

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

WRIT PETITION NO. 4321 OF 2017

1. Anil Anand Kandane
2. Dr. Timothy Johns

.....Petitioners

V/s.

The State of Maharashtra

....Respondent

Mr. Deepak Girme for the petitioner.
Mr. Y. Y. Dabke APP for the State.

CORAM : NITIN W. SAMBRE, J.

DATE : MARCH 7, 2018.

P.C.

Leave to amend the prayer clause for quashing. Amendment to be carried out forthwith.

2 In C.C. No. 418134/2013 The State of Maharashtra Vs/ Anil Kandane pending on the file of Court of 8th Judicial Magistrate First Class at Pune, petitioners are prosecuted for alleged act of performing of operation and extending medical treatment on Yemen national from 22/04/2013 to 24/04/2013 for offence under section

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176 of the Indian Penal Code, section 5 of the Registration of Foreigners Act, 1939 Rule 14 (6) of the Registration of Foreigners Rules 1992 and Rule 2 of Foreigners (report to police) Order 1971.

3 In the said proceedings, petitioners/accused moved an application for discharge under section 239 of the Code of Criminal Procedure, 1973 which came to be rejected by an order dated 14/02/2017 passed by the learned Magistrate, confirmed in Revision Application no. 104 of 2017 vide order dated 21/09/2017 passed by Sessions Court, Pune. Petitioner has preferred this petition questioning the order of their prosecution.

4 The learned counsel for the petitioners would urge that the offence for which the petitioners are charge-sheeted are non cognizable. He would invite attention of this Court to the following penal statutory provisions, classification of offence and maximum punishment prescribed.

SECTION	ACT	CLASSIFICATION OF OFFENCE
S. 176	I.P.C.	S.I. 1 month/Fine Rs. 500 N.C.
S. 5 Rule 14 (6)	Registration of Foreigners Act 1939 Registration of Foreigners Rules 1992	Fine Rs. 500 N.C.
Rule 2	Foreigners (report to police) Order 1971	Nil

5 In the backdrop of the fact that the offence is non cognizable, he submits that in view of provisions of section 155 (2) of Code of Criminal Procedure, 1973 before initiating the prosecution against the petitioner, prosecution should have sought leave of the Court/learned Magistrate. He would urge that admittedly in the present case, prosecution of the petitioner is without obtaining leave of the Magistrate entrusted with powers to try or commit such case and as such, prosecution is liable to be quashed and set aside against him.

6 *Per contra*, the learned APP opposed the claim by submitting that provisions of section 239 of Code of Criminal Procedure, 1973 are applicable to a warrant case. That being so, the case in hand being a summons case, order of discharge cannot be passed in

exercise of the powers under section 239 of Code of Criminal Procedure, 1973. He prays for dismissal of the proceedings.

7 The fact remains that offence for which the petitioners were charge-sheeted are not cognizable. Provisions of section 155 (2) of Code of Criminal Procedure, 1973 reads thus:

“155 (1).....

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial”.

8 Plain reading of the aforesaid provision makes it clear that before initiating the prosecution against the petitioners for non cognizable offence, it was mandatory on the part of the prosecution to first seek leave of the Magistrate in accordance with section 155 of the Code of Criminal Procedure, 1973 and then to proceed against the petitioners.

9 Admittedly in the present case, no leave from the court of Magistrate was sought by the prosecution for proceeding against the petitioners in a non cognizable offence. In absence thereof, claim of

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the petitioner for prosecution against the petitioner itself is not maintainable, is required to be accepted.

10 Apart from above, it is to be noted that this Court is not going into the merits of the matter qua the availability of the provisions of section 239 of the Code of Criminal Procedure, 1973 to the petitioners claiming discharge from the prosecution.

11 This Court is dealing with the claim of the petitioners for quashing of the prosecution against them for non compliance of section 155 (2) of Code of Criminal Procedure, 1973. The learned counsel for the petitioners invite attention of this Court to Judgment of Division Bench delivered by Aurangabad Bench in the matter of **Shri Uday Kisan Gite Vs. The State of Maharashtra and another** in Criminal Writ Petition no. 1416 of 2015.

12 The Division Bench has taken a view that once the Statute mandates a procedure before initiating the prosecution and taking cognizance against the accused person to be followed, non

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compliance of the same vitiates the prosecution of the accused persons.

13 In the wake of above, in my opinion, prosecution initiated against the petitioner for want of leave from the Magistrate pursuant to the provisions of section 155 (2) of Code of Criminal Procedure, 1973 is not maintainable. As such charge-sheet no. 101 of 2013 initiated against the petitioners for offence under section 176 of the Indian Penal Code, section 5 of the Registration of Foreigners Act, 1939 Rule 14 (6) of the Registration of Foreigners Rules 1992 and Rule 2 of Foreigners (report to police) Order 1971 is hereby quashed and set aside. Writ petition stands allowed in the above terms.

[NITIN W. SAMBRE, J.]