

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO.1063 OF 2017

Salim s/o Jilani Qureshi
Age: 52 years, Occu.: Business,
R/o.Azam Colony Road, Roshan Gate,
Aurangabad, Taluka and District:-
Aurangabad.

..Petitioner

Versus

- 1) The State of Maharashtra
through the Police Inspector,
Jinsi Police Station, Aurangabad
(City), Aurangabad, Taluka and
District: Aurangabad.
- 2) Anjum Ara Siddiqui w/o Nadim
Age: 43 years, Occu.: Service,
R/.o.Azam Colony Road,
Roashan Gate, Aurangabad.
- 3) Hina Siddiqui w/o.Babar Qureshi
Age: 36 years, Occu.: and
R/o.: As above.
- 4) Anam Nadim
Age: 23 years, Occu.: Household,
R/o.: As above
- 5) Umar Ara Nadim
Age: 20 years, Business,
R/o.: As above
- 6) Adil Madni
Age: 41 years, Occu.: Business,
R/o.Maqsood Colony, Roshan Gate,

Aurangabad, Taluka and District:
Aurangabad.

7) Khuram Siddiqui s/o.Babar Siddiqui
Age: 36 years, Occu.: Business,
R/o.Azam Colony Road, Roshan Gate,
Aurangabad, Taluka and District:
Aurangabad.

8) Irfan Siddiqui s/o. Babar Siddiqui
Age: 34 years, Occu.: and
R/o. As above.

9) Faiz Siddiqui
Age: 26 years, Occu.: and
R/o.As above.

..Respondents

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Advocate for the Petitioner : Mr.Govind Kulkarni h/f.

Mr.R.S.Deshmukh

APP for Respondent No.1 : Mr.K.S.Patil

Advocate for the Respondent Nos.2 to 9 : Mr.P.F.Patni

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CORAM : PRAKASH D.NAIK, J.

DATES : 29.11.2017

ORAL JUDGMENT:-

1) The petitioner is the original complainant. The complaint was filed against the respondent Nos.2 to 9. The petitioner has invoked the supervisory jurisdiction of this Court under Article 227 of Constitution of India, and taken exception to the order dated 16.6.2017 passed by the Additional Sessions Judge, Aurangabad, in Criminal

Revision Application No.128 of 2016 as well as the order dated 28.6.2016 passed by the Judicial Magistrate First Class, Aurangabad, below Exh.1 in Regular Criminal Case No.1572 of 2016.

2) The facts which are necessary for deciding the present petition are as follows:-

(a) The petitioner filed Regular Criminal Case No.1572 of 2016 against the respondents/accused alleging that they have committed offences under Sections 147, 148, 149, 307, 326, 325 and 452 r/w Section 34 of the Indian Penal Code as well as Sections 4 and 25 of the Arms Act.

(b) The case of the petitioner/complainant is that the accused No.1 had unauthorizedly constructed house after demolishing the old house by encroaching upon public property. The residents of the area opposed the construction and prevented them from constructing the house. The accused carried misunderstanding that

the complainant's family had instigated residents to stop the construction of house started by accused. On 9.6.2016, the complainant and his sons were at home. The accused came near the house of the petitioner and knocked at his door. They were armed with weapons. The accused Nos.1 and 4 stated that the complainant has instigated residents to stop the construction. They instigated others to assault the complainant and others and forcefully entered into house. The accused No.5 assaulted the petitioner on his abdomen by Sword. The accused Nos.4, 6 and 8 assaulted the complainant's wife and son Javed by hockey-stick and stick. Accused Nos.4 and 6 assaulted brother of complainants Riyaz with hockey-stick and accused Nos.1 to 3 assaulted complainant, his wife and son by sticks on abdomen, chest and back. The attack was with an intention to kill the complainant and others. It is further alleged that upon raising hue and cry, the witnesses have rushed to the residence of the complainant and they were rescued

from the clutches of the accused. If the said persons would not have come to save the complainant and his family, the accused would have killed them. The complainant rushed to the Police Station. The injured were referred to for medical treatment in GHATI Hospital, Aurangabad. They were treated at hospital and then considering the injuries sustained by them, they were sent for X-ray and Sonography. By that time, it was too late and hence, they could not get to the Police Station. The wife of the complainant had undergone abdominal surgery and on account of assault in the present incident, her condition was serious and for that reason also, they could not visit Police Station.

