

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.32468 of 2015

Arising Out of PS.Case No. -133 Year- 2009 Thana -HASPURA District- AURANGABAD

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1. Ravindra Sharma Son of late Baleshwar Sharma
2. Praduman Sharma Son of late Ramjee Sharma Both resident of Village- Mahuar, P.S Haspura, Distt- Aurangabad.

.... Petitioner/s

Versus

1. The State of Bihar
2. Sanjeev Kumar Son of Kamlesh Sharma, resident of Village- Mahuar, P.S Haspura, Distt- Aurangabad.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Rajendra Prasad

For the Opposite Party/s : Mr. Sanjay Kumar Sharma(App)

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

ORAL ORDER

2 01-05-2017

Heard learned counsel for the parties.

The present application has been filed for quashing the order dated 5.6.2015 passed by the learned Judicial Magistrate Ist Class, Daudnagar, Aurangabad in Haspura P.S. Case No. 133 of 2009 registered under sections 147, 148,149,323,324,325,307,384,504 and 506 of the Indian Penal Code, whereby the petitioners' application under section 239 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') for discharge has been rejected.

A supplementary affidavit dated 25.4.2017 has been filed making statement in paragraph 3 that charges have not yet



been framed.

The factual matrix of the case is that Haspura P.S. Case No. 133 of 2009 got initiated on the fardbeyan of Sanjeev Kumar alleging therein that on 13.7.2009 at 8 P.M., he was in his house when accused Amaresh Sharma knocked his door when the informant's younger brother Raghvendra Kumar opened the door. Thereafter, Amaresh Sharma dragged the brother of the informant in the street. On alarm being raised, the father of the informant came outside the house, when the petitioners armed with bhala and garasa while other accused persons being armed with khanti and iron rod, threatened the informant that he would have to pay Five Thousand Rupees per month for securing the release of his brother. On protest being made, Praduman Sharma (petitioner no. 2) assaulted the informant with garasa which caused injury on the head of the informant, thereafter Ravindra Sharma (petitioner no. 1) assaulted on the leg of the informant. He also assaulted the younger brother of the informant with garasa causing injury on his head. Consequently, Haspura P.S. Case No. 133 of 2009 was registered under sections 147, 148,149,323,324,325,307,384,504 and 506 of the Indian Penal Code.

On conclusion of investigation, only petitioners were chargesheeted whereas others were not sent up for trial.



Consequently, the order of cognizance was passed and the case was committed to the Court of Sessions. Thereafter, the petitioners filed an application for discharge under section 239 of the Code on 19.3.2015 but the same was rejected by the learned Judicial Magistrate Ist Class, Daudnagar, Aurangabad vide order dated 5.6.2015 passed in TR No. 704 of 2014, which is the order impugned in the present proceeding.

It is submitted by learned counsel for the petitioners that the present case was lodged by the informant to save his skin from Haspura P.S. Case No. 130 of 2009 lodged by petitioner no. 2 - Praduman Sharma against the present informant Sanjeev Kumar and others with the accusation under sections 341,323,324 and 504/34 of the Indian Penal Code on 12.7.2009 whereas the present FIR was registered on 14.7.2009. It is further submitted that with regard to other co-accused persons, the prosecution has been quashed by the learned Judicial Magistrate Ist Class, Daudnagar, Aurangabad vide order dated 26.2.2015, as contained in Annexure 2. It is also further contended that the informant's side also filed Complaint Case No. 654 of 2010/3774 of 2011 against the petitioner Praduman Sharma and others wherein the order of cognizance was quashed by a bench of this court vide order dated 18.9.2012 passed in Cr. Misc. No. 13216 of 2012 as



contained in Annexure 5. Moreover, by a cryptic order the application for discharge of the petitioners has been rejected.

Learned counsel for the State submits that the learned Magistrate after hearing counsels for the parties, found sufficient material on record and hence rejected the petition for discharge.

After hearing the rival submissions of learned counsel for the parties, it is relevant to refer the provision under section 239 of the Code to appreciate whether the learned Magistrate has considered the application for discharge in true perspective. Section 239 of the Code reads as follows:

“239. When accused shall be discharged.- If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.”

The above provision suggests that for considering discharge application the court has to consider the police report and the documents sent with it under section 173 of the Code, on



making such examination, if any, of the accused as the Magistrate thinks necessary and after giving prosecution and the accused an opportunity of being heard, the accused can be discharged, if the charges are found to be groundless and for the same, reason has to be recorded.

