

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRM-M No.26849 of 2013

Decided on: 07.05.2018

Sukhbir

....Petitioner

Versus

Davender Warden

....Respondent

CORAM: HON'BLE MR JUSTICE ARVIND SINGH SANGWAN

Present : Mr. S.S. Narula, Advocate
for the petitioner.

Mr. N.S. Shekhawat, Advocate
for the respondent.

ARVIND SINGH SANGWAN, J. (Oral)

Prayer in this petition is for setting-aside the order dated 17.07.2013 (Annexure P1) passed by the Revisional Court vide which while setting-aside the order dated 08.03.2011 (Annexure P5) passed by the trial Court, summoning the respondent along with other co-accused in a criminal complaint filed by the petitioner under Sections 307, 323, 506, 148, 149 and 120-B IPC of the Indian Penal Code (in short 'IPC') was set-aside and the case was remanded back by recording a finding that no offence punishable under Section 307 IPC is made out.

Brief facts of the case are that the petitioner has filed a criminal complaint No.421 of 2008 dated 08.03.2011 before the Additional Chief Judicial Magistrate, Hisar. It is alleged in the complaint that the petitioner was in judicial custody in FIR No.116 dated 10.02.2017 registered under Section 302 read with Section 34 IPC at Police Station Sadar Hisar and was lodged in Borstal Jail, Hisar w.e.f. 14.02.2017. It is further alleged in the complaint that the family

of deceased person in the aforesaid FIR and some witnesses hatched a conspiracy with the staff members of Borstal Jail, Hisar, to kill the petitioner and on 20.09.2008, the petitioner was confined in a room where he was beaten up with belt and a stick was inserted in his anus. The petitioner bleed profusely and lost his consciousness and he was left to die in the room. The petitioner regained consciousness on the next day and was taken out from the room but again the accused persons threatened to kill him, in case, if he inform the incident to anyone. It is further stated in the complaint that the father of the petitioner, came to meet him in Jail on 24.09.2008 and he narrated the entire incident to his father, who moved an application before the Sessions Judge, Hisar on 27.09.2008 for the medico legal examination of the petitioner. The petitioner was medico legally examined by the Medical Officer, Government Hospital, Hisar where the doctor has wrongly recorded that the petitioner had fallen from the stairs, under the pressure of the accused persons. Since, the police has not taken any action, the complaint was filed.

The petitioner – Sukhbir in his preliminary evidence examined himself as PW1 and reiterated the version given in the complaint. PW2 – Dharambir, father of the petitioner also deposed on the line of the complaint and stated that he has moved an application before the Sessions Judge, Hisar for medical examination of the petitioner. PW3 – Krishan and PW4 – Santro, mother of the petitioner also deposed on the similar line.

Thereafter, Dr. Dalel Singh, Medical Officer, General Hospital, Hisar, who conducted the medico legal examination of the

petitioner appeared as PW5 and made the following statement with regard to his examination conducted on 29.09.2008:-

“On dated 29.9.08, I medico legally examined Sukhbir son of Dharmbir, 21 years male confined in Borstal Jail, Hisar. He was brought by Constable Bhup Singh – 1305, at about 05:15 P.M. with alleged history of fall from stairs and I found following injury:-

“Both buttocks were having areas of redness with scabs formation, which is dry and coming off at places. No oozing of discharge present. Patient was complaining of itching on both buttocks. He reports improvement with the medicine prescribed by skin specialist of GH, Hisar, on dated 26.9.08. He was advised to continue the same treatment and follow up in skin OPD. No mark of any external injury seen. I have brought the original MLR, the photocopy of which is Ex.PW5/A.

RO&AC

*Recorded on my dictation
Sd/-
(Anshu Shukla)
ACJM/Hisar. 20.11.09”*

After closing of the preliminary evidence, the trial Court summoned the respondent as well as the 08 other accused persons for facing the trial under Sections 307, 323, 506, 148, 149 and 120-B IPC vide order dated 08.03.2011. The operative part of the order passed by the trial Court is reproduced as under:-

“3. I have perused the case file very carefully with the assistance of learned counsel for the complainant.