(c) On 10.6.2016 the complainant was at the Police Station for registration of crime, but the Police refused to register the crime and informed that action will be taken after receipt of medical report. The petitioner lodged the report with the Police

Commissioner on 14.6.2016. However, no cognizance was taken by Police. The accused are politically influential persons and hence no action was taken against them and on the contrary, false FIR was registered against the petitioner. The complainant approached the Police for action, but he was threatened that, he will be arrested in the offence. The accused had conspired and with intention to kill the complainant and others had assaulted them by dangerous weapons. Since the Police failed to take cognizance, the petitioner filed a private complaint.

(d) The petitioner had prayed for issuance of directions under Section 156(3) of the Code of Criminal Procedure. The Court was not inclined to issue such directions initially and therefore directed him to remain present for verification under Section 200 of the Code of Criminal Procedure and was also given liberty to lead evidence in support of his complaint.

(e) The petitioner was aggrieved by the said order dated 28.6.2016 and therefore, preferred Criminal Revision Application No.128 of 2016 before the Court of Sessions, Aurangabad on 11.7.2016. The Sessions Court vide Order dated 16.6.2017 dismissed the said Criminal Revision Application. Petitioner therefore, approached this Court to challenge the said orders on several grounds.

3) The learned counsel for the petitioner submits that there was enormous evidence before the Trial Court to issue directions under Section 156(3) of the Code of Criminal Procedure. It is submitted that the accused had committed serious cognizable offence and therefore, Court ought to have directed investigation. The facts involved in the complaint were required to be thoroughly investigated by the Police. Therefore, it was a fit case to issue directions of investigation. It is submitted that the Court, however, adopted the other mode available

in law and therefore, placed the matter for recording verification statement of the complainant. It is therefore, submitted that the Court was proceeding to post-cognizance stage and prayed for investigation under Section 156(3), which is the pre-cognizance stage and was deemed to have been rejected by the Trial Court. It is submitted that once the complaint makes out cognizable offence, it was bounden duty of the Police to take cognizance of the same and proceed in accordance with law. The complaint refers to allegations of assault by deadly weapons and therefore, the said complaint ought to have been investigated by the Police.

4) It is further submitted that inspite the complaint being made to the Police, the Police machinery refused to take cognizance of his complaint, which is contrary to the decision of the Supreme Court in the case of *Lalita Kumari Vs. Govt. of U.P. and ors.*, reported in **AIR 2014 SC, 187**. It is submitted that the assault as stated by the complainant was not a concocted story, but it was

supported by the medical evidence. Although, the accused were referred for medical examination, which is not in dispute, the Police did not thought it fit to register the First Information Report. It is therefore, submitted that the order passed by the Trial Court is contrary to law. In the interest of justice and to collect the evidence against the accused, who were involved in the crime, it was necessary to conduct investigation.

5) It is submitted that adhering to any other mode available in law either calling report under Section 202 of the Code of Criminal Procedure or issuance of process would not serve the purpose and the complaint requires Police investigation and therefore, the order of the Magistrate would be required to be set aside. It is submitted that the Sessions Court has also failed to appreciate the aforesaid aspects and rejected the Criminal Revision Application preferred by the petitioner. It is submitted that the case was made out for offences under Sections 307, 324, 325 and 326 of the

Indian Penal Code and therefore, the complaint makes out cognizable offences, which requires the Police machinery to conduct investigation.

6) The prosecution has filed affidavit in reply. It is stated that the petitioner was not found in the vicinity of Roshan Gate, Azam Colony area. Since, the petitioner was not available, the First Information Report was not registered. Reliance was placed on Case Diary. It is also stated that a case was registered against the petitioner and others and the petitioner had applied for anticipatory bail before the Sessions Court. It is also submitted that the incident, which is subject matter of Crime No.236 of 2016 filed against the petitioner was real incident, which is evident from spot panchanama, which was annexed to the said reply.

