

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

CRIMINAL APPLICATION NO. 4456 OF 2017

- 1] Ashok Maroti Garkal
Age : 50 yrs. Occu:Service,
- 2] Kakasaheb Maroti Garkal
Age : 55 yrs. Occu.Aгри.
- 3] Jalindar Ashok Garkal
Age : 29 yrs. Occu.Aгри.
- 4] Maroti Asraji Garkal
Age : 80 yrs. Occu. Aгри.
- 5] Manubai @ Manisha Ashok Garkal
Age : 48 yrs., Occu.Aгри.

All above R/o.Ghogaspargaon
Tal.Shirur Kasar, Dist.Beed.

.. PETITIONERS
(Orig.accused)

VERSUS

The State of Maharashtra
Through Police Station Officer
Chaklamba Police Station
Tal.Shirur Kasar,Dist.Beed.

.. RESPONDENT

.....

Mr. N.V.Gaware, Advocate for the applicants.
Mr. B.V.Virdhe,APP for respondent State .

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**CORAM : MANGESH S. PATIL, J.
RESERVED ON :03.09.2019
PRONOUNCED ON : 16.10.2019**

JUDGMENT :-

Heard both the sides. Rule. Rule is made returnable forthwith. The learned APP waives service for the respondent State. With the consent of both sides, the matter is heard finally at the stage of admission.

2] By way of this Application the applicants who are the original accused are invoking powers of this Court under Section 482 of the Cr.P.C. and challenging the order passed by the learned Judicial Magistrate, First Class, Shirur Kasar, District Beed dated 20/5/2017 directing to issue process *inter alia* for the offence punishable under Section 307 of the I.P.C.

3] In sum and substance the facts leading to the filing of this application are to the effect that on 24/8/2015 the complainant lodged the F.I.R. *inter alia* alleging that on account of a dispute regarding land the applicants formed an unlawful assembly, some of the members were armed with sticks and knife, they abused and assaulted him. He also alleged that applicant no.5 also tried to throttle his wife with a saree and in the process even the gold mangalsutra was snatched and stolen away from around her neck. Initially the crime was registered for the offences punishable under sections 143, 147, 148, 149, 394, 326 and 504 of the I.P.C. and for the offence punishable under Section 25 read with Section 4 of the Arms Act. During the course of investigation, the Investigating Officer deleted Section 394 of the I.P.C. but included Section 327 of the I.P.C. At the end he submitted the charge sheet on 13/12/2016 with such a change. The Magistrate received this charge sheet and directed it to be registered as a Regular Criminal Case by order dated 15/12/2016. However, while submitting the charge sheet Section 307 was not included although in the summary the Investigating Officer

specifically mentioned about the applicant no.5 having tried to strangle wife of the complainant with a saree.

4] It appears that the Investigating Officer then submitted a report dated 24/3/2017 to the Magistrate and requested that though the charge sheet contains a statement about the applicant no.5 having tried to strangle the wife of the complainant with a saree that version be deleted since nothing of the sort was disclosed during the investigation and the offence was committed only with a view to take possession of the disputed land and there was no intention to kill.

5] By the impugned order the learned Magistrate held that the record submitted alongwith charge sheet revealed that the informant and the other witnesses were consistent in alleging that applicant no.5 had tried to throttle the wife of the informant with the help of a saree and even a reference could be found in Column No.13 of the charge sheet. But still the Investigating Officer had omitted to include Section 307 of the I.P.C. The learned Magistrate refuted the report submitted by the Investigating Officer on the ground that there was sufficient ground to proceed against the applicants even for the offence punishable under Section 307 of the I.P.C. alongwith other Sections and passed the following operative order :

"Issue process against accused for offences punishable under Sections 143, 147, 148, 149, 307, 327, 326, 336, 504 of the Indian Penal Code and Section 4/25 of the Arms Act."

Hence this Application.

6] The learned advocate for the applicants submitted that the Magistrate has failed to bear in mind the procedure prescribed under the Cr.P.C. He failed to take note of the provisions of Sections 202, 204, 207 and 209 of the I.P.C. before directing the process to be issued under Section 307 of the I.P.C. The learned advocate referred to the decision in the case of Hardeep Singh V/s State of Punjab and others; 2014 DGLS(SC) 35. The learned advocate further submitted that at this pre-trial stage the Magistrate is only required to perform ministerial work and is expected to ensure compliance with Section 207 and 208 of the Cr.P.C. while committing the matter to the Sessions Court. At this stage the Magistrate is not expected to apply his mind to the merits of the case and to determine as to whether any accused needs to be added or subtracted to face trial before the Court of Session.