The Apex Court in the case of State of Karnataka Vs. Muniswamy and Ors. (1977) 2 Supreme Court Cases 699, while considering the scope of section 227 of the Code has held that at the stage of framing of charge, the court has to apply its mind to the consideration whether or not there is any ground for presuming the commission of the offence by the accused. Since the order framing charge affects a person's liberty substantially, hence need for proper consideration of materials warranting framing of charge was emphasized. In the case of Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia and Anr. (1989) 1 Supreme Court Cases 715, it has been held that the court has to see while considering the question of framing of charge, as to whether the material brought on record would reasonably connect the accused with the crime. Nothing more is required to be inquired into. Similar is the view of the Apex Court in the case of R.S. Nayak Vs. A.R. Antulay and Anr. (1986) 2 Supreme Court Cases 716. Paragraph 43 reads as follows:



“43. As pointed out by the Constitution Bench in the judgment to which reference has been made, the relevant sections of the CrPC ('Code' for short) for the trial of a case of this type are Sections 244, 245 and 246. Section 245(1) provides:

If upon taking of the evidence referred to in Section 244, the Magistrate considers, for reasons to be recovered, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

While Section 246(1), on the other hand, requires:

If when such evidence has been taken or at any previous stage of the case the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter which such Magistrate is competent to try and which in his opinion should be adequately punished by him, he shall frame in writing a charge against the accused.

The Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain some what different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he 'considers that there is not sufficient ground for



proceeding against the accused.' Obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless." The power to discharge is exercisable under Section 245(1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction." It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a prima facie case is made out, charge has to be framed."



The Apex Court in the case of State of Maharashtra and Ors. Vs. Som Nath Thapa and Ors. (1996) 4 Supreme Court Cases 659, while considering the three provisions of discharge and framing of charge under sections 227 and 228 (sessions triable cases), section 239, 240 (warrant triable cases) and section 245(1)(2) (complaint cases), has held that charge can be framed if on the basis of materials on record, a court comes to the conclusion that commission of the offence is a probable consequence. Paragraph 32 of the judgment states thus:

“..... if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage.”

Considering the discharge and framing of charge, Three Judges bench of the Apex Court in the case of Onkar Nath



Mishra and Ors. Vs. State (NCT of Delhi) and Anr. (2008) 2 Supreme Court Cases 561, after noticing three pairs of the provisions of discharge under sections 227, 228, 239, 240, 245(1) and (2) of the Code has held as such in paragraph 11, which reads as follows:

“11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.”

While considering the scope of all the above three provisions under the Code for discharge, the Apex Court in the



case of State of Tamil Nadu Vs. N. Suresh Rajan and Ors. (2014) 11 Supreme Court Cases 709, has held that the language in the three provisions has been differently employed but notwithstanding the differences, the court at this stage is required to see that there is a prima facie case for proceeding against the accused.

In view of the above discussions made, now advertent to the present case, it is relevant to quote the cryptic impugned order dated 5.6.2015 which reads as follows:

“अभियुक्त रविन्द्र शर्मा की हाजरी है । अभियुक्त प्रदुमन शर्मा की ओर से दारिखल प्रति० का आवेदन आज के लिए स्वीकृत किया ।

अभियुक्त रविन्द्र शर्मा एवं प्रदुमन शर्मा की ओर से दारिखल आवेदन दिनांक 19.03.2015 अर्न्तगत धारा 239 Cr.P.C. पर उभय पक्षों को सुना ।

अभिलेख पर दोनों अभियुक्तों के विरुद्ध आरोप गठन हेतु पर्याप्त सामग्री उपलब्ध है । अतः आवेदन दिनांक 19.03.2015 को अस्वीकृत किया गया ।”

The above said order prima facie does not stipulate that any consideration has been made of the police report or the documents brought on record and at the same time the fact that, other co-accused have been discharged by the Magistrate, has also not been considered.

The word ‘consider’ which is sine qua non for the purpose of exercising jurisdiction under section 227 of



the Code, though has not been defined in the Code, but the word 'consider' has been defined by Oxford dictionary as 'think about', 'take into account', 'be of the opinion'. The word 'consideration' has been defined as 'act of considering', 'think about'. The Websters Dictionary defines the word 'consider' as 'to ponder', 'to think out', 'weigh the advantages and disadvantages of', 'to assess before reaching a decision'. The word 'consideration' has been defined as 'deliberation'. But the impugned order does not suggest that any consideration of the police report or the materials on record have been made by the learned Magistrate which depicts the complete non application of mind while passing the impugned order. The order dated 26.2.2015 passed by the learned Magistrate in T.R. No. 704/2014, was the part of records of the case, wherein the seven other co-accused have been discharged, but while considering the application for discharge of the present petitioners, the learned Magistrate has failed to consider the order dated 26.2.2015. Hence, the impugned order cannot be sustained.

So far as the plea of the petitioners that the present case has been registered against them in retaliation to the case filed by the petitioners' side against the informant side, the said defence



cannot be considered at this stage, as has been held in the case of State of Orissa Vs. Devendra Nath Padhi (2005) 1 Supreme Court Cases 568. Paragraph 23 reads as follows:

“23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. Satish Mehra's case holding that the trial court has powers to consider even materials which accused may produce at the stage of Section 227 of the Code has not been correctly decided.”

In view of the discussions made above, the order dated 5.6.2015, passed by the learned Judicial Magistrate Ist Class, Daudnagar, Aurangabad in Haspura P.S. Case No. 133 of 2009 is hereby quashed with a liberty to the learned Magistrate to pass fresh order on the application of discharge within the parameters of section 239 of the Code and in the light of the discussions made above, after giving due opportunity of hearing to the counsels for the accused and the prosecution.

This application is, accordingly, allowed.

(Dinesh Kumar Singh, J)

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