

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

CRIMINAL WRIT PETITION NO. 484 OF 2018

1. Pappu Pundlik Kharat
Age: 33 years, Occu.: Service,
R/o Shubhashree Colony,
CIDCO, Aurangabad.

2. Shakuntalabai Pundlik Kharat
Age: 61 years, Occu.: Househol,
R/o As above.

..PETITIONERS

VERSUS

State of Maharashtra

..RESPONDENT

Mr. R.S. Deshmukh, Advocate for petitioners.
Mr. S.D. Ghayal, A.P.P. for respondent - State.

CORAM : SANGITRAO S. PATIL, J.

DATE : 19th JUNE, 2018

ORAL JUDGMENT :-

Rule, returnable forthwith. With the consent of the learned Counsel for the petitioners and the learned A.P.P., heard finally.

2. The original accused in R.C.C. no. 1918 of 2016 have challenged the judgment and order dated 20th February, 2018 passed by the learned Additional Sessions Judge, Aurangabad in Criminal Revision Petition no. 150 of 2017,

whereby the order dated 21st June, 2017 passed by the Trial Court rejecting the application (Exh.20) filed by the present petitioners for discharge of the offences punishable under Sections 354-A(1), 323, 504, 506 read with Section 34 of the Indian Penal Code, has been set aside and the Trial Court has been instructed to record the evidence of the prosecution before framing of charges and then consider whether there are sufficient grounds to frame charges against the petitioners or not.

3. The learned Counsel for the petitioners submits that the informant – Smita Ravindra Kharat lodged an F.I.R. in Police Station CIDCO, Aurangabad, on the basis of which Crime no. 400 of 2016 came to be registered for the above mentioned offences. The investigation followed. After completion of investigation, charge-sheet came to be filed against the present petitioners for the above mentioned offences. The petitioners filed application (Exh.20) seeking their discharge of the above mentioned offences. The learned Judicial Magistrate First Class (Court no.33), Aurangabad rejected that application vide order dated 21st June, 2017. Being aggrieved by that order, the petitioners

filed Criminal Revision Petition no.150 of 2017, which was heard by the learned Additional Sessions Judge, Aurangabad, who, in turn, passed the impugned order.

4. The learned Counsel for the petitioners submits that as per the provisions of Section 239 of the Code of Criminal Procedure ("Code" for short), if the case is instituted on a police report, there is no provision of recording the evidence of the witnesses of the prosecution before framing of charges. It is only when the case is instituted otherwise than on police report, the Magistrate is supposed to record the evidence of the prosecution before framing of charge vide Section 244(1) of the Code and consider that evidence for the purpose of framing charges. The learned Counsel submits that the provisions of Section 244(1) of the Code are not applicable to the case instituted on a police report. The learned Additional Sessions Judge wrongly issued instructions to the learned Magistrate for recording evidence before framing of charges in a case instituted on a police report, which is against the provisions of Section 239 of the Code. He, therefore, prays that the impugned order passed by the learned

Additional Sessions Judge directing the learned Magistrate to record the evidence before framing charges, may be set aside.

5. The learned A.P.P. fairly concedes that in a case instituted on a police report, there is no provision under the Code to record evidence before framing of charge.

6. Section 239 of the Code reads as under :-

"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."

7. The bare reading of this Section would make it clear that in a case instituted on a police report, the Magistrate, before framing charges, has to consider the police report and the documents annexed thereto, examine the accused if he thinks necessary and give opportunity of

hearing to the prosecution and the accused. Recording of evidence of witnesses of the prosecution is not at all warranted prior to framing of charges in such a case. Here reference may be made to the case of **Ramnarayan Mor and Another Vs. The State of Maharashtra AIR 1964 SC 949** wherein it is observed in paragraph 10 of the judgment as under :-

"Section 251-A prescribes a special procedure for warrant cases, instituted upon police reports. In a case started otherwise than on a police report, the old procedure of examining witnesses and framing a charge on which the accused is to be tried continues to apply. But where the proceedings commence on a police report, the Magistrate has under Section 251-A(2) (Section 239 New) to consider the documents referred to in S. 173(4) and then to examine the accused, if necessary and to give the accused and the prosecutor opportunity of being heard. Under S. 251-A no provision is made for examination of witnesses before making an order under sub-sec. (2) discharging the accused or under sub-s. (3) framing a charge. Under sub-sec. (2) of S. 251-A the Magistrate may upon consideration of the documents referred to in S. 173(4) and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the

prosecutor and the accused an opportunity of being heard, discharge the accused if he considers the charge to be groundless, or frame a charge against him under sub-s. (3) if there is ground for presuming that the accused has committed an offence. In a warrant case therefore there will be no evidence of witnesses and the examination of the accused if found necessary by the Magistrate must of necessity be restricted to the circumstances appearing from the documents under S. 173 (4)."

8. As per sub-section (1) of Section 244 of the Code, when, in any warrant-case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution **and take all such evidence as may be produced in support of the prosecution.** Sub-section (1) of Section 245 contains that if, upon taking all the evidence referred to in Section 244, 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, the Magistrate shall discharge him. (Emphasis supplied)

9. It is clear from the provisions of Section 244(1) of the Code that it is only when the case is instituted otherwise than on a police report that the Magistrate has to take evidence as may be produced by the prosecution before framing of charge. It seems that the learned Additional Sessions Judge wrongly interpreted the words "examination of the accused" mentioned in Section 239 to mean "examination of witnesses". As stated above, examination of witnesses is not at all contemplated under Section 239 of the Code. The impugned order passed by the learned Additional Sessions Judge directing the learned Magistrate to record evidence of the prosecution before framing of charge is not supported by the provisions of Section 239 of the Code. It is liable to be quashed and set aside.

10. As seen from the impugned order, the learned Additional Sessions Judge has not considered the merits of the matter while setting aside the order passed by the learned Magistrate. It was expected of the learned Additional Sessions Judge to consider the facts of the case, the documents produced on record as well as the submissions made on behalf of the petitioners in respect of

the allegations made against them, pass a reasoned order to indicate whether there are sufficient grounds to proceed against the petitioners or not and then to record his finding about correctness or otherwise of the order passed by the learned Magistrate. No such exercise has been done by the learned Additional Sessions Judge. The learned Additional Sessions Judge decided the revision petition on the wrong assumption that under Section 239 of the Code, it was necessary for the learned Magistrate to record evidence of the prosecution before charge, hear the accused and then either to allow or to reject the application for discharge. The order passed by the learned Additional Sessions Judge being incorrect and illegal, is liable to be quashed and set aside in its entirety. The matter will have to be remanded for being considered afresh on merits thereof. I, therefore, pass the following order :-

ORDER

- (i) Criminal Writ Petition is allowed.
- (ii) The impugned judgment and orders are quashed and set aside.

- (iii) Criminal Revision Petition no. 150 of 2017 is remanded to the learned Additional Sessions Judge, Aurangabad for being decided afresh on merits, after extending the petitioners and the respondent necessary opportunity of being heard.
- (iv) The parties shall remain present before the learned Additional Sessions Judge on 03rd July, 2018.
- (v) Rule is made absolute in the above terms.
- (vi) Criminal Writ Petition is disposed of accordingly.

[SANGITRAO S. PATIL]
JUDGE