7] The learned advocate for the applicants also submitted that the decision in the case of Kishun Singh & others V/s State of Bihar and others; A.I.R. 2000 S.C. 3725 has been approved by the Supreme Court in the case of Dharam Pal and others V/s State of Haryana and another; AIR 2013 S.C. 3018, wherein it has been laid down by the Larger Bench of the Supreme Court that the Sessions Judge is expected to take cognizance after the case is committed to it by the Magistrate. The Magistrate should not have directed straightway to include the offence punishable under Section 307 of the I.P.C. The learned advocate also placed reliance on the decision in the case of State of Gujrat V/s Girish Radhakrishnan Varde; A.I.R. 2014 S.C. 620. The order clearly exceeds his jurisdiction.

8] The learned advocate further submitted that the Magistrate could not have passed the order in a casual manner since offence punishable under Section 307 of the I.P.C. is triable by the Court of Sessions. The Magistrate ought to have taken recourse to the provisions of Section 202 of the Cr.P.C. By directing postponement of issuance of process he ought to have directed the informant to produce all his evidence as is required by Section 202 (2) of the Cr.P.C.

9] The learned A.P.P. strongly supported the impugned order. He submitted that the controversy has been set at rest by the decision in the case of Dharam Pal (supra). The learned A.P.P. would submit that as has been laid down in the case of Dharam Pal (supra) whenever charge sheet is filed by the police, the Magistrate is competent to form an opinion as to which offences have been made out from the charge sheet and even can direct an accused to be included at the stage of taking cognizance if he is of the opinion that there is substance even to proceed against him. Therefore, the impugned order passed by the Magistrate is clearly within his jurisdiction.

10] The learned A.P.P. would further submit that this decision in the case of Dharam Pal (supra) which is a Larger Bench decision was not cited before the Bench comprising of two Hon'ble Judges who decided the case of State of Gujrat (supra). Therefore, the applicants are not entitled to derive any benefit from this latter decision.

11] I have carefully gone through the papers as well as the decisions cited by both the sides. In my considered view, the issue raised in this Application

is in fact no longer *res integra*. The decision of the Constitution Bench of the Supreme Court in the case of Dharam Pal (*supra*) clearly sets the issue at rest and can be relied upon to decide the matter in hand.

12] As can be seen, in the matter in hand, in spite of there being specific statement of the informant and few other witnesses mentioning about the Applicant No.5 having tried to strangle the wife of the informant with a saree, the charge sheet did not include Section 307 of the I.P.C. albeit in Column No.13 of the charge sheet, a reference was also made to such an incident. Having perused the entire charge sheet, while passing the impugned order, the Magistrate applied his mind and came to the conclusion that there was sufficient material to proceed even under that Section and directed the process to be issued accordingly. Merely because the Investigating Officer submitted a report for deleting the allegations in the charge sheet regarding such an episode the Magistrate was not obliged to accept it and rightly refused to accept such report and took cognizance for the offence punishable under Section 307 of the I.P.C. as well.

13] In the case of Dharam Pal (*supra*), the Larger Bench was constituted because of apparent conflict of opinion in the decisions of the Division Bench in the case of Kishun Singh (*supra*), Rajender Prasad V/s Bashir and others; A.I.R. 2001, S.C. 3524 and SWIL Limited V/s State of Delhi and others; A.I.R. 2001 S.C. 2747. A reference was made to the Bench of three Judges. However, when the matter was taken up for consideration by the Three Judge Bench it was brought to the notice of the Court that there were two other decisions having direct bearing on the question viz. Kishun Singh (*supra*) and a decision of 3 Judge Bench in the case of Ranjit Singh V/s State of Punjab;

A.I.R. 1998 S.C. 3148. It was noticed that Ranjit Singh's case disapproved the observations made in Kishun Singh's case which were to the effect that the Sessions Court has power under Section 193 of the Cr.P.C. to take cognizance of an offence and summon other persons whose complicity can *prima facie* be gathered from the material on the record. It was held in Ranjit Singh's case that from the stage of committal till the Sessions case reached the stage indicated in Section 230 of the Cr.P.C. the Sessions Court could only deal with the accused who have been sent up with the charge sheet and there was no intermediary stage for the Sessions Court to add any other person as an accused. The Three Judge Bench which was constituted disagreed with the views expressed in Ranjit Singh's case and accordingly this Constitution Bench was constituted.

14] Apparently the issue before the Constitution Bench was not exactly the same obtaining in the matter in hand. However, the following observations are indeed eloquent and would even cover the situation in the matter in hand:

"21] Section 190, which has been extracted hereinbefore, empowers any Magistrate of the First Class or the Second Class specially empowered in this behalf under sub-section (2) to take cognizance of any offence in three contingencies. In the instant case, we are concerned with the provisions of Section 190 (1) (b) since a police report has been submitted by the police, under Section 173 (3) of the Code sending up one accused for trial, while including the names of the other accused in Column 2 of the report. The facts as revealed from the materials on record and the oral submissions made on behalf of the respective parties indicate that, on receiving such police report, the learned Magistrate did not straightway proceed to commit the case

to the Court of Session but, on an objection taken on behalf of the complainant, treated as a protect petition, issued summons to those accused who had been named in column 2 of the charge sheet, without holding any further inquiry, as contemplated under Section 190, 200 or even 202 of the Code, but proceeded to issue summons on the basis of the police report only. The learned Magistrate did not accept the Final Report filed by the Investigating Officer against the accused, whose names were included in column 2, as he was convinced that a prima facie case to go to trial had been made out against them as well, and issued summons to them to stand trial with the other accused, Nafe Singh. The questions which have arisen from the procedure adopted by the learned Magistrate in summoning the Appellants to stand trial alongwith Nafe Singh, have already been set out hereinbefore in paragraph 4 of this judgment.

