

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

Criminal Writ Petition No.381 of 2018
(Mohd Hanif s/o Abdul Rashid and others .vs. State of Maharashtra through
Police Station Officer, P.S. Lakadganj, Nagpur and another)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders.

Mr. Subodh Dharmadhikari, Senior Advocate with Mr. U.P. Dable,
Advocate for Petitioners.

Ms. Shamsi Haider, Additional Public Prosecutor for Respondent
No.1.

Mr. R.H. Rawlani, Advocate for Respondent No.2.

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Coram : Manish Pitale, J.

Date of Reserving order : June 28, 2018.

Date of Pronouncing Order : July 05, 2018.

The petitioners herein have filed this writ petition praying for quashing and setting aside order dated 27.06.2017 passed by the Court of Judicial Magistrate First Class, Nagpur (Magistrate) taking cognizance of offences under Sections 143, 147, 148, 149 and 307 of the Indian Penal Code (IPC) and sections 4 and 25 of the Arms Act, 1959. The petitioners have also prayed for setting aside judgment and order dated 21.02.2018 passed by the Sessions Court, Nagpur, whereby the criminal revision application filed by them challenging the said order of the Magistrate was dismissed by the Sessions Court.

2. The Magistrate took cognizance for the said offences and issued summons to the petitioners pertaining to an incident that took place on 01.06.2015. The petitioners herein have claimed that respondent no.2 and others came to the house of petitioner no.3 Abdul Mujeeb and assaulted him and his family with deadly weapons. On this basis, Crime No. 213 of 2015 was registered at Lakadganj Police Station, Nagpur. The respondent no.2 also lodged a complaint in respect of the same incident against the petitioners, which came to be registered as Crime No. 214 of 2015 in the said Police Station.

3. On the basis of the said complaint and registration of first information report (FIR) against the petitioners, investigation was undertaken by the Police. Upon completion of investigation in the aforesaid Crime No. 214 of 2015 against the petitioners, the investigating officer found that although FIR was registered for offences under Sections 307, 343, 147, 148 and 149 of the IPC and Sections 4 and 25 of the Arms Act, an offence only under Section 334 of the IPC was made out i.e. voluntarily causing hurt on provocation. This is a non-cognizable and bailable offence triable by the Magistrate.

4. When the said final report was submitted by the investigating officer for offence punishable

under Section 334 of the IPC, the Magistrate took into consideration the charge sheet and the entire aforesaid report of the investigating officer. Upon hearing the A.P.P. and the counsel for the informant, the Magistrate disagreed with the report of the investigating officer and found that prima facie offences under Sections 143, 147, 148, 307 read with 149 of the IPC and under Sections 4 and 25 of the Arms Act were made out against the petitioners. On this basis, by impugned order dated 27.06.2017, the Magistrate took cognizance of the offences and issued summons against the petitioners.

5. Aggrieved by the said order, the petitioners filed Criminal Revision Application No. 252 of 2017 before the Sessions Court, Nagpur. Before the Sessions Court, it was submitted on behalf of the petitioners that the Magistrate could not have differed from the opinion of the investigating officer in the final report and that, therefore, the order dated 27.06.2017 issued by the Magistrate was unsustainable. It was also submitted that there was no application of mind by the Magistrate while passing the said order dated 27.06.2017, due to which it deserved to be set aside.

6. By the impugned judgment and order dated 21.02.2018, the Sessions Court, Nagpur

dismissed the revision application of the petitioners and confirmed the order of the Magistrate. Sessions Court found that as per settled law, the Magistrate was not bound by the final report submitted by the Police and that there was power in the Magistrate to independently apply his mind to the material on record to pass appropriate order. The Sessions Court also analysed the manner in which the Magistrate had issued summons and it found that the material on record had been taken into consideration while passing the order. On this basis, the revision application of the petitioners was dismissed. Aggrieved by the same, the petitioners have filed this writ petition.

