

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

CRIMINAL APPLICATION NO.929 OF 2018

Shaikh Jafar s/o Shaikh Kadar,
Age 34 years, Occu. Labour,
R/o. Main Road, Georai,
Tq. Georai, Dist. Beed.

... **APPLICANT**

Versus

1. The State of Maharashtra,
Through D.G.P., Beed,
Dist. Beed.
2. Vaishali w/o Bhagwanrao Patil,
Age 40 years, Occu. Service,
R/o. Jaikwadi Vasahat,
Tq. Georai, Dist. Beed.
3. Vandana w/o Tejrao Hire,
Age 45 years, Occu. Service,
R/o. Jaikwadi Vasahat,
Tq. Georai, Dist. Beed.

... **RESPONDENTS**

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Advocate for Applicant : Mr. C.V. Thombre
A.P.P. for Respondent/State: Mr. P.K. Lakhotiya
Advocate for Respondent No.2: Mr. Yuvraj S. Chaudhari

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CORAM : MANGESH S. PATIL, J.
DATE : 09.10.2019

JUDGMENT :-

Heard. Rule. The Rule is made returnable forthwith. The learned A.P.P. waives service for the respondent-State and learned advocate

Mr. Yuvraj S. Chaudhari waives service for the respondent nos.2 and 3. With the consent of both the sides the matter is heard finally at the stage of admission.

2. The applicant is the original complainant in S.C.C. No. 283 of 2017 filed in the Court of J.M.F.C., Georai on 13.04.2017 alleging that the respondent nos.2 and 3 have committed offence punishable under Section 323, 504, 506 read with Section 34 of the I.P.C. The Magistrate by the order dated 28.07.2017 directed a process to be issued under Section 204 of the Cr.P.C. for the aforementioned offences, after conducting inquiry under Section 202 of the Cr.P.C. and recording statement of couple of witnesses kept present by the applicant.

3. The respondent nos.2 and 3 preferred revision under Section 397 of the Cr.P.C. before the Sessions Court. By the impugned order the learned Sessions Judge allowed the revision and quashed and set aside the order directing the process to be issued on the ground that in view of the proviso inserted by way of State amendment to Section 190 of the Cr.P.C., the respondent nos.2 and 3 being public servants, in the absence of any sanction under Section 197 of the Cr.P.C. the Magistrate was not entitled to take cognizance of the offence. Being aggrieved this application under Section 482 of the Cr.P.C. has been preferred.

4. The learned advocate for the applicant submits that the learned Magistrate had conducted an inquiry under Section 202 of the Cr.P.C. He had recorded statements of couple of witnesses and it is only thereafter, pursuant to application of mind that he had taken cognizance and directed the process to be issued. If such was the state of affairs, the order passed by the Magistrate being an order passed after application of mind invoking the power under Section 204 of the Cr.P.C., it could not have been lightly interfered with by the Sessions Judge in revision. The order passed by the Magistrate was preceded by cogent reasoning about disclosure of the offences and should not have been interfered with. The learned advocate for the applicant would further submit that the learned Sessions Judge has allowed the revision only on the ground that there was no previous sanction under Section 197 of the Cr.P.C. The learned Sessions Judge ought to have considered on the basis of the allegations that the offence cannot be said to have been committed in discharge or purported discharge of the official duties. Besides, even the learned Sessions Judge failed to consider if respondent nos.2 and 3 could be said to be public servants when they were employed in a private school as Teachers.

5. The learned advocate for the respondent nos.2 and 3 submits that they being public servants no cognizance could have been taken by Magistrate

in the absence of sanction under Section 197 of the Cr.P.C. and the learned Sessions Judge has rightly dismissed the complaint on that count.

6. I have carefully gone through the papers.

7. The applicant has filed a private complaint *inter alia* alleging that his son was studying in the school wherein the respondent no.2 is a Teacher and respondent no.3 is the Headmistress. He alleges that in a previous incident one of the students from the school had caused grievous injury to his son about which he had filed a police complaint and a crime was registered against that boy. He alleges that it was because of negligence of the school and its faculty that his son had to lose an eye. He thereafter alleges that on 21.03.2017 he dropped his another son Nouman in the same school. When that son got involved in some fighting with his classmates, the respondent no.2 who was the Teacher twisted left ear of his son and also slapped on his left ear causing bleeding injury. He was called to the school and on inquiry his son told him about she having slapped him on the left ear. He took his son to a doctor who told him about the son having sustained injury to the ear and there was likelihood of loss of ability to hear.