23] The view expressed in Kishun Singh's case (1993 AIR SCW 771) in our view, is more acceptable since, as has been held by this Court in the cases referred to hereinbefore, the Magistrate has ample powers to disagree with the Final Report that may be filed by the police authorities under Section 173 (3) of the Code and to proceed against the accused persons de hors the police report which power the Session Court does not have till the Section 319 stage is reached. The upshot of the said situation would be that even though the Magistrate had powers to disagree with the police report filed under Section 173 (3) of the Code, he was helpless in taking recourse to such a course of action while the Session Judge was also unable to proceed against any person, other than the accused sent up for trial, till such time evidence had been adduced and the witnesses had been cross-examined on behalf of the accused.

24] In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(3), Cr.P.C. In the event the Magistrate

disagrees with the police report, he has two choices. He

may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column No.2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter."

15] As can be noticed, whenever a report is submitted by the police under Section 173(3) of the Cr.P.C. the Magistrate has two choices. He can accept the report and act accordingly but if he disagrees with the police report he may act on the basis of protest Petition or may issue process and summon an accused. In such an event if the case is triable by the Court of Sessions, he has to commit the case to the Sessions Court. Since he acts on a police report, he can proceed even without holding any further inquiry as contemplated under Sections 200 or 202 of the Cr.P.C.

16] These observations clearly answer the points raised by the learned advocate for the applicants. Since the charge sheet was submitted by the Police on an F.I.R. which only included the offence which were triable by the Magistrate, the learned Magistrate while acting under Section 190 of the Cr.P.C. had applied his mind before issuance of process and after coming to the conclusion on the basis of the record forwarded with the charge sheet that there was sufficient ground disclosing commission of the offence punishable under Section 307 of the I.P.C. also directed the process to be issued. The order passed by the Magistrate was well within his powers going by the observations in the case of Dharam Pal (supra).

17] In this regard, one can also refer to the decision in the case of Minu Kumari and another V/s State of Bihar and others; A.I.R. 2006 S.C. 1937 which is more specific and precise and can easily be pressed into service in the matter in hand. The following observations directly cover the situation of the matter in hand:

"10] When a report forwarded by the police to the Magistrate under Section 173(2) (i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1) (b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1) (b) does not lay down that a Magistrate can take cognizance of an offence only if the

Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating Officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190 (1) (b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190 (1) (a) though it is open to him to act under Section 200 or Section 202 also."

One need not delve much. The observations clearly show that the Magistrate was well within his jurisdiction and powers while passing the impugned order.

18] The decision in the case of State of Gujrat (supra) appears to make a distinction in respect of the powers of a Magistrate when it is a case registered by police based on the F.I.R. under Section 154 of the Cr.P.C. and the case where a complaint is filed under Section 190 (a) of the Cr.P.C. It has been concluded that a Magistrate cannot make any inquiry when the case is based on F.I.R. resulting in filing of a charge sheet by police and if it is a police case wherein a charge sheet is submitted by police, the Magistrate cannot exclude or include any section into the charge sheet and such addition of charge would only be possible for a Magistrate under Sections 216, 218, 228 of the Cr.P.C. as the case may be. It is only when a complaint is filed before the Magistrate under Section 190 or 200 of Cr.P.C., that he is empowered to conduct an inquiry into the complaint and arrive at an independent conclusion as to which sections are attracted.

19] However as is submitted by the learned A.P.P. the decision in the case of State of Gujrat (supra) was delivered on 25/11/2013 whereas the decision in the case of Dharam Pal (supra) had come on 18/7/2013 whereas Minu Kumari's case was decided on 12/4/2006. But both these decisions were not placed before the Court which decided State of Gujrat (supra).

20] Considering all the aforementioned aspects, the situation in the matter in hand being squarely covered by the cases of Minu Kumari as well as Dharam Pal (supra), there is no apparent illegality committed by the Magistrate in taking cognizance of the offence punishable under Section 307 of I.P.C. which according to the learned Magistrate was made out from the charge sheet. Needless to state that the learned Magistrate now will have to ensure compliance with Sections 207 and 208 of the Cr.P.C. and to commit the case to the Sessions Court.

21] The Application is dismissed. The Rule is discharged.

[MANGESH S. PATIL, J.]

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