7) The learned counsel for the respondents submitted that there is no error in the order under challenge. There was no justification for issuing directions under

Section 156(3) of the Code of Criminal Procedure and therefore, the learned Magistrate has rightly posted the matter for recording the verification statement of the complainant. It is submitted that false and frivolous complaint has been lodged by the petitioner and there was no reason to direct investigation under Section 156(3) of the Code of Criminal Procedure. It is submitted that there was no evidence on record to support the contentions of the complainant that the complaint makes out cognizable offence and in the absence of said evidence, the Court could not have directed the investigation under Section 156(3) of the Code of Criminal Procedure. It is submitted that the Court had directed that the complaint would proceed by recording verification statement, which would mean that the Trial Court had option of issuing process directly or calling for report under Section 202 of the Code of Criminal Procedure. The grievance could also be dealt with by any other options available to the Trial Court. The petitioner therefore, cannot challenge the discretion of

the Court and contend that the complaint has to be sent for investigation under Section 156(3) of the Code of Criminal Procedure. It is submitted that the injury certificate on record does not support the allegation of any cognizable offence and therefore, there was no question of exercising powers under Section 156(3) of the Code of Criminal Procedure. The learned Magistrate has therefore posted the matter for recording verification statement of the complainant. It is also open to the complainant to lead evidence of witnesses in support of his complaint and it would be open to the Trial Court to take appropriate decision in accordance with law. There has to be material on record to invoke powers under Section 156(3) of the Code of Criminal Procedure, it is therefore submitted that there is no reason to interfere in the order passed by the Trial Court. The learned Magistrate has categorically observed that the xerox copies of medical certificates show history of assault. However, there is no evidence of deadly weapon. The medical papers did not disclose the nature of injuries.

The Sessions Court also reiterated same aspects and dismissed revision. It is therefore prayed that the petition is devoid of merits and same be dismissed. The learned counsel relied upon the decisions of Supreme Court in the case of *Priyanka Srivastava Vs. State of Uttar Pradesh [(2015) 6 Supreme Court Cases, 287]* and *Madhao and Another Vs. State of Maharashtra [(2013) 5 SCC, 615]*.

8) On perusal of the documents on record, it is apparent that the alleged incident had occurred on 9.6.2016. The complainant and others had approached the Police Station immediately after the incident. They were forwarded for medical examination at the instance of police. The medical certificate does indicate that the petitioners and others had sustained injuries on the various parts of the body. The complainant has also forwarded a written complaint on 14.6.2016 stating that the accused were armed with dangerous weapons like sword, iron rod, hockey-sticks, and that the victims were

assaulted by them with an intention to kill them. The complainant approached the concerned Police Station, however, no action was initiated by the Police. The complaint dated 14.6.2016 discloses the fact that the accused were armed with aforesaid weapons and assaulted the complainant and others. Prima-facie the incident of assault as alleged by the complainant was fortified by the injury certificate. The complaint dated 14.6.2016 discloses cognizable offence. On reading the said complaint, it is apparent that the complaint does make out a case for cognizable offence and it was bounden duty of the Police to take cognizance of the said complaint.

9) The Supreme Court in the case of *Lalita Kumari* (supra) relied upon by the learned counsel for the petitioner, has categorically stated that the use of word "shall" in Section 154(1) of the Code clearly shows the legislative intent that it is mandatory to register a FIR if the information given to the Police discloses the commission of cognizable offence. The object of using

the word "shall" in the context of Section 154(1) of the Code is to ensure that, all information relating to cognizable offences is promptly registered by the Police and investigated in accordance with provisions of law. Investigation of offences and prosecution of offenders are duties of the State for 'cognizable offences', a duty has been cast upon the Police to register FIR and to conduct investigation except as otherwise specifically permitted under Section 157 of the Code.

