

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

**CRIMINAL WRIT PETITION NO.155 OF 2018
with
CRIMINAL WRIT PETITION NO.156 OF 2018
with
CRIMINAL WRIT PETITION NO.157 OF 2018**

- 1) Abdul Jaweed s/o Sy. Rasheed,
Age-34 years, Occu: Business,
R/o Qurban Ali Shah Road, Dargah
Road, Parbhani, Dist. Parbhani.
- 2) Abdul Majeed s/o Abdul Rasheed,
Age 42 years, Occu: Business,
R/o As above.
- 3) Shaikh Shakil s/o Shaikh Maqbool
Age 29 years, Occu: Labour,
R/o As above.
- 4) Shaikh Javeed Khan s/o Sattar Khan,
Age 26 years, Occu: Labur,
R/o As above.

... **PETITIONERS**

Versus

- 1) The State of Maharashtra
Through In-charge Police Station,
Kotwali Police Station, Parbhani,
Tq. & District Parbhani.
- 2) Mohd. Atique s/o Mohd. Ibrahim
Age 35 years, Occu: Private Service,
R/o Khwja Colony, Parbhani,
Tq. & District Parbhani.

... **RESPONDENTS**

...
Advocate for Petitioners : Mr. Rajendra S. Deshmukh
A.P.P. for Respondent-State : Mr. B.V. Virdhe
Advocate for Respondent No.2 : Mr. S.S. Rathi
...

CORAM : MANGESH S. PATIL, J.
DATE : 24.09.2019

JUDGMENT :-

Since the petitioners have preferred separate Writ Petitions, though they are challenging the common order whereby the learned Additional Sessions Judge decided three different applications in the same case viz. Sessions Trial No. 76 of 2015. Hence all the three petitions are being disposed of by this common judgment.

2. Heard. Rule. The Rule is made returnable forthwith. The learned A.P.P. waives service for the respondent-State and the learned advocate Mr. S.S. Rathi waives service for the respondent no.2, who is the original complainant. With the consent of the parties the matters are heard finally at the stage of admission.

3. It is necessary to note the history. On 13.02.2011 the petitioners and the respondent no.2 and his associates indulged in some scuffle on account of previous animosity. The F.I.R. was lodged by one of the present petitioners on 13.02.2011 and Crime No. 34 of 2011 was registered for the

offences punishable under Section 307, 341, 147, 149 etc. of the I.P.C. against respondent no.2 and few other persons. The respondent no.2 and his associates were arrested. The charge-sheet was filed and the case was committed to the Sessions Court and has been pending as Sessions Trial Case No. 29 of 2012. The trial commenced and has reached the stage of examination of the accused under Section 313 of the Cr.PC.

4. It appears that the respondent no.2 also lodged the F.I.R. on 14.02.2011 about the self same incident. Accordingly, Crime No. 35 of 2011 was registered for the offences punishable under Section 324, 323, 147, 148, 149 etc. of the I.P.C. The petitioners were arrested. The investigation was completed and the charge-sheet was filed in the Court of Magistrate.

5. It appears that since it was a case triable by the Magistrate that trial was going on before the Magistrate. It also appears that at the request of the accused therein, the learned Sessions Judge directed to transfer this R.C.C. No. 568 of 2011 pending on the file of the Magistrate to be heard with Sessions Trial No. 29 of 2012. Accordingly, the case was committed to the Sessions Court and was registered as Sessions Trial No. 76 of 2015 on 04.07.2015.

6. When both such trials were going on before the Sessions Court,

the respondent no.2 through his advocate submitted the application (Exhibit-18) and prayed for adding the charge for the offences punishable under Section 307 and 326 of the I.P.C. He also filed application (Exhibit-20) again through his advocate seeking leave to produce some documents. The petitioners who are the accused in Sessions Trial No. 76 of 2015 also submitted application (Exhibit-23) under Section 227 of the Cr.P.C. and claimed discharge.

7. After hearing the parties, by the impugned common order the learned Additional Sessions Judge allowed the application (Exhibit-18) for addition of charge and the application (Exhibit-20) for production of documents both of which were filed by respondent no.2 herein but rejected the application (Exhibit-23) for discharge preferred by the petitioners. Hence these separate Writ Petitions impugning the self same order qua each application i.e. (Exhibits-18, 20 and 23).

8. The learned advocate for the petitioners vehemently submits that since it was a State case, the respondent no.2 in his individual capacity could not have filed the applications (Exhibits-18 and 20). The prosecution has to be conducted by the prosecutor. At the most, the injured or victim or the complainant can assist the prosecutor. However bye-passing the procedure

the respondent no.2 in his individual capacity by engaging his own advocate submitted these applications and therefore for this reason alone the learned Additional Sessions Judge has grossly erred in firstly allowing such applications to be filed and then considering them on merits and allowing them.

9. Independently, according to the learned advocate, both these applications (Exhibits 18 and 20) were opposed by the prosecution / Investigating Officer. In view of such opposition by the prosecution, the learned Additional Sessions Judge ought not to have allowed these applications. The procedure adopted by him is alien to the Code of Criminal Procedure. Even for this reason the learned Additional Sessions Judge ought to have rejected these two applications.

10. Even on merits, according to the learned advocate, it was the prerogative of the learned Additional Sessions Judge to add to or alter the charge in view of the provisions of Section 216 of the Cr.PC. and based on the material before him he could have invoked that power at an appropriate stage. When according to the Investigating Officer, the offences punishable under Section 307 and 326 could not be made out on the basis of the material collected by him, the learned Additional Sessions Judge ought not to have

directed the charge to be added for the offences punishable under Section 307 and 326 of the I.P.C. The learned advocate would further submit that the documents sought to be produced by the respondent no.2 ought to have been produced before the Investigating Officer. The offence was registered in the year 2011 and at no point of time the documents were sought to be produced before the Investigating Officer. Even the Investigating Officer had visited the private hospital where the respondent no.2 was allegedly treated and therefore, production of the case paper of that private hospital at such belated stage should not have been allowed at the insistence of the respondent no.2 particularly when the prosecution was opposing it.