8. After such complaint was filed by passing an order on 17.06.2017 the learned Magistrate deferred issuance of process and called upon the

applicant to lead evidence. Accordingly, one Shaikh Munawar Ajiz and one Shaikh Shahid Shafik were examined by the Magistrate. Shaikh Munawar stated that he was called to the school being the cousin of the complainant. When he reached there he saw that there was bleeding to the ear of Nouman. On inquiry he told about respondent no.2 having twisted his ear and slapped him in the ear causing injury. He then stated that he went to the office of the respondent nos.2 and 3 but they started questioning him and they threatened him of dire consequences. He then stated about having taken Nouman to a doctor.

9. Shaikh Shahid is a boy aged 7 years and has stated about studying in the same school with Nouman. He then by gestures described about respondent no.2 whom he called Patil Miss having twisted the ear of Nouman and having slapped him on the ear. It is after recording such statement, the learned Magistrate by the order dated 27.06.2017 directed the process to be issued against respondent nos.2 and 3.

10. The impugned order passed by the learned Sessions Judge clearly overlooks such factual aspects and statements of these two witnesses as well as the medical certificates though it was specifically brought to her notice and even she referred to and described it in paragraph 10. Ignoring such factual aspects, simply by observing that by virtue of the amended Section 190 of the

Cr.P.C. the Magistrate ought not to have taken cognizance in the absence of sanction under Section 197 of the Cr.P.C. that she has allowed the revision and set aside the order passed by the Magistrate taking cognizance. The proviso added to Section 190 of the Cr.P.C. reads as under:

“Provided that, no Magistrate shall take cognizance of any offence alleged to have been committed by any person who is or was a public servant as defined under any other law for the time being in force, while acting or purporting to act in the discharge of his official duties, except with the previous sanction under section 197 of the Code of Criminal Procedure, 1973 or under any law for the time being in force:

..... ”

11. A bare reading of this proviso clearly demonstrates that the immunity granted to public servants is only when the offence is committed while acting or purporting to act in the discharge of official duties. If in a given case the offence is committed not in discharge of the official duties, no such protection is available. If such is the legal position, it was imperative for the learned Sessions Judge to have gone into the allegations and the material and to have ascertained as to if the alleged offence could be said to have been committed in discharge of official duties. *Prima facie* twisting the ear and slapping a student cannot be said to be a part of an official duty of a teacher,

even if the circumstances are such that the act is impulsive. Therefore when there was enough material to *prima facie* substantiate the allegations in the complaint about the respondent no.2 having twisted the left ear and having slapped on that ear, it could have been easily concluded by the Sessions Judge that the alleged offence was not committed in discharge of the official duties.

12. There is one more aspect, the respondent nos.2 and 3 were serving in a private school and whether they can be said to be public servants would be another disputed question which should have been gone in to by the learned Additional Sessions Judge before proceeding on the premise that they are such public servants to whom protection under Section 397 of the Cr.P.C. was available.

13. True it is that the question of sanction under Section 197 of the Cr.P.C. can be agitated at any stage of the proceeding and in a given case even at the inception itself. However when such an issue is dependent upon variety of disputed facts, it is appropriate to keep such issue open for being decided finally by extending opportunity to both the sides to prove such facts. Nothing of the sort has been resorted to by the learned Sessions Judge. She has neither considered the law nor has she considered the facts. She has also not applied the law to the peculiar facts and circumstances of the case which were obtaining before the Magistrate. She has clearly overlooked the evidence

recorded by the Magistrate before directing process to be issued. Without even whispering anything as to why the statement of the witnesses should be ignored or overlooked. She has simply allowed the revision on the ground of absence of sanction under Section 197 of the Cr.P.C.

14. The impugned order is clearly perverse, arbitrary and capricious and deserves to be interfered with.

15. However as far as respondent no.3 is concerned, there is absolutely no material either in the form of allegation or in the evidence of the witnesses to demonstrate as to what role had she played. The only allegation against her is to the effect that after the incident had taken place when the complainant and his cousin approached her in her chamber she had not responded them favourably and had threatened them. In my considered view, even if the allegations in the complaint and the other material is taken at its face value all the necessary ingredients for constituting the offences cannot be made out against her. Applying the principles laid down in the case of **Smt. Nagawwa V/s. Veeranna Shivalingappa Konjalgi and Ors,; AIR 1975 Supreme Court 1947** the process ought not to have been issued against respondent no.3. Therefore to this extent, the impugned order passed by the learned Sessions Judge cannot be interfered with.

16. The application is partly allowed. The impugned order passed by the learned Sessions Judge allowing the revision preferred by respondent nos.2 and 3 is quashed and set aside to the extent of the respondent no.2 and the order passed by the Magistrate directing process to be issued against the respondent no.2 is restored. The rule is accordingly made absolute to the extent of the respondent no.2.

[MANGESH S. PATIL, J.]

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