4. In view of the submissions made by the learned counsel on behalf of the complainant as well as on perusal of the statements of the witnesses and on perusal of the documents placed on file I come to the conclusion

that prima facie there is sufficient evidence on file to proceed against the accused under Sections 307/323/506/148/149/120-B of the Indian Penal Code for 9.6.2011 on compliance of Section 204 Cr.P.C.

*Announced in Open Court
8.3.2011*

*Sd/-
Addl. Chief Judl. Magistrate
Hisar.”*

Thereafter, the respondent was arrayed as accused No.6 in the complaint and he filed a revision before the Court of Sessions and the Additional Sessions Judge, Hisar vide impugned order dated 17.07.2013 allowed the revision petition and while setting-aside the order passed by the trial Court, remained the case back for passing afresh order. The operative part of the judgment passed by the Revisional Court is reproduced as under:-

“12. I have heard Shri P.K. Sandhir, learned counsel for revisionist/accused and Shri J.S. Malhi, learned counsel for complainant/respondent and have gone through the case file carefully.

13. In the present case, the complainant alleged that injury was caused by the accused on 20.09.2008 at about 05:30 PM with an intention to kill him; That thereafter, he was threatened and on 24.09.2008, he was produced before the Court; That there his father suspected some wrong, but upon his asking, the complainant did not utter anything; That in the evening when the father of complainant came to Borstal Jail, the complainant narrated all the facts regarding the incident, upon which the application was given by father of complainant, through his counsel, in the Court of learned Sessions Judge on 27.09.2008. But the fact that danda was thrust in the anus of complainant, was not stated in the said application. As per evidence, the complainant disclosed

said fact to his father, but as to why said fact was not mentioned in the said application, has not been explained in the complaint filed by the complainant; the fact that due to fear, he could not disclose all the facts to his father has also not been stated by the complainant, neither in his complaint nor in his statement, nor it has been stated that all the facts were not disclosed to his father.

14. Upon presentation of said application, learned Sessions Judge directed jail authorities to get the complainant medically examined from General Hospital, Hisar. It was stated in the complaint that he was again threatened and was then sent to General Hospital, Hisar, for the purpose of medical examination, but it has not been alleged that he was threatened not to disclose the injury in the anus region to the Doctor. Dr. Dalel Singh PW5 who examined the complainant has reported, injuries only upon the buttocks and it was reported that both buttocks were having redness with scabs formation, which was dry and coming off at places. It has also not been alleged that all the injuries were not mentioned in the MLR prepared by Doctor and that the injury on the anus region was healed. In this manner, PW5 recorded only the injury, which was allegedly caused to the complainant by the accused with belts. The injury on the anus region has not been recorded by PW5 Dr. Dalel Singh, nor the complainant informed Doctor regarding said injury. Dr. Dalel Singh when appeared into witness-box in preliminary evidence as PW5 was also not asked that thrusting of danda in the anus region can be dangerous to life.

15. In view of the evidence, it cannot be said that there was any injury in the anus region, so as to bring this case a case of offence punishable under Section 307 of IPC. In the present case, PW5 Dr. Dalel Singh has not given any statement regarding possibility of causing death

due to the other injury mentioned in the MLR. Had there been any injury on anus region capable of being declared dangerous to life, traces of same should have been present at the time of examination of complainant by PW5 Dr. Dalel Singh, particularly when the complainant stated that blood oozed due to that injury.

16. *Therefore, intention of accused cannot be inferred from the evidence brought on record by the complainant in the present case, of their committing offence under Section 307 of IPC. Mere suspicion of complainant of commission of attempt to murder is not sufficient to summon the accused for commission of offence under Section 307 of IPC. Mere suspicion cannot take place of proof.*

17. *No case under Section 307 of IPC is made out as the complaint is based on no evidence to establish the commission of offence punishable under Section 307 of IPC. The judgment of Hon'ble Apex Court in case State of Madhya Pradesh, Appellant vs Imrat & another, respondents (supra) is not applicable to the facts of the case, as in that case, the intention of the accused was inferred from their action, whereas, in his case, it cannot be inferred. The judgment of Hon'ble Punjab & Haryana High Court in case Chander Kalan vs Rameshwar and others (supra) also cannot be followed as the complainant has failed to prove prima facie case in his favour and suspicion shown by the complainant is also not strong enough to summon the accused for commission of offence punishable under Section 307 of IPC.*

18. *It seems that lower court did not evaluate the evidence of the complainant and passed order in a mechanical manner. The order shows that the lower court did not apply her mind to the facts of the case and the law applicable thereto. In view of judgment in case titled as*

Pepsi Food Ltd. vs Special Judicial Magistrate, 1998 SCC (Criminal) 1400, the lower court did not discharge its duty properly, the relevant part is reproduced as under:-

Para No.28:-

“Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral as well as documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.