11. As far as the discharge application (Exhibit-23) is concerned the learned advocate submits that there was a delay in filing the F.I.R at the instance of the respondent no.2, it is only as an afterthought, as a counter blast to the F.I.R. lodged by the petitioners that the F.I.R. in the present case was filed on the next day. There were no sufficient grounds to frame the charge and the learned Additional Sessions Judge has committed an error in rejecting the application of discharge (Exhibit-23).

12. The learned advocate would submit that when the Sessions Trial initiated on the basis of the F.I.R. lodged by the petitioners has reached the fag

end where the examination of the respondent no.2 and the other accused under Section 313 of the Cr.P.C. is to take place that the present applications (Exhibit-18 and 23) have been filed. For all these reasons the impugned order is grossly illegal and may be set aside. The applications (Exhibit-18 and 20) be rejected and application for discharge (Exhibit-23) be allowed.

13. The learned A.P.P. and the learned advocate for the respondent no.2 support the order.

14. I have carefully gone through the papers of the impugned order. It is indeed very surprising that the respondent no.2 in his individual capacity was allowed to file the applications (Exhibit-18 and 20) seeking addition of the charge and production of documents respectively under his own signature and the signature of his advocate and the applications were not filed through the public prosecutor who was conducting the trial on behalf of the State. Needless to state that it is only the public prosecutor who can conduct the prosecution. The only leverage that can be granted to a complainant / injured is to assist the prosecutor. Independently on his own, the injured or the complainant has no right to participate in the trial being conducted by the prosecutor. Bye-passing such mandate of law, the learned Additional Sessions Judge has allowed these applications to be filed by the respondent no.2 and

has entertained them and has even decided them on merits by the impugned order. The procedure adopted by the learned Additional Sessions Judge *de hors* the provision of the Cr.P.C. needs to be deprecated.

15. Be that as it may, by virtue of the provision of Section 216 of the Cr.P.C., the Court has ample powers to alter or add a charge at any stage of the proceeding. Merely because the application (Exhibit-18) was filed by the respondent no.2 and is opposed by the prosecution that would not be a sufficient ground to deprive the Court of such power. The learned Judge in the impugned order has clearly mentioned that the respondent no.2 was treated at Spandan Hospital, Parbhani and the F.I.R. was lodged while he was admitted in that hospital. The F.I.R. reads that the petitioner-Jaweed had assaulted him with an iron rod on the head, there were eye witnesses to such incident and the Investigating Officer has also collected a certificate from that hospital on 15.02.2011. It reveals that the respondent no.2 had sustained head injury with fracture and few other injuries. The injuries sustained by him were of grievous nature and there was sufficient basis to add the charge under Section 307 and 326. In my considered view, the learned trial Judge has arrived at such a conclusion on the basis of the objective material before him, by invoking the power vested in him under Section 216 of the Cr.P.C. Needless to state that petitioners would get an opportunity to meet the charge

during the course of the trial and in that sense apparently no prejudice is likely to be caused to them by the impugned order to the extent it allows the application (Exhibit-18) and directs addition of the charge under Section 307 and 326 of the I.P.C.

16. As far as the order to the extent it allows the application (Exhibit-20) for production of documents at the instance of the respondent no.2, as is mentioned herein-above, it would be an obnoxious thing to allow such documents to be produced at the instance of respondent no.2. The proper procedure ought to have been that he could have sought further investigation under Section 173 (8) of the Cr.P.C. and could have attempted to bring such additional material on the record which could have enabled even the Investigating Officer to undertake a fair and independent investigation. A copy of the charge-sheet would reveal that the Investigating Officer had visited Spandan Hospital where the respondent no.2 was treated and even he has cited a doctor from that hospital as a witness. If such is the state of affairs, allowing the respondent no.2 to produce certain documents by-passing the prosecution particularly when the prosecution is also opposing the request would not be proper. In my considered view, the learned Additional Sessions Judge has erred in allowing such documents to be produced under application (Exhibit-20). Therefore the order to this extent is not sustainable

in law.

17. So far as the application for discharge (Exhibit-23) is concerned, the learned Additional Sessions Judge has elaborately discussed that there is enough material on record in the form of the papers of Spandan Hospital showing that the respondent no.2 had sustained a fracture of the skull. The F.I.R. specifically attributes use of iron rod as the weapon for inflicting the injury. There are witnesses. The proceeding has been pending may be before the Magistrate, since the year 2012, the present application (Exhibit-23) was filed belatedly in the year 2017. Considering all these aspects, there is sufficient material to *prima facie* show involvement of the petitioners in carrying out the assault. The parties had indulged in a fight on the same date and time, even the presence of the petitioners at the scene of the crime can be easily inferred. Taking in to account all these aspects, I find no illegality in the impugned order to the extent it rejects the application of the petitioners (Exhibit-23) seeking discharge under Section 227. In the result, Writ Petition no. 155 of 2018 deserves to be allowed and Writ Petition No. 156 of 2018 and Writ Petition No. 157 of 2018 are liable to be dismissed.

18. The impugned order to the extent it allows the application for production of documents (Exhibit-20) is quashed and set aside and the rest of

the order is confirmed. The rule is accordingly made absolute in Writ Petition No. 155 of 2018 and is discharged in Writ Petition Nos. 156 of 2018 and 157 of 2018.

[MANGESH S. PATIL, J.]