

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

3 CRIMINAL WRIT PETITION NO.761 OF 2022

MACHINDRA EKNATH DHANAWADE AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Petitioners : Mr. Andhale Sandip Ramnath
APP for Respondent-State : Mr. S. P. Deshmukh
...

CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 20-06-2022

ORDER :

1. Present writ petition has been filed invoking the Constitutional powers of this Court under Article 226 and 227 of the Constitution of India to challenge the order below Exhibit 28 in Sessions Case No.231 of 2021, passed by learned Additional Sessions Judge, Ahmednagar on 12-04-2022 and thereby the charge under Section 306 of Indian Penal Code kept on the accused persons has been altered to Section 302 of the Indian Penal Code under Section 216 of the Code of Criminal Procedure.
2. Heard learned Advocate Mr. S. R. Andhale for petitioners and learned APP Mr. S. P. Deshmukh for respondent-State.
3. It has been vehemently submitted on behalf of the petitioners

that in view of the First Information Report lodged by one Tulshiram Vinayak Madke on 10-09-2021, offence vide Crime No.551 of 2021 was registered with Shevgaon Police Station for the offence punishable under Section 306, 364, 385, 279, 323, 504, 506 r.w.34 of Indian Penal Code. The investigation was conducted which was in the form of recording of inquest panchanama, sending the dead body for post mortem, execution of spot panchanama, seizure panchanama regarding the clothes, statements of witnesses under Section 161 as well as 164 of the Code of Criminal Procedure. The petitioners were released on bail under Section 439 of Cr.P.C. After the committal of the case, the learned Additional Sessions Judge, Ahmednagar framed charge for the offence punishable under Section 306, 364, 385, 323, 504, 506 read with 34 of the Indian Penal Code. The petitioners have pleaded not guilty, and thereafter, the prosecution filed application under Section 216 of Cr.P.C. at Exhibit 28 stating that perusal of the police report, documents attached to it and the facts and circumstances are suggesting the offence under Section 302, and therefore, it be kindly altered. Say of the accused persons was taken and they have resisted the said application mainly contending that there is no prima facie case made out for such alteration. After hearing both sides, the learned Additional

Sessions Judge has allowed the application and passed the order about alteration of charge under Section 306 of the Indian Penal Code to Section 302 read with 34 of the Indian Penal Code, and thereafter, the charge has also been framed. That order and charge is under challenge in this writ petition.

4. It has been further submitted on behalf of the petitioners that as per the FIR itself it was the case under Section 306 of IPC even on the same day a general diary entry has been taken at 07.10 a.m. wherein the Police Inspector had noted that persons from Gadewadi Taluka Shevgaon had met him in police station and told that deceased Vinayak was murdered by Mukesh Mankar, Rupesh Mankar and Machindra Dhanwade in the hotel of Machindra Dhanwade by means of a handkerchief, and therefore, he says that he along with his staff went to Gadewadi and took the suspected accused persons in custody, made inquiry with him, so also thereafter the informant who is the son of deceased was enquired in presence of all the three accused persons and at that time that his father has not been murdered but he has hanged himself and committed suicide. Accordingly he says in the said general diary entry that his statement has been recorded i.e. written down as well as its

videography has been made. It is also stated in the said general diary entry that informant has tried to mislead the police for which the Police Inspector says that he has informed the said fact to his superiors. This general diary entry is not the part of the charge-sheet, but it has been obtained under the Right to Information Act. It has been further submitted on behalf of the petitioners that the statements of the witnesses also do not indicate that it is a case under Section 302 of Indian Penal Code. The probable cause of death is stated to be hanging, and therefore, the said order deserves to be set aside.

5. The learned APP supported the reasons given by the learned Additional Sessions Judge for alteration of the charge.

6. At the outset it can be stated that the alteration of the charge can be made at any point of time before the pronouncement of the Judgment also. Here, the evidence is yet to be recorded. No doubt it appears that initially the charge was framed under Section 306 and other sections of Indian Penal code. The endeavour of the Sessions Judges should be to go through the entire charge-sheet first and then come to the conclusion under which provisions of law/offences, the charge can be framed. It need not be restricted to the

sections those have been invoked by the police. This rule applies even to the stage of taking cognizance. In other words, merely because the police are giving some sections/offences to a case the Magistrate or the Sessions Judges are not bound to follow them. Independent assessment of the material at the time of taking cognizance as well as while framing charge is the integral part of a trial.

7. In this case application was moved by the prosecution at Exhibit 28 stating that the material on record shows something different and offence under Section 302 of IPC has been made out. Here, it is to be noted that the general diary entry which the petitioners are referring was not before the learned Sessions Judge because even as per the petitioners that general diary entry is not forming part of the documents with the charge-sheet. It appears that it was not fetched when the say to Exhibit 28 was called by the learned Additional Sessions Judge. The application under the Right to Information Act was filed on 07-05-2022 when the order of alteration of the charge was passed by the learned Additional Sessions Judge on 12-04-2022. It is not clear as to why that general diary entry was taken by Police Inspector on 10-09-2021

when the First Information Report is of the same date. Further, as regards that general diary is concerned, if we want to take into consideration the contents as it is, the Police Inspector appears to have developed a novel idea that even before the First Information Report could be filed he had taken the suspected accused into custody, and in presence of them, he has made inquiry with the informant. What initial information he had received was that of murder and that too from three persons including that of the informant. Why he had not reduced that information into writing and had not treated it as FIR, is a question, and when that information which was initially given was disclosing a cognizable offence. Therefore, the role played by the Police Inspector Mr.Prabhakar Bhaurao Patil is questionable, yet it can still be said that the petitioners are at liberty to use that document at any appropriate stage.

8. It is also stated in the First Information Report that about eight days prior to the incident there was some dispute arose between the petitioners and the deceased. Thereafter, on the next date the petitioners had gone to the deceased house and asked him to give money, which they wanted to spent for consummation of

liquor, but then the deceased did not agree to that, and therefore, they had abused and assaulted deceased. They had given threat that he will not be left alive. It is then stated that the petitioners have created terror in the village, and therefore, they had not reported the incident to the police due to the fear. On the next day again accused Rupesh had given phone call to the informant and gave abuses and threatened him, and thereafter, when the informant went to his house around 09.15 p.m. he could find the accused/petitioners with their four wheeler. Again Rupesh had given phone call to the informant and gave threat that he will not let the father alive. Informant could hear the voice of assault and cry of his father. Informant was searching for the father and he says that he could find the vehicle parked in front of Hotel Suyog owned by accused Machindra Dhanwade. He had seen all the three accused persons assaulting his father, but then informant came back and took his brother with him to Hotel Suyog. They could see that those persons who were assaulting the father had gone from that place. They again searched for the father and they could find him in hanging position to a tree which was behind the hotel in an agricultural land. The informant and his brother brought down the body of the father and took him to Government Hospital where he

was declared dead. He, therefore, says that his father was harassed by abducting by the accused persons and then he was abetted to commit suicide, but then the next sentence is that the accused persons are responsible for the death of his father which is unnatural (घातपाती मृत्यु).

9. From the contents of the FIR in fact which is not an encyclopedia we can get the circumstances under which the offence is stated to have been committed. Definitely the informant intended to convey that it was an unnatural death for which he has given the circumstances about abduction and assault.

10. The inquest panchanama gives the description of the deceased and especially the point to be noted is that his height is stated about 5 feet 5 inch. At this moment itself we are required to consider the spot panchanama and it is stated that the same was shown by the informant. The height of the tree was 8 feet 1 inch and the branch to which the hanging was noticed was 6 feet. The question would be whether a person having height of 5 feet 5 inch would commit suicide with that branch having height from ground 6 feet. The post mortem report shows the probable cause of death as hanging, but

when such reason is given, two possibilities would be created, one of suicide and another murder i.e. homicidal. As regards injury noted in Column No.17, they are thus :-

A) Ligature Mark Present over and around neck with following characteristics :-

1) Present anteriorly above thyroid cartilage, running obliquely and backward upwards toward B/L angle of mandible.

2) Breadth :- 1.5 cm. Length : 39 cm Depth 1 cm. Gap 3 cm.

Length from left ear -4 cm

length from right ear -3 cm

length from chin -4 cm

length from sternal notch -11 cm

3) Areas of hyperemia present

On internal dissection of neck :-

1) Blood vessels, Bone's – Normal

2) Trachea :- mild hyperemia present

3) Areas of white subcutaneous tissue present beneath mark.

And Column No.18 only gives description of an old injury. At this stage also we can say that the description may not wholly support the statement of the informant that his father was taken by assaulting him but still the explanations are possible at the time of

trial.

11. The statements of the witnesses would show that earlier since about eight days prior to the incident there was dispute and the petitioners had abused and threatened the deceased. There are witnesses to the incident that the deceased was taken forcibly in the four wheeler by the petitioners. Therefore, taking into consideration all these facts, the learned Additional Sessions Judge was justified in altering the charge. There is material on record for such alteration the order passed below Exhibit 28 was certainly within the powers of the learned Additional Sessions Judge, Ahmednagar under Section 216 of the Code of Criminal Procedure, and therefore, there is no question of interference that too under writ jurisdiction of this Court. Hence, petition stands rejected.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.