

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

916 CRIMINAL APPLICATION NO.1159 OF 2022

SANDIP JANARDAN GANGARDE AND OTHERS

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

...

Mr. A.D. Ostwal, Advocate for applicants

Mr. B.V. Virdhe, APP for the respondent No.1

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 01st JULY, 2022

ORDER :

1 Present application has been filed by the original accused persons invoking the inherent powers of this Court under Section 482 of the Code of Criminal Procedure, 1973 to challenge the impugned order dated 04.11.2020 by learned Additional Sessions Judge, Ahmednagar in Criminal Revision No.83/2019. The said criminal application was filed to challenge order dated 11.03.2019 passed by learned Judicial Magistrate First Class, Ahmednagar in Regular Criminal Case No.874/2013 filed by the present respondent No.2/original complainant, thereby the concerned Magistrate decided to frame charge for the offence punishable under Section 495 read

with Section 34 of the Indian Penal Code against all the accused.

2 It is not even necessary to issue notice to respondent No.2.

3 Heard learned Advocate Mr. A.D. Ostwal for applicants and learned APP Mr. B.V. Virdhe for the respondent No.1.

4 The facts giving rise to the present application are that a private complaint has been filed by the present respondent No.2 bearing Regular Criminal Case No.874/2013 against the present applicants alleging that they have committed offence punishable under Section 495, 323, 504, 506 read with Section 34 of the Indian Penal Code. After the perusal of the contents of the complaint, verification and report filed under Section 202 of the Code of Criminal Procedure, the learned Judicial Magistrate First Class, Ahmednagar (Court No.6) had issued process under Section 495, 323, 504, 506 of the Indian Penal Code against accused No.1 and against accused Nos.2 to 8 under Section 109 of the Indian Penal Code by order dated 22.07.2014. It appears that some part of the evidence was taken on behalf of the complainant before charge and then pursis came to be filed by the complainant that she does not want to produce any further evidence before charge. Thereafter, it appears that both the learned Advocates made their submissions and the learned Judicial Magistrate First Class, Ahmednagar

(Court No.5) then discharged all the accused persons for the offence punishable under Section 323, 504, 506 read with Section 34 of the Indian Penal Code and directed that the charge under Section 495 read with Section 34 of the Indian Penal Code be framed against all the accused.

5 The accused persons i.e. present applicants then approached the Sessions Court by filing Criminal Revision No.83/2019 to challenge the said order dated 11.03.2019, passed by the learned Judicial Magistrate First Class, Ahmednagar (Court No.5). After hearing both sides, the learned Additional Sessions Judge, Ahmednagar set aside the order and remanded the matter to give fresh opportunity for recording evidence of the complainant and her witnesses, if any, under Section 244(1) of the Code of Criminal Procedure and the cross-examination of the witnesses by the accused in view of the decision in **Ajoy Kumar Ghoshe vs. State of Jharkhand and another, (2010) 1 SCC (Cri.) 1301**. While arriving at the said conclusion, the learned Additional Sessions Judge, Ahmednagar had come to the conclusion that after the appearance of the accused persons the complainant has not adduced her evidence under Section 244(1) of the Code of Criminal Procedure, which is the precondition to appreciate whether there is ground for presuming that the accused has committed offence and, therefore, the matter was then remanded. The present applicants are now objecting to the said remand.

6 The learned Advocate appearing for the applicants has submitted that the learned Additional Sessions Judge, Ahmednagar failed to consider that, in fact, the complainant herself had given a pursis stating that she does not want to lead any evidence further than the evidence that was led by her. In fact, she had examined herself and cross-examined on behalf of the accused to some extent on 01.01.2019. Thereafter, she had examined CW 2 Sachin Pathak. The cross to this witness was reserved by the accused. Therefore, on the basis of whatever evidence was led by her the learned Magistrate ought to have come to the conclusion, but unfortunately when the process was issued against accused No.1 only under Section 495, 323, 504, 506 of the Indian Penal Code and against accused Nos.2 to 8 under Section 109 of the Indian Penal Code; yet, the learned Magistrate discharged all the accused persons from the offence under Section 323, 504, 506 read with Section 34 of the Indian Penal Code, but then directed to frame the charge against all the accused persons under Section 495 read with Section 34 of the Indian Penal Code. That means, against whom the process was not issued under that section, the charge was directed to be framed. It was wrongly held by the learned Additional Sessions Judge, Ahmednagar that there was no evidence as contemplated under Section 244(1) of the Code of Criminal Procedure Code led by the complainant. The Revisional Court was not at all justified in remanding the matter. It ought to have allowed the revision. As

the wrong order has been passed it deserves to be aside.

7 The learned APP supported the reasons given by the Revisional Court.

8 At the outset, it is to be noted that a private complaint was filed by the present respondent No.2 contending that the accused persons have committed offence punishable under Section 495, 323, 504, 506 read with Section 34 of the Indian Penal Code. Out of these sections, offence under Section 495 of the Indian Penal Code prescribes punishment for 10 years and fine and it is triable by the Court of Magistrate and, therefore, it was a warrant triable case. Since it was a case instituted otherwise than on a police report, the procedure that has been contemplated under Chapter XIX(B) from Section 245 to 247 of the Code of Criminal Procedure was required to be followed. Therefore, after the appearance of the accused persons before the Magistrate in view of Sub-section (1) of Section 244 of the Code of Criminal Procedure the Magistrate should proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. After the evidence is led as referred to under Section 244 of the Code of Criminal Procedure if the Magistrate considers for the reasons to be recorded that no case against the accused has been made out, which, if unrebutted, would

warrant his conviction, the Magistrate shall discharge him. Here, the learned Magistrate while passing order dated 11.03.2019 has discharged the accused persons from the offence punishable under Section 323, 504, 506 read with Section 34 of the Indian Penal Code under Section 239 of the Code of Criminal Procedure which appears to be wrongly quoted section. Thereafter, the Magistrate was supposed to take the procedure, that is, contemplated under Section 246 of the Code of Criminal Procedure. The documents produced on record show that verification of the complainant was taken. The present respondent No.2 is the original complainant. It appears that she has entered the witness box. It was seen by the learned Additional Sessions Judge, Ahmednagar that the learned Magistrate had treated the verification, that is, statement of the complainant and CW 2 Bharat as the evidence under Section 244(1) of the Code of Criminal Procedure. It has been rightly observed that the statement of verification or statements taken at the stage of postponement of the issuance of process cannot be considered as evidence under Section 244(1) of the Code of Criminal Procedure and, therefore, the learned Additional Sessions Judge, Ahmednagar has rightly remanded the matter for correction in the procedure. Accused persons cannot be allowed to take advantage of the procedural error committed by the Magistrate. Interference in the inherent powers cannot be made in this case, when the Hon'ble Supreme Court in **Ajoy Kumar Ghoshe** (supra) has clarified the

position of law as to how the procedure is required to be adhered to, in a case, which is instituted otherwise than on a police report. Application stands rejected.

(Smt. Vibha Kankanwadi, J.)

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