19. Therefore, in my opinion, summoning of accused for commission of offence under Section 307 of IPC is not sustainable. Hon'ble Apex Court in case Smt. Nagawwa vs Veeranna Shivalingappa Konjalgi and others 1976 Cril. L. J. 1533, has held that an order of the Magistrate issuing process against the accused can be quashed or set-aside in the following cases:-

1. Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out

absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused.

2. Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused.

3. Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

4. Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the life.

20. The order passed by the lower court for summoning the accused for commission of offence under Section 307 of IPC is liable to be modified in view of observations of Hon'ble Apex Court in Smt. Nagawwa versus Veeranna Shivalingappa Konjalgi and others (supra). As such, revision in hand is partly accepted and learned lower court is directed to pass a fresh order in the light of observations made above for further proceedings against the accused. The parties through their counsel are directed to appear before learned ACJM, Hisar on 22.07.2013. The copy of this order be kept in the case titled Sukhbir Vs. Sunil etc. pending in this court, while the revision file be consigned to records after due compliance.

Announced:17.07.2013

*Sd/- 17.07.2013
(Chandra Shekhar)
Addl. Sessions Judge,
Hisar.”*

Counsel for the petitioner has submitted that the petitioner, while being in judicial custody was tortured by the respondent and other staff members, who were officials of the Borstal Jail, Hisar, in conspiracy with the family members of the person, who was murdered qua which the aforesaid FIR No.116 dated 10.02.2007 under Section 302 read with Section 34 IPC was registered against the petitioner at Police Station Sadar Hisar. Counsel for the petitioner has further submitted that in the medico legal examination of the petitioner, no such injury was reported because the doctor was under the influence of the respondents. It is further submitted that the father of the petitioner has moved an application before the Sessions Judge, Hisar on 24.09.2008 highlighting the incident and only, thereafter, the medico legal examination of the petitioner was conducted.

Counsel for the petitioner has relied upon the judgment passed by the Hon'ble Supreme Court ***“State of M.P. vs M/s. Imrat and another”***, 2008(11) SCC 523 to submit that in order to prove an offence punishable under Section 307 IPC, it is not essential that bodily injury capable of causing death must be inflicted and Court has to see whether the act irrespective of its result was done with intention on knowledge and under circumstances mentioned in the Section. Counsel for the petitioner has further submitted that the Revisional Court while setting-aside the summoning order has recorded a finding that prima facie offence punishable under Section 307 IPC is not made out and at the stage of summoning of a person, the only requirement is that a prima facie offence is made out.

Counsel for the respondent, on the other hand, has opposed the submissions made by counsel for the petitioner on the ground that the father of the petitioner moved an application before the Sessions Judge, Hisar, but no such complaint was made regarding inserting a stick/danda in the anus of the petitioner.

It is further submitted that as per the statement of PW5 – Dr. Daler Singh, the petitioner has stated that he had suffered the injuries 8-9 days back due to fall from the stairs.

It is, thus, submitted that the petitioner himself has never declared any such incident before the Medical Officer posted at Government Hospital, Hisar and the said doctor is not subordinate to the respondent/accused persons and there was no reason as to why the petitioner has not disclosed about the injuries which are mentioned in the complaint.

Counsel for the respondent has also argued that as per the statement of the doctor made in the Court, coupled with the injuries shown in the MLR, the injuries were found on the buttocks of the petitioner and not on the anus part.

PW5 has even deposed that the petitioner was getting treatment from a skin specialist and was showing improvement and in case of any injury on the anus, it is not for the skin specialist to treat such patient. Counsel for the respondent with reference to the statement of PW5 – Dr. Dalel Singh and the MLR Ex.PW5/A has further argued that, in fact, the nature of injuries suggest that the petitioner had fallen from the stairs.