10) The injury certificate is not creation of complainant or injured persons. The complainant and others reached the Police Station after the incident immediately and they were forwarded to the medical examination. The injury certificate discloses injuries sustained by the victims etc. It was bounden duty of the Police to collect the medical certificates by getting the injured persons examined by Doctors and initiate immediate action. The Police refused to take cognizance on oral complaint and even thereafter on written

complaint. On reading the complaint, if the cognizable offences were made out, nothing prevented them from registering the FIR.

11) It is the contention of the petitioner that the intention of the assailants is required to be taken into consideration on the basis of manner in which the accused committed crime. It is submitted that the manner in which the assault took place, the nature of weapons used by the accused and the fact that 10 victims were assaulted on various parts of the body, justifies investigation by Police. Since the Police did not take cognizance of the complaint, he was required to file a private complaint before the Trial Court. The factual aspects, as stated in the complaint made to the Police, were also reiterated in the private complaint. There was sufficient material to issue directions under Section 156(3) of Code of Criminal Procedure.

12) The Trial Court, however, was pleased to observe

that the accused have filed a complaint against the present complainant. The xerox copies of medical certificates shows the history of assault. However, as far as the deadly weapons are concerned, there is no iota of evidence with regards to deadly weapons used. There is no direct or indirect evidence to infer that the weapons were used by the accused. The contents of the complaint shows that there was previous enmity and the nature of injuries reflected in the medical certificates does not disclose any grievous injury. The Trial Court has travelled beyond the scope of Section 156(3) of the Code of Criminal Procedure. The complainant spells out requisite ingredients which constitute cognizable offences and the medical certificates which were on record corroborates the incident. The medical case papers showed history of assault on hand, chest and abdomen of petitioner, head, chest and back of Salima, forearm and abdomen of Javed and mouth, head, hand and back of Riyaz. The petitioner is relying upon the certificates of injury issued by hospital showing

injuries by hard, blunt object. These certificates were apparently not before the Trial Court but certainly corroborates the theory of assault. The Police ought to have collected the said certificates.

13) Apparently the Trial Court proceeded beyond the scope of the powers by making such observations. The evidence would be collected only after the investigation commence and the Court was required to consider whether the prima-facie case is made out or not, making out cognizable offence, directing investigation. It appears from the tenor of the order passed by the Trial Court that the Court passed the said order on the basis of the medical certificates, which were on record, which only refers to physical assault.

14) It is contended by the learned counsel for the respondents that injury certificates, which discloses that injuries were with hard and blunt objects, were not before the Trial Court when the impugned order was

passed. It is however contended by the learned counsel for the petitioner that the facts, which disclosed in the complaint coupled with the medical certificate, which was on record depict that there was an assault on the victims on the head, chest, back and abdomen by deadly weapon. It is therefore, submitted that the material before the Trial Court was sufficient to direct investigation.

15) There is substance in the submission advanced by the learned counsel for the petitioner. It is true that medical certificate, which shows that the injuries were caused by the hard and blunt object were not before the Trial Court. However, the material on record was sufficient to direct investigation under Section 156(3) of the Code of Criminal Procedure. The fact remains that the injury certificates, which were produced before the Sessions Court corroborates the version of the complaint. Since there was failure on the part of the Police machinery to take cognizance, the complainant was required to file a private complaint. The affidavit

filed by Investigating Officer indicates that the complainant and others were not available for investigation as there was counter case registered against them and therefore no steps could be taken for dealing with the complaint filed by the petitioner. The fact that the petitioner and others were not available is evident from Case Diary as stated in the said affidavit. Assuming that the said assertions are true that doesn't wipe out the commission of offence as alleged by the complainant. The affidavit in reply, however, confirms that complainant filed an application on 14.6.2016, stating that there was incident of assault. It is also admitted that the injured were referred to hospital with letter dated 10.6.2016 by Police. The injury certificates are annexed to the reply. It is further stated that since the petitioner was not available, FIR was not registered. This assertion would also indicate that cognizable offence was made out and Police wanted to register FIR, but the same could not be done on account of non-availability of petitioner. The affidavit also

