

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO. 3052 OF 2016

Shri. Ashok Mahadev Desai and anr. ... Petitioners
vs.

Shri. Haseen Ahmed Quereshi and anr. ... Respondents

Mr. L. N. Karde i/by Ms. Kirtimala H. Kamble, Advocate for the petitioners.

Mr. M. K. Kochrekar, Advocate for respondent no.1.

Mr. V. V. Gangurde, A.P.P. for the State/respondent no.2.

Coram : Smt. R. P. SondurBaldota, J.

Date : 9th February, 2017

P.C. :

1. This is the second attempt on the part of the petitioners to seek discharge from the proceedings against them on the same ground. Petitioners are accused nos.2 and 3 in the complaint filed by respondent no.1 being CC No.140/M/2005 which was later renumbered as CC No. 90/SW/2006 for the offences punishable under Sections 420, 467, 468, 406, 323, 324, 325, 506(ii) r/w Sections 114 and 34 of Indian Penal Code ("I.P.C." for short). The complaint alleges that the petitioners along with other accused assaulted the complainant while he was in police custody in Pydhonie Police Station in connection with C.R. No.315 of 2004

2. On 3rd December, 2005 respondent no.1 filed his verification statement in the case based upon which the trial Court

i.e. the Additional Chief Metropolitan Magistrate, 2nd Court, Mazgaon, Mumbai, issued process against the petitioners for the offences punishable under Sections 323 and 325 of IPC. The order further recorded that for rest of the offences alleged sanction for prosecution under Section 197 Criminal Procedure Code (“Cr.P.C.” for short) is required. On coming to know about the order, the petitioners obtained its certified copy and without even waiting for service of summons upon them challenged the same in the Sessions Court by filing Criminal Revision Application No.137 of 2006. They had contended that, their prosecution without sanction under Section 197 Cr.P.C. was bad even for the offences punishable under Sections 323 and 325 I.P.C. As the revision application was found to be premature, they withdrew the same on 9th June, 2006. Thereafter petitioner no.2 received the summons and appeared before the trial Court along with the petitioner no.1. Both then filed second revision application being Criminal Revision Application No.211 of 2006 in the Sessions Court seeking quashing of the order issuing process against them on the same ground. By the order dated 27th February, 2007 their revision application was dismissed. Being aggrieved by the same, the petitioners filed Writ Petition No. 759 of 2007 in this Court, contending that in view of Section 197 Cr.P.C. respondent no.1 ought to have obtained sanction for prosecuting the petitioners which was finally heard and rejected by the order dated 20th June, 2008. At para-4 of the order, this Court observed as under : -

“4. In my view, the allegations in the complaint and the medical papers indicate that offences under Sections 323 and 325 have been committed prima-facie. However, it is for the trial Court to decide whether these offences have been committed at all and whether they

have been committed in the line of duty or otherwise. Taking a conspectus of the judgments cited, it is well settled that the protection afforded to a public servant under Section 197 does not extend to every act or admission done by him while in service but only to those acts which he performs in the discharge of his official duty.”

. Feeling aggrieved by the order, the petitioners carried it to the Apex Court by way of Special Leave Petition No. 6957 of 2008. By it's order dated 29th July, 2013, the Apex Court dismissed the special leave petition granting liberty to the petitioners to raise the question of sanction under Section 197 Cr.P.C. at the appropriate stage.

3. The petitioners thereafter preferred the application at Exh.5 under Section 245(2) Cr.P.C. before the Trial Court for their discharge on the same ground of requirement of prior sanction for prosecution. The trial Court by it's order dated 24th March, 2015 rejected the application and directed respondents to adduce evidence under Section 244 of Cr.P.C. The petitioners then once again approached the Sessions Court with Criminal Revision Application No.687 of 2015. The Sessions Court dismissed the revision by it's order dated 26th July, 2016. In it's order the Sessions Court after recording the above history of the matter held that the appropriate stage for raising the question of sanction was yet to arise. The reasons stated therefor in the order read as under :

