

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

5 CRIMINAL WRIT PETITION NO.1451 OF 2021

HANUMANT MANOHAR JAGTAP

VERSUS

THE STATE OF MAHARASHTRA AND ANOTHER

...

Mr. R.G. Hange, Advocate for the petitioner

Mr. R.B. Bagul, APP for the respondent No.1

Mr. A.L. Kanade, Advocate for the respondent No.2

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 06th JUNE, 2022

PER COURT :

1 Present writ petition challenges Judgment and order passed in Criminal Revision Application No.53/2020 by learned Additional Sessions Judge, Beed on 29.09.2021, by which the challenge to the common order dated 24.08.2020 passed by the learned Judicial Magistrate First Class, Beed (Court No.9) in Crime No.18/2020 in respect of report of the Investigating Officer under Section 169 of the Code of Criminal Procedure and application of the revisionist filed at Exh.26 was declined by the learned Judicial Magistrate First Class, Beed and process was issued against the present writ

petitioner/revisionist/original accused. The learned Additional Sessions Judge, Beed has dismissed the criminal revision filed under Section 397 of the Code of Criminal Procedure.

2 The facts giving rise to the writ petition are that the present respondent No.2 is the original informant who lodged First Information Report vide Crime No.18/2020 for the offence punishable under Section 307, 341, 504, 506 read with Section 34 of the Indian Penal Code against in all four persons including the present petitioner. First Information Report was lodged on 15.02.2020. He submitted that when he was coming back to his village Kutewadi after distribution of milk to Beed around 10.30 a.m. on 14.02.2020 one Pratap Haridas Jagtap gave cut of his motorcycle to the motorcycle of the informant and, therefore, the informant told Pratap that he should drive his vehicle properly. But at that time Pratap had assaulted the informant. They were separated by another motorist and then informant came back to his house. Thereafter at about 5.30 p.m. on the same day the informant and his son Pankaj were again returning to their house at Kutewadi from Beed and when they were near Bhilvasti, at that time, they were intercepted by motorcycle, on which said Pratap and present revision petitioner Hanumant were travelling. After the motorcycle of the informant gets halted he was dragged by the present petitioner and then he was

assaulted by kicks and fist blows after abusing and threatening that he would be killed. Haridas and Pratap caught hold of Pankaj and then the present petitioner Hanumant tried to give blow of scythe on the head of Pankaj but Pankaj ducked the same but received the injury on his right leg. Pratap gave blow of iron pipe on the head of Pankaj and caused injury. One Mahesh Kakde and Sanjay Kute from village Jarud and Kutewadi and other persons separated those persons. Informant took his son to hospital at Beed, where Pankaj was admitted and then on 15.02.2020 the First Information Report has been lodged.

3 After the registration of the offence evidence has been collected. The Investigating Officer filed charge sheet under Section 173 of the Code of Criminal Procedure. It was against three accused persons i.e. Pratap, Amol and Haridas, however, as regards the present petitioner is concerned, it was stated that no case is made out and, therefore, Section 169 of the Code of Criminal Procedure cannot be invoked and he was not made as an accused in that case. It appears that a separate application was also filed by the petitioner on 10.06.2020 before the learned Magistrate stating that he should be released from the offence under Section 167 of the Code of Criminal Procedure. A common order has been passed by the learned Magistrate rejecting the application filed by the present petitioner and it appears that the

report under Section 169 of the Code of Criminal Procedure of the Investigating Officer was also not considered and ultimately process has been issued against the present petitioner for the offence punishable under Section 307, 341, 323, 504, 506 read with Section 34 of the Indian Penal Code.

4 As aforesaid, both these orders were challenged in revision and the revision has been dismissed by the learned Additional Sessions Judge, Beed and the said order is now under challenge in this writ petition.

5 Heard learned Advocate Mr. R.G. Hange for the revision petitioner, learned APP Mr. R.B. Bagul for the respondent No.1 and learned Advocate Mr. A.L. Kanade for the respondent No.2.

6 The learned Advocate appearing for the petitioner has vehemently submitted that the Investigating Officer himself had come with a case that there is no evidence against the present petitioner which could be said to be prompting the Investigating Officer to file charge sheet either under Section 170 or 172 or 173 of the Code of Criminal Procedure. Though earlier the present petitioner was arrested and he has undergone PCR, nothing was required at his instance. Whatever recovery was there, it was at the instance of co-accused Pratap in respect of discovery of the iron pipe as well as the scythe. Investigating Officer had made inquiry with the present

petitioner and had come to know that the petitioner was in Zilla Parishad office at Beed at about 5.30 p.m. on 14.02.2022. Statements of witnesses Asaram Satwaji Jadhav working as a Senior Assistant in the Construction Department of Zilla Parishad, Beed; Vijay Mohan Dolas, who runs a cart of Tea selling in the Shivaji Chowk, Beed; Junior Assistant in the Construction Department of the Zilla Parishad Mr. Ganpat Sukhdeo Kilpe and one Shivkumar Rameshwar Chipade would show that around 5.00 to 5.30 p.m. on 14.02.2020 the petitioner was present in Zilla Parishad office. His CDR as well as SDR also gives tower location around Zilla Parishad, Beed. When the petitioner was not present at all at the spot, it can be clearly stated that his presence at the spot at the relevant time has been falsely stated by the informant and the witnesses. The Investigating Officer had rightly given the report under Section 169 of the Code of Criminal Procedure. The learned Magistrate erred in not considering the material evidence on record and issuing process against the present petitioner. The learned Revisional Court also did not consider the facts of the case and wrongly confirmed the order passed by the learned Magistrate. Both the orders required interference under Article 227 of the Constitution of India as it would be blatant legal defect for proceeding against the petitioner when there is absolutely no evidence against him. The petitioner may take plea of *alibi* or may not take; yet, when the record itself shows his presence at the different place, then, his

involvement in the commission of the crime cannot be assumed. It is also highly impossible that when the blow of scythe tried to be given on the head would be missed by the accused and then he would received that blow on the right leg. Even if it is so accepted, the injury certificate shows that Pankaj received two simple injuries and one is grievous. The grievous injury appears to be not possible by scythe. Petitioner cannot be asked to face the trial when the prosecution evidence does not show his presence at the spot.

7 Reliance has been placed on the decision in **Ganpati Irappa Potphale vs. Ananda Uttam Potphale and others [2019(2) Mh.L.J. (Cri.) 173]**. In a similar circumstance this Court when no prima facie case was made out against one of the accused report under Section 169 of the Code of Criminal Procedure was filed. The material was entirely considered and acceptance of the said report by the learned Magistrate was upheld by this Court.

8 Learned APP representing the State as well as the learned Advocate representing the original informant strongly objected the writ petition and supported the reasons given by both the Courts below. They submitted that the statements of eye witnesses will have to be considered on a better footings than the statements of those persons whose statements have been recorded when a statement has been made by the accused to the

Investigating Officer and also the CDR and SDR cannot be considered at this stage as they are not supported by the mandatory certificate under Section 65-B of the Indian Evidence Act. It was pointed out that three injuries have been caused and certainly one is caused by the present petitioner by means of scythe and taking into consideration the said medical report with the First Information Report it can be said that prima facie the case is made out for Section 307 of the Indian Penal Code. Statements of independent witnesses who have stated that they had seen the present petitioner at the spot and a specific role has been attributed by those witnesses i.e. Mahesh Kakde and Sanjay Kute will have to be given preference. No interference is required in the orders those have been passed by the Courts below.

9 At the outset, it is to be noted that the Magistrate has a power either to accept or reject a report under Section 169 of the Code of Criminal Procedure. Section 169 of the Code of Criminal Procedure deals with release of accused when evidence is deficient. Of course, it should be viewed from an angle of the Investigating Officer but when a Magistrate considers that whatever evidence has been collected is sufficient for proceeding, then he may issue process on the basis of whatever available evidence has been put before him. Section 169 of the Code of Criminal Procedure provides that – *If, upon an investigation under this Chapter, it appears to the officer in charge*

of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial. Ultimate satisfaction of the material that has been collected under investigation is with the Magistrate and not with the Investigating Officer. Section 167 of the Code of Criminal Procedure deals with the procedure when investigation cannot be completed in twenty-four hours. It is to be noted that the present petitioner had filed an application Exh.26 on 10.06.2020. In fact, he was arrested on 15.02.2020 itself. Therefore, his said application Exh.26 by no stretch of imagination could have been entertained under Section 167 of the Code of Criminal Procedure and at the cost of repetition it can be said that said section deals with the investigation when the investigation cannot be completed within twenty-four hours. The said 24 hours were already over when the application has given at Exh.26. Another fact to be noted is that the charge sheet is filed on 13.05.2020 and in that report was submitted as against the petitioner under Section 169 of the Code of Criminal Procedure. There was absolutely no reason or occasion for the petitioner to file application Exh.26.

10 As aforesaid, acceptance of the report under Section 169 of the Code of Criminal Procedure is within the discretionary power of any Magistrate and under the said circumstance the discretion will have to be exercised judiciously. The entire material on record will have to be considered by the Magistrate. Here, in this case, what was collected and was presented before the Magistrate was the spot panchnama, recovery panchnama, statements of witnesses, medical report etc. Statements of eye witnesses Mahesh Kakde and Sanjay Kute, whose names were reflected in the First Information Report itself, have been recorded and they have consistently stated about the presence of the present petitioner and they have attributed specific role to him that he had assaulted Pankaj with scythe and also to the informant by kicks and fist blows. Injured Pankaj is also stating on the same line. The discovery of iron pipe and scythe is by accused Pratap Jagtap. How it is admissible as against the present petitioner would be the matter of trial. The Medico Legal Certificate shows three injuries i.e. simple CLW, CLW and extradural hemorrhage to injured Pankaj and the situs on which the injuries were caused were left parietal region, right leg and left temporo parietal. The probable weapon stated to be heavy sharp object, sharp object and heavy sharp weapon. The nature of the injury is simple, simple and grievous respectively. If we consider the Medico Legal Certificate together with the contents of the First Information Report, statements of the two independent

eye witnesses and the injured, then, the injury on the right leg with sharp weapon in the nature of contused lacerated wound of 3 x 2 x 1 c.m. which is said to be the simple injury has been caused by the present petitioner.

11 Now, turning towards the statements, on which the petitioner is relying, that is, the statements of Asaram, Vijay, Ganpat and Shivkumar would show that they are saying that the petitioner had taken vehicle of Asaram at about 5.30 to 5.45 p.m. and the said vehicle was returned around 6.30 p.m. on 14.02.2020. That vehicle was belonging to witness Asaram. Witness Vijay states that his scooty was taken by petitioner on 14.02.2020 around 11.00 a.m. and he returned it by 5.30 p.m. These two vehicles are different. The first and the foremost question, that is, coming in the mind of this Court is, as to what was the reason for the Investigating Officer to record the statements of these persons. How names of these witnesses came forward cannot be gathered from the report of the Investigating Officer under Section 169 of the Code of Criminal Procedure. No doubt, it is the duty of the Investigating Officer to carry out the investigation independently but that does not mean that he should make investigation as per the direction of the accused. It is fair enough to collect the CDR, SDR of the mobile of the accused persons nowadays and to see whether the location of the mobile phone of the accused matches with the spot of incident/occurrence. But then

the Investigating Officer says that when he found his location is at Beed and the petitioner is a contractor, the Investigating Officer made inquiry with the Government employees of Zilla Parishad, Beed and also private persons. This appears to be overreach of the Investigating Officer with ulterior motive. Magistrate was then justified in not considering the statements of those witnesses at this stage. As regards the plea of *alibi* is concerned, it is for the accused to prove by leading cogent evidence and certainly report under Section 169 of the Code of Criminal Procedure cannot depend upon evidence so collected from a particular angle and with motive.

12 Even if we consider that those statements as it is; yet, it does not rule out the possibility of the occurrence, because these witnesses have not been continuously with the petitioner. What Atmaram and Vijay had stated is that their vehicles have been taken by the petitioner by saying that he would return. Vijay says that his vehicle was taken at 11.00 a.m. and was returned only at 5.30 p.m. and then Asaram says that his vehicle was taken by the petitioner at 5.30 to 5.45 p.m. and was returned at 6.30 p.m. If at all the petitioner wanted a vehicle, then, he could have continued with the scooty of witness Vijay till 6.30 p.m. also and Vijay does not say that in the meantime he had contacted the petitioner and asked him to return the vehicle immediately. It appears that since the presence of the petitioner was to be

shown at Zilla Parishad this change of vehicle by the petitioner has been told by these witnesses. Witness Ganpat Kolpe is not the person who had seen the petitioner taking the vehicle of Asaram, but then he says that Asaram told them that he is waiting for vehicle to be brought by the petitioner. Witness Shivkumar Chipade says that he had seen petitioner around 5.30 to 5.45 p.m. in Zilla Parishad. When it was orally asked to the learned Advocate for the petitioner, as to whether there was CCTV installed in Zilla Parishad, he told that CCTVs are not installed in Zilla Parishad, but those are installed in the Rashtrawadi Bhavan i.e. the office of a political party, and then he says that petitioner has collected CCTV footage. It is for the petitioner to prove his plea of *alibi* at the time of trial and not now.

13 Taking into consideration the evidence that has been collected when there are statements against statements regarding the involvement of the applicant at this stage we will have to give weightage to the statement of the eye witnesses to the occurrence and not to the statements of those witnesses on the plea of *alibi* or behind whose statement there is no reason as to why their statement has been recorded. Therefore, the learned Magistrate was justified in rejecting application Exh.26 as well as report under Section 169 of the Code of Criminal Procedure.

14 As aforesaid, whether to accept the report under Section 169 of the Code of Criminal Procedure or not depends upon the judicial discretion of the Magistrate. When the record shows that, that judicial discretion has been properly utilized, there is no question of interference in the said order under Section 397 of the Code of Criminal Procedure by the learned Additional Sessions Judge. Therefore, further, there is no question of exercising powers under Section 227 of the Constitution of India by this Court. There is no merit in the present petition. It deserves to be dismissed. Accordingly, it is dismissed.

(Smt. Vibha Kankanwadi, J.)

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