7. Mr. Subodh Dharmadhikari, learned senior counsel appearing on behalf of the petitioners, submitted that although there could not be any quarrel with the proposition that the Magistrate was not bound with the final report submitted by the Police upon completion of investigation, when the Magistrate differed from the opinion in the final report, he was expected to apply his mind to material on record and to take into consideration the entire material, including statements of all witnesses before issuing summons for offences other than the offence that was recommended in the final report. It was submitted that in the present case, the Magistrate took into consideration

statement of only three witnesses, who were already accused in the cross case and that the statements of two independent witnesses were not taken into account by the Magistrate while passing the impugned order dated 27.06.2017, issuing summons against the petitioners. It was submitted that the Sessions Court also did not refer to the relevant material on record and there was no application of mind by the Sessions Court while deciding the revision application. Reliance was placed on judgment of the Hon'ble Supreme Court in the case of **Nupur Talwar .vs. C.B.I. - (2012) 12 Supreme Court Cases 188.**

8. Per contra Mr. R.H. Rawalani, learned counsel appearing on behalf of respondent no.2 (original complainant), submitted that the Magistrate was only expected to examine prima facie the truth or falsehood of the allegations and that in the present case a perusal of the order dated 27.06.2017 passed by the Magistrate demonstrated that there had been application of mind on the part of the Magistrate while issuing summons to the petitioners. It was submitted that no error can be attributed to the Sessions Court when it dismissed the revision application of the petitioners because as per settled law the higher courts are not supposed to substitute their own discretion for that of the Magistrate when the Magistrate has found

sufficient material on record to differ with the opinion of the investigating officer by directing issuance of summons against the accused. Reliance was placed on judgment of the Hon'ble Supreme Court in the case of **Fiona Shrikhande .vs. State of Maharashtra - (2013) 14 Supreme Court Cases 44.**

9. Heard counsel for the parties. On behalf of the petitioners, learned senior counsel fairly conceded that it could not be argued that the Magistrate was bound by the opinion of the investigating officer in the final report submitted with the charge sheet. The main objection raised against the impugned orders on behalf of the petitioners was that the Magistrate had issued summons against the petitioners for offence under Section 307 of the IPC, as against offence under Section 334 of the IPC recommended in the final report by the investigating officer, without proper application of mind to the entirety of material on record. It was submitted that only selective material in the form of statements of witnesses who were accused in the cross case were taken into consideration, while statements of independent witnesses were not at all considered while issuing summons against the petitioners for offence under Section 307 of the IPC. According to the learned senior counsel, the Magistrate had issued summons

in a casual manner and this was impermissible, particularly when the Magistrate in the present case differed with the opinion of the investigating officer, while exercising jurisdiction under Section 190 of the Code of Criminal Procedure.

10. A perusal of the order dated 27.06.2017 passed by the Magistrate while issuing summons shows that the Magistrate perused the final report submitted by the investigating officer and the statements of the witnesses and it was found by him that the Police at the threshold could not have concluded that offence only under Section 334 of the IPC was made out. The Magistrate then referred to the manner in which the incident had occurred and found that a prima facie case under Section 307 of the IPC was made out against the petitioners. The relevant portion of the order of the Magistrate reads as follows:-

“4. Having a leaf into the report and the statement of the witnesses, particularly Juber Ahmad, Rehan Ahmad, Abdul Sattar, recorded u/s 161, Cr.P.C. the prima facie offence u/s 143, 147,148, 307 r/w 149, IPC and u/s 4/25, Arms Act has been made out. At the threshold stage the police could not have concluded regarding the aspect of provocation, which is an element to be dealt in the course of evidence and trial. So also, the police could not have made their opinion in view of the cross report

filed by the accused against the informant and others. Both the reports and cases are different and the material of one case could not have been considered in an another case. The report and statements clearly spell out that victim has been wounded on his head with a sword and so also informant saved himself from the ghastly attack of sword on his neck. It could also be read from the report that accused were armed with arms and one of them, namely Abdul Hanif, accused number 12 exhorted other accused to kill the informant and others. The vital aspect for an offence u/s 307, IPC is the intention and not the nature of injury. Perhaps, there may not be any injury still having intention to kill would make out a case u/s 307, IPC. Viewed from this angle, the opinion of medical officer cannot be given much weight at this juncture of the case.

5. *In evaluation I am of the view that prima facie a case u/s 143, 147, 148, 307 r/w 149, IPC and u/s 4/25, Arms Act has been made out qua accused. Hence , accused needs to be summoned to answer the charge and face the trial for the offences u/s 143, 147, 148, 307 r/w 149, IPC and u/s 4/25, Arms Act. Accordingly, issue summons to accused number 1 to 12 to appear and furnish bail of Rs.15000/- each for an offence u/s 143, 147, 148, 307 r/w 149, IPC and u/s 4/25, Arms Act. Summons shall be returnable on 27.07.2017. Administrative office of this Court is directed to register this case in the nature of warrant trial."*

11. In the judgment in the case of **Nupur Talwar .vs. C.B.I.** (supra), the Hon'ble Supreme Court has held as follows:-

"15. Now the question is: what should be the extent of judicial interference by this Court in connection with an order of taking cognizance by a Magistrate while exercising his jurisdiction under Section 190 of the Code?

16. Section 190 of the Code lays down the conditions which are requisite for the initiation of a criminal proceeding. At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him. In doing so, the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion irrespective of the views expressed by the Police in its report and may prima facie find out whether an offence has been made out or not.

19. The correctness of the order whereby cognizance of the offence has been taken by the Magistrate, unless it is perverse or based on no material, should be sparingly interfered with. In the instant case, anyone reading the order of the Magistrate taking cognizance, will come to the conclusion that there has been due application of mind by the Magistrate and it is a well reasoned order. The order of the High Court passed on a Criminal Revision under

Sections 397 and 401 of the code (not under Section 482) at the instance of Dr. Mrs. Nupur Talwar would also show that there has been a proper application of mind and a detailed speaking order has been passed.”

12. The Sessions Court while dismissing the revision application of the petitioners also applied its mind and found that the Magistrate was satisfied on the basis of material on record before issuing summons against the petitioners under Section 307 and other provisions of the IPC. In the case of **Fiona Shrikhande .vs. State of Maharashtra** (supra), the Hon’ble Supreme Court has held as follows:-

“11. We are, in this case, concerned only with the question as to whether, on a reading of the complaint, a prima facie case has been made out or not to issue process by the Magistrate. The law as regards issuance of process in criminal cases is well settled. At the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to prima facie satisfy whether there are sufficient grounds to proceed against the accused and it is not the province of the Magistrate to enquire into a detailed discussion on the merits or demerits of the case. The scope of enquiry under Section 202 is extremely limited in the sense that the Magistrate, at this stage, is expected to examine prima facie the truth or falsehood of the allegations

made in the complaint. The Magistrate is not expected to embark upon a detailed discussion of the merits or demerits of the case, but only consider the inherent probabilities apparent on the statement made in the complaint. In Nagawwa v. Veeranna Shivalingappa Konjalgi, this Court held that once the Magistrate has exercised his discretion in forming an opinion that there is ground for proceeding, it is not for the Higher Courts to substitute its own discretion for that of the Magistrate. The Magistrate has to decide the question purely from the point of view of the complaint, without at all adverting to any defence that the accused may have."

13. Thus, as per the aforesaid position of law, the higher courts are not supposed to substitute their own discretion for that of the Magistrate while examining whether the Magistrate was justified in issuing summons against the accused for specific offences. In the present case, a perusal of the above quoted portion of the order of the Magistrate shows that the Magistrate has considered the material on record and upon applying his mind to the same, he has exercised his discretion in issuing summons to the petitioners under Section 307 and other provisions of the IPC, by differing with the opinion submitted before him in the final report by the investigating officer. The Magistrate has recorded that he has perused the statements of the

witnesses. Therefore, there is no substance in the contention raised on behalf of the petitioners that statements of independent witnesses have been ignored. There is no doubt about the position that if the material on record warrants, the Magistrate is empowered to take a different view from the final report submitted before him and to issue summons to the accused. There is nothing in the present case to show that the Magistrate has issued summons against the petitioners in a perverse manner or that the order issued by him is based on no material. The stage of issuance of summons by the Magistrate necessarily involves *prima facie* opinion and exercise of discretion by the Magistrate. The higher courts cannot sit in appeal over the same as if an order on the issue of discharge or challenge to conviction is involved. The standard of examination of question concerning issuance of summons by the Magistrate cannot be raised to the level as if the conviction or acquittal of the accused is involved.

14. In the present case, there is nothing to show that the order dated 27.06.2017 issued by the Magistrate was of such a nature that it deserved to be interfered with either by the Sessions Court exercising revisional jurisdiction or this Court exercising writ jurisdiction. Neither the Sessions Court nor this Court can substitute its own discretion for that of the Magistrate, particularly

when it has not been demonstrated on record as to how the exercise of jurisdiction by the Magistrate in the present case suffers from any perversity.

15. Therefore, there is no merit in the grounds of challenge raised in the present writ petition while challenging the impugned orders passed by the Magistrate and the Sessions Court. Accordingly, the writ petition is dismissed.

JUDGE

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