“Once the process is issued and the trial to be held as a regular trial, then after issuance of process the stage comes for recording evidence under Section 244 of Code of Criminal Procedure and that stage yet to come in this matter. Therefore even though liberty is granted by the Honourable Supreme Court to raise the question of

sanction under Section 197 of Code of Criminal Procedure, still that question can be raised after recording evidence under Section 244 while deciding whether to discharge the accused under Section 245 of Code of Criminal Procedure or to frame charge under Section 246 of Code of Criminal Procedure. Therefore the appropriate stage will be after recording evidence under Section 244 of Code of Criminal Procedure. The accused may pray for discharge for want of sanction under Section 197 of Code of Criminal Procedure. By filing an application to discharge prior to recording evidence under Section 244 of Code of Criminal Procedure and after issuance of process, it cannot be said that the stage has come to discharge the accused.”

The Sessions Court, also noted that, the order of issuance of process had been challenged and the order is confirmed by the Apex Court. Being aggrieved by that order the petitioners have approached this Court.

4. Mr. Karde, the learned advocate for the petitioners, submits that in view of Section 245(2) Cr.P.C. it was open for the trial Court to consider whether the charge was groundless before adducing evidence under Section 244 Cr.P.C. and for that purpose the Court has to consider the question whether there is requirement of sanction under Section 197 Cr.P.C. In his extensive submissions, Mr. Karde has place reliance upon the following decisions of the Apex Court and this Court on the requirement of sanction :

1. Rizwan Ahmed Javed Shaikh vs. Jammal Patel reported in 2001 Cri. L. J. 2897 (Supreme Court).
2. Abdul Wahab Ansari vs. State of Bihar reported in 2000 Cri. L. J. 4631 (Supreme Court).
3. Ajay Kumar Ghose vs. State of Jharkhand & anr. reported in AIR 2009 Supreme Court, 2282.
4. Criminal Writ Petition No. 149 of 2003 (Asif

*Yusuf Patel (Deceased) through LRs vs. The State of
Maharashtra and ors.) High Court of Bombay.*

It is his submission that, the petitioners being police officers were discharging their duties at the relevant time and therefore even for the offences for which process has been issued against them prior sanction for prosecution was required. He further argues that the trial Court as well as Sessions Court have failed to appreciate that the Government of Maharashtra has issued notification dated 2nd June, 1979 under Section 197(2) Cr.P.C. making the provisions of Section 197(2) Cr. P.C. applicable to the categories of the police officers to which the petitioners belong. Therefore according to him the sanction to prosecute under Section 197 was required to be obtained from the Government of Maharashtra for all police officers and since no such sanction was obtained the Courts below ought to have discharge the petitioners for one of the requisite sanction to prosecute them.

5. Mr. Kocharekar, the learned Advocate for respondent no.1, points out that, this very argument along with decisions relied upon by the petitioners has been considered by the Sessions Court in it's earlier order. Once their argument is rejected and the rejection upheld right upto the Apex Court, the petitioner cannot be permitted to repeat the same again until the entire trial is held.

6. The Trial Court, by its order dated 18th February, 2008 held that there was sufficient material to proceed against the petitioners for the offences punishable under Sections 323, 325 Indian Penal Code and for rest of the matter, sanction under Section 197 of Cr.P.C is required. This would mean that, no sanction is required to proceed for the said two offences. This order has been

upheld by this Court with observations that, the Trial Court will have to decide both the aspects i.e. whether the offences have been committed at all and whether they have been committed in the line of duty or otherwise. The only next stage at which the trial Court can consider this objection is after adducing evidence under Section 244 Cr.P.C. Therefore, both the Courts are perfectly correctly in the view taken by them. Merely because the petitioners are in a hurry, there can be no pre-ponement of the stage of consideration in cases instituted otherwise otherwise than on police report. Besides, considering the facts and circumstances of the case, an opportunity to respondent no.1 to lead evidence on this aspect of the matter cannot be denied. The petitioners themselves being police officers are expected to be aware of the procedure. Therefore, the application dated 24th February, 2015 at Exhibit-5 for discharge filed by them is clearly an abuse of process of law. Since then, the petitioners have delayed till date, recording of evidence under Section 244 Cr.P.C. The petition is therefore dismissed with costs quantified at Rs.20,000/- to be paid in one set to respondent no.1.

[Smt. R. P. SondurBaldota, J.]