

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 232 OF 2019

Balaji Yadoji Waghmare

...Petitioner

Versus

1. The State of Maharashtra
2. Gangadhar Pandoji Waghmare
3. Tushar Gangadhar Waghmare
4. Prakash Pandurang Rethe

...Respondents

Mr. S. S. Panale, Advocate for the Petitioner.

Mr. G. O. Watamwar, Advocate for Respondent No. 1.

Mr. S. N. Lute, Advocate for Respondent Nos. 2 to 4.

CORAM : R.M. JOSHI, J.

RESERVED ON : AUGUST 08, 2023
PRONOUNCED ON : AUGUST 28, 2023

ORDER

1. This Petition is filed seeking directions to learned JMFC, Basmat and setting aside order passed on application dated 18.04.2018 in Crime No. 173/2017.

2. Petitioner is the first informant in Crime No. 173/2017 registered on 04.10.2017 for the offence punishable under Sections 307, 377, 367, 201 of the Indian Penal Code and Sections 4, 8 and 12 of the

Protection of Children from Sexual Offences Act, 2012. The first information report came to be lodged with Basmant Rural Police Station. The report was lodged by the Petitioner stating that an incident occurred on 30.09.2017 wherein he had been to the agricultural field on that day at about 07.00 am and his both sons were sleeping in the house. At about 08.15 am his son Shreyash went to attend the prayers near the house of the informant. He, however, did not return after attending prayers and hence, search was taken for him. At about 09.30 am the employee working with him telephonically informed that his son is found in unconscious condition in sugarcane field. Petitioner along with his relatives took his son to rural hospital and from there he was taken to J.J. Hospital, Mumbai for treatment. It was found that there was excessive bleeding from the brain of the child. It was also revealed to him from Doctors that there was sexual assault on the boy. There is allegation that with an intention to destroy the evidence, an attempt was made to strangulate him. The FIR came to be lodged on 04.10.2017 against unknown persons. Thereafter Shreyash succumbed to the injuries sustained by him and hence,

offence punishable under Section 302 came to be added on 23.10.2017 by recording supplementary statement of the informant. The Petitioner has further stated about the manner in which investigation has been carried out. According to him, investigating officer filed application under Section 169 of Cr.P.C on 18.04.2018 before learned JMFC, Basmat. It is his grievance that without issuing any notice to the informant i.e., Petitioner herein and without giving opportunity of hearing, the learned Magistrate passed order "Seen". The investigating officer treated the said order to be acceptance of the report. Thereafter charge-sheet came to be filed on 19.04.2018 against the step mother and father of the petitioner. The respondent Nos. 2 to 4 were not chargesheeted. It is claim of the Petitioner that when he remained present before the trial Court and his evidence was recorded as prosecution witness no. 1, he realized that no charge-sheet has been filed against Respondent Nos. 2 to 4. Hence, present Petition is filed.

3. Learned Counsel for the Petitioner submits that in the instant case the informant had right to

receive notice in respect of the report filed by the investigating officer exonerating Respondent Nos. 2 to 4. It is further submitted that learned JMFC ought to have applied its mind to the said report and should have passed order whether or not to proceed against these Respondents. In order to support his submissions, he placed reliance on the judgment of Hon'ble Apex Court in case of Minu Kumar Vs. State of Bihar, 2007 (Supp.) Bom. Cr. 128 (S.C.). It is his contention that the order of 'Seen' passed by the Magistrate on report under Section 169 Cr.P.C indicates non application of mind and hence, it be set aside and the Magistrate be directed to pass appropriate order by applying mind to facts of the case.

4. Learned Counsel for the contesting Respondents submitted that the Petitioner has belatedly filed this Petitioner in order to cause harassment to the Respondents. It is his contention that having regard to the provisions of Code of Criminal Procedure, there is no need of filing any report under Section 169 of Cr.P.C before learned Magistrate. By relying upon the judgment of this Court in case of Mohd. Rafique Abdul

Rahmand and Others Vs. State of Maharashtra, Criminal Writ Petition No. 231 of 2012, it is submitted that the intimation of Section 169 Cr.P.C report to the Magistrate is not necessary and that the learned Magistrate was not required to pass any order thereupon even if such report was filed. It is also argued that the case has been already committed to the Sessions Court and at this stage, such application cannot be entertained.

5. The law on the point of the power of Magistrate to issue process against accused against whom the investigating officer has decided not to file charge-sheet is no more res integra. The Hon'ble Apex Court in case of Abhinandan Jha and another Vs. Dinesh Mishra, AIR 1968 SC 117 has held that the Magistrate is not under obligation to accept the report under Section 169 of Cr.P.C. if he does not agree with the opinion formed by the police. In case of Minu (supra) it is held by the Apex Court that while taking cognizance and proceeding with the case, notice may not be necessary to the informant but when the case is dropped, notice and grant of opportunity being heard given to the

informant is must. Similarly in case of Bhagwant Singh Vs. Commissioner of Police, AIR 1985 S.C. 1285 it is held that notice to the informant and an opportunity of being heard be given to him is just and necessary if the Magistrate accepts opinion of the investigating agency of not proceeding against certain accused persons.

6. In the instant case, perusal of the record indicates that the report was lodged before the Magistrate on 18.04.2018 wherein opinion was expressed that no evidence is found against Respondent Nos. 2 to 4 and therefore, charge-sheet is not filed against them. Perusal of the said report clearly indicates that permission was sought by the investigating officer of discharging these Respondents from crime. On this report, learned Magistrate has not passed any other order than to remark "Seen". It is thus clear that the learned Magistrate has not applied its mind to the report submitted by the investigating officer. The law on the point is fairly settled to say that the report/opinion of the investigating officer of not filing charge-sheet against any accused is not binding

upon the Magistrate and he is not obliged to accept the same. Informant has made specific allegation against Respondent Nos. 2 to 4 and in order to not to proceed against these Respondents, some reason ought to have been recorded by the learned Magistrate. The order "seen" clearly indicates that there is non application of mind to the facts of the case and even report of investigating officer on the part of learned Magistrate. Moreover since the order in question has caused prejudice to the informant, he is within his right to take exception to the same.

7. The next question raised by Respondent is as to whether at the stage of the proceeding before Sessions Court after committal of case and commencement of recording of evidence of prosecution witnesses said issue can be permitted to be invoked. It is the contention of the Counsel for the Respondents that after filing of the charge-sheet charge is framed against accused persons and the trial has already commenced against them. No emphasis is required to be laid on the proposition that the proceeding with or not proceeding with the criminal trial against any

accused in serious matters and certainly not to be done casually. In both situations reasons are required to be recorded by the Court. When there are allegations made by the informant in the FIR against persons and the investigating officer is of the opinion that there is no sufficient evidence to proceed against him, it is mandatory for the Magistrate to apply his mind to the facts of the case and report so filed and in case he decides to accept the same, there is obligation cast upon him to call upon to extend informant an opportunity to be heard and only after, it would be open for the Court to accept such report and drop proceeding against any accused. Non compliance of such procedure undoubtedly affects validity of such order. Needless to say such order needs correction at any stage of the proceeding as it involved issue about proceeding or not against any accused.

8. There is nothing on record to show that informant/Petitioner ever had knowledge of such report and he did not take immediate steps. Merely because the Petitioner did not have knowledge about said order and when he could know about it after commencement of the

trial against person, he is not precluded from taking exception to such report. In the instant case, since Petitioner is deprived of an opportunity to challenge report under Section 169 Cr.P.C. exonerating Respondent Nos. 2 to 4, and as there is non application of mind to the said report by learned Magistrate, this is a fit case to call upon Magistrate to pass appropriate order on said report after giving opportunity to Petitioner/informant. It is absolutely immaterial as to stage of trial against the accused in respect of whom charge-sheet has already been filed.

8. In view of above discussion, Petition is allowed in terms of prayer clauses 'B' and 'C'. Learned Magistrate is directed to apply its mind to report filed under Section 169 of Cr.P.C. by investigating officer after giving an opportunity of hearing to the informant and to pass appropriate order in accordance with law.

(R.M. JOSHI, J.)

Malani