states that the petitioner had approached Police on 17.6.2016, after obtaining anticipatory bail in cross case and inspite of assurance did not approach Police. It is difficult to accept this contention as the petitioner had lodged complaint on 14.6.2016, with said Police Station, which bears acknowledgement. The further averment in affidavit shows that the Police recorded statement of some witnesses which falsifies complaint. The Officer had doubt about occurrence of incident as stated by complainant. The approach of Police reflects bias. The complainant had approached Police immediately after incident and they were sent for medical examination and even then the Police had reason to doubt the occurrence of incident. It is further stated that, although petitioner party sustained injury and that rival party did not suffer injury, the statements of witnesses show that the incident stated by rival group was real. The cross FIR was registered vide Crime No.236 of 2016 against the petitioner for offences under Sections 143, 452, 427, 323, 506 of the Indian Penal Code. It is also

relevant to note that the Police without recording statement of petitioner and registering FIR conducted purported enquiry in negative. The Supreme Court in the case of *Lalita Kumari* (supra) has laid down guidelines as to what extent preliminary enquiry can be conducted. In paragraph 111 of the said decision, it is observed that, if the information received does not disclose cognizable offence but indicates the necessity for an enquiry, a preliminary enquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

16) In the decision of the Supreme Court in the case of *Priyanka Srivastava and another* (supra), it is observed that, the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that, sending the matter would be conducive to justice and then he may pass the requisite order. Issuing directions stating "as per application" to lodge a FIR creates very

unhealthy situation in society and reflects erroneous approach of Court. The power under Section 156(3) warrants application of judicial mind. The learned counsel for respondent therefore contended that the Trial Court has rightly refused to direct investigation under Section 156(3) of the Code of Criminal Procedure. From the facts in the present case, however, it is clear that investigation by Police was imperative. In the aforesaid decision, the Court has also observed that, a principled and really grieved citizen with clean hands must have free access to invoke the said power.

17) In another decision of *Madhao and another (supra)*, the Supreme Court has analyzed the mode to be adopted by learned Magistrate after receipt of complaint. It is observed that, when a Magistrate receives a complaint, he is not bound to take cognizance of facts alleged in the complaint disclosing commission of offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that allegations therein

disclose a cognizable offence and the forwarding of the complaint to the Police for investigation under Section 156(3) will be conducive to justice and save valuable time of the Magistrate from being wasted in enquiring into matter, which was primarily the duty of Police to investigate, he will be justified in adopting that course as an alternative for taking cognizance of offence itself.

18) Therefore, in the circumstances as stated herein above, and considering the material on record, the matter require Police investigation and hence, the Trial Court ought to have directed investigation under Section 156(3) of the Code of Criminal Procedure. Reading the complaint alongwith medical case papers, the cognizable offence does discloses in the said complaint. As observed in *Priyanka Srivastava's* (supra) case, there has to be application of mind. The Trial Court can also apply its mind as to what cognizable offence is made out in complaint. After investigation, it would be open to

investigating machinery to come to the conclusion whether the offence is made out under Sections 307, 324 or any other offence under the Indian Penal Code or any other opinion in accordance with law.

19) In view of the above, the order passed by the Trial Court directing recording of the verification statement is required to be set aside. For the reasons stated above, I pass the following Order:-

ORDER

(I) Writ Petition No.1063 of 2017 is allowed.

(II) The order dated 28.6.2016 passed by the Judicial Magistrate First Class, Aurangabad, in Regular Criminal Case No.1572 of 2016, is quashed and set aside.

(III) The order dated 16.6.2017 passed by the Additional Sessions Judge, Aurangabad, in Criminal Revision Application No.128 of 2016 is quashed and set aside.

(IV) The Trial Court is directed to issue direction under Section 156(3) of the Code of Criminal Procedure, in accordance with law.

(V) In pursuant to the direction issued to the Trial Court for issuing direction under Section 156(3) of the Code of Criminal Procedure, the Police machinery shall investigate the complaint in accordance with law without being influenced by the observations made in this order.

(VI) Petition stands disposed of.

[PRAKASH D.NAIK, J.]