sections 341,323,504/34 and 307 of the IPC. Thereafter, the matter was committed to the Court of Sessions under Section 209 of the Code.

Subsequently, a petition under section 228(1)(a) of the Code was filed by the petitioners on 22.8.2016, though, neither the said application nor the rejoinder said to have been filed by the learned APP has been brought on record. It is further the case that the ground for filing petition under section 228(1)(a) of the Code is that the injury report suggests that the petitioners had no intention to kill



the informant or her mother-in-law. Initially, charge sheet was not submitted under section 307 of the IPC, but on the basis of a malicious petition filed by the informant to the Superintendent of Police, the Inspector subsequently submitted charge sheet under section 307 of the IPC also.

The learned Additional Sessions Judge, Vaishali at Hajipur, vide order dated 12.4.2016, after perusing the materials on record and considering the nature of injury held as follows:

“From perusal of the para 17,41 of the case-diary, serious case of U/s 307,325 I.P.C. is made out against the accused-persons. The Doctor has found injury on the vital part and sensitive part of the person of Khuraida Khatoon. During investigation, the I.O. found injury on vital part of Khujaida Khatoon as well as Doctor found injury on vital part (brain haemorrhage) from perusal of documents available on the record and on the basis of the nature of the injury scope of injury a case of U/s 307,325 is made out against accused-persons.”

The above order of the learned Additional Sessions Judge, Vaishali at Hajipur is impugned in the present proceeding.

It is submitted by learned counsel for the petitioners that final form was submitted under sections 341,323 and 504/34 of



the IPC but on the basis of application submitted by the informant, subsequently, to the Superintendent of Police, the Inspector mechanically submitted chargesheet under sections 341,323,504/34 and 307 of the IPC. It is further submitted that even assuming the accusations to be true, no offence under section 307 of the IPC is made out. On conclusion of investigation, no witness has suggested that the petitioners assaulted with the intention to kill the informant and the offence alleged under section 307 of the IPC is not made out, as the injury has been found to be simple in nature, which is exclusively triable by the Court of Sessions.

Learned APP appearing on behalf of the State submits that the learned Additional Sessions Judge on perusal of the materials and documents available on record and after hearing counsels for the prosecution and the defence, has rightly rejected the application of the petitioners under section 228(1)(a) of the Code. It is further submitted that at the time of considering discharge application under section 227 or the application under section 228(1)(a) of the Code, the court has only to see whether a prima facie case is being made out.

Having heard learned counsels 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 22.8.2016, under section 228(1)(a) 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 deals with the trial before the Court of Sessions. Section 226 stipulates the opening of the case for prosecution, when the accused appears or is brought before the court in pursuance of 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 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 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 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 Session 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 of the 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, the court is required to weigh the material 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 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 under sections 341,323,379 and 506/34 of the IPC and the police found the case true only under sections 341,323 and 504/34 of the IPC but subsequently, charge sheet was submitted under sections 341,323,325, 307 and 504/34 of the IPC and consequently, the learned CJM took cognizance under sections



341,323,325, 307 and 504/34 of the IPC. The impugned order reflects that the learned Sessions Judge has discussed the nature of injury and the material collected during investigation and then formed opinion that case under Sections 341,323,325, 307 and 504/34 of the IPC is made out.

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.

In the present case, it is alleged that petitioners, Md. Ishak, Md. Yakub and Md. Mahtab, assaulted the aged mother-in-law of the informant with lathi and danda. The FIR further stipulates that the Informatory Petition, bearing Information Petition No. 4011 of 2013, was filed in the court of the learned CJM to the effect that the petitioners used to give life threat to the informant. Hence, it is apparent that for constituting offence under section 307 of the IPC, only the intention to kill matters. The causing of actual injury is not important. The Judge, at the stage of exercise of jurisdiction under section 228(1)(a) of the Code has only to presume on the basis of materials before it, as stipulated in Section 227 of the Code, that the offence committed is not exclusively triable by the court of Sessions and for presuming that offence under section 307 of the IPC is not made out, the court must have examined the manner of occurrence and the fact that previously informatory petition was filed levelling accusation that life threats are being given by the petitioners. The FIR was registered under section 307 of the IPC, on conclusion of investigation though initially no charge sheet was submitted under section 307 of the IPC but, subsequently charge sheet was submitted under section 307 of the IPC and the learned Magistrate consequently took cognizance under section 307 of the IPC also.



Hence, in view of this Court, once the learned trial court declines to transfer the case to the learned CJM or the Magistrate in exercise of jurisdiction under section 228(1)(a) of the Code, the High Court should be reluctant to interfere with such order unless it is absolutely perverse.

Moreover, the impugned order was passed on 12.4.2016, but there is nothing on record to suggest the present stage of the trial. Hence, this court is not inclined to interfere in the matter.

Accordingly, 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)

Prakash/-Anil/

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