It is further submitted that from the statement of PW5 – Dr. Dalel Singh, it has not come on record that the nature of injuries sustained by the petitioner were either dangerous to life or in the absence of special treatment or urgent medical attention, it could have caused the death of the patient.

Counsel for the respondent has further submitted that the father of the petitioner even subsequently moved an application on 08.12.2008 to the Inspector General of Jail, Haryana, Panchkula for transfer of the petitioner from Bostal Jail, Hisar to any other jail and in this application (Annexure R2), it is stated that the petitioner was given beatings with leather belt and due to this reason, the MLR of his son was prepared by the Civil Hospital, Hisar.

It is, thus, submitted that the stand taken by the petitioner in the present complaint is against the plea of father of the petitioner that he sustained injuries on account of beatings by leather belt.

Counsel for the respondent has also submitted that on the application given by father of the petitioner to the District and Sessions Judge, Hisar, an enquiry was marked to the Illaqa Magistrate to hold a preliminary enquiry and later on, the same was entrusted to the Additional Chief Judicial Magistrate, Hisar. In the said enquiry, after recording the statement of 08 witnesses, the Additional Chief Judicial Magistrate, Hisar has held that none of the above witness uttered anything regarding the maltreatment of the complainant in the hands of the Deputy Superintendent (jail) and other officials and, therefore, the only bald statement of PW1 – Sukhbir Singh, the present petitioner is not enough to prove the allegations against the jail officials and

recommended that there is no force in the complaint. Thereafter, no further action was taken by the District and Sessions Judge, Hisar. Counsel for the respondent has further argued that while filing the complaint, the petitioner has concealed the fact of aforesaid enquiry, conducted by the Additional Chief Judicial Magistrate.

After hearing the counsel for the parties, I find no merit in the present petition for the following reasons:-

a) On an application moved by father of the petitioner to the District and Sessions Judge, Hisar, an enquiry was marked to the Illaqa Magistrate which was later on entrusted to the Additional Chief Judicial Magistrate, Hisar. During the enquiry, 08 witnesses were examined by the Additional Chief Judicial Magistrate, Hisar and it was held that none of the witnesses deposed anything against the Deputy Superintendent (Jail) and other jail officials regarding causing of any injury or maltreatment to the petitioner and it was recommended that there is no force in the complaint. It was further held that the statement of PW1 – Sukhbir Singh, the present petitioner is not enough to prove the allegation. The petitioner has concealed the factum of the enquiry conducted by the Additional Chief Judicial Magistrate, Hisar in the complaint and the trial Court has passed the summoning order without going through the same.

b) Even from the statement of PW5 – Dr. Dalel Singh and MLR Ex.PW5/A, the nature of injury alleged by the petitioner is not proved rather it suggest that the petitioner has fallen from the stairs. This witness i.e. PW5 – Dr. Dalel Singh, was a Medical Officer posted at Government Hospital, Hisar and at the time of medical examination, the petitioner never disclosed that the respondents have inserted a stick in his anus and rather it

was stated that the injuries were found on the buttocks of the petitioner and not on the anus part and therefore, the allegations of the petitioner are prima facie not proved. A perusal of the statement of PW5 further show that the petitioner was getting treatment from a skin specialist showing improvement, which also suggest that the injury was not on the anus part of the petitioner. From the statement of PW5 and MLR Ex.P5/A, it is not proved that the injury was dangerous to life or in the absence of any special medical attention, it could have caused the death of the patient.

c) The father of the petitioner had given an application on 08.12.2008 to the Inspector General (Jail) Haryana seeking transfer of the petitioner from Borstal Jail, Hisar to some other jail and in the application (Annexure R2), it is stated that the petitioner was given beatings with a leather belt and he was medically examined at the Civil Hospital, Hisar. The allegation of the petitioner that he informed his father about the injury sustained by him is not mentioned in this application.

d) Lastly, the Revisional Court has only remanded the case back to the trial Court to pass a fresh order by observing that the offence under Section 307 IPC is not made out by passing a detailed judgment by holding that the trial Court has not evaluated the evidence in proper manner.

In view of what has been discussed hereinbefore, this petition is dismissed.

(ARVIND SINGH SANGWAN)
JUDGE

07.05.2018
yakub

Whether speaking/reasoned	Yes/No
Whether reportable:	Yes/No