

(2016) 10 BOM CK 0026

In the Bombay High Court

Case No : Criminal Writ Petition No. 149 of 2003

Asif Yusuf Patel

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 13-10-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Criminal Procedure Code, 1973 (CrPC) — Section 197, Section 46(2)

Citation : (2016) 3 AIRBomRCri 951 : (2017) ALLMRCri 381 : (2017) 2 MhLJCri 122

Hon'ble Judges : V.K. Jadhav, J.

Bench : Single Bench

Advocate : Shri A.R. Kale, A.P.P, for the Respondent/State; Mr. A.M. Gaikwad, Advocate, for the Respondent No. 2; Mr. S.D. Karkare h/f Mr. A.M. Karad, Advocates, for the Petitioner

Final Decision : Dismissed

Judgement

V.K. Jadhav, J. - The petitioners, are seeking quashment and setting aside the orders dated 2.2.2002 passed below Exh.12 in R.C.C. No. 131 of 2001 passed by the learned J.M.F.C. Newasa and the order dated 18.9.2002 passed by the learned IInd Additional sessions Judge, Shrirampur in Criminal Revision application No. 49 of 2002 confirming thereby the order passed by the Magistrate, the original complainant (now substituted by his legal heirs) preferred this Criminal Writ Petition.

2. Brief facts giving rise to the present writ petition are as follows :-

(a) On 22.3.2001 the original petitioner was at Bidkin in the house of his mother's sister. In the night between 22.3.2001 and 23.3.2001, respondent Nos. 2 to 4, who were attached to Newasa police station and working as Police Sub Inspector and Police constables, respectively, came there. The petitioner was brought outside of the house and respondent Nos. 2 to 4 started beating him. In consequence of which, the petitioner-complainant sustained many injuries. The

petitioner was thereafter taken to the police station at Bidkin in a jeep. In police station his one hand and one leg tied with the help of chain, and he was again subjected to beating. Thereafter, he was taken to the Government Hospital at Newasa at 11.00 a.m. Dr. Zarekar, attached to the Government Hospital, Newasa opined that there might be fracture to the leg of the petitioner and thus advised to take the petitioner to Ahmednagar. However, instead of taking the petitioner to the Hospital at Ahmednagar, respondent No. 2 again put him in the lock-up and kicked on his injured leg. He was also threatened that if he complains to the Magistrate about the torture, he would obtain PCR and again assault him by pouring kerosene on his buttocks.

(b) On 23.3.2001 the petitioner was produced before the J.M.F.C. Newasa in crime No. 39 of 2001 for having committed offences punishable under Sections 147, 148, 307 and 436 of Indian Penal Code. At that time, the petitioner had complained about the torture at the hands of respondent Nos. 2 to 4 as stated above. The learned Magistrate has accordingly recorded the statement of the petitioner and also referred him for medical examination to Civil Surgeon, Ahmednagar. Furthermore, the statements of certain persons, in whose presence, the petitioner was assaulted also came to be recorded. The report to that effect came to be submitted to the learned District and Sessions Judge, Ahmednagar by the Magistrate. The learned District and Sessions Judge directed the Magistrate to take suitable action against erring police officials. Learned Magistrate has thereafter issued process against respondent Nos. 2 to 4 for the offences punishable under Section 330 r.w. 34 of I.P.C. by registering regular criminal case vide order dated 16.8.2001 and accordingly the case is registered as R.T.C. No. 131 of 2001.

(c) Respondent Nos. 2 to 4 thereafter filed an application for discharge. By order dated 2.2.2002 the learned Magistrate allowed the aforesaid application. The petitioner preferred Criminal Revision Application No. 49 of 2002. However, the learned 2nd Additional Sessions Judge, Shrirampur by order dated 18.9.2002 also dismissed the said Criminal Revision Application. Hence, this writ petition.

3. During pendency of this Criminal Writ Petition, the petitioner original complainant Asif Yusuf Patel expired on 13.9.2011. By order dated 17.3.2016 this Court has allowed criminal application No. 5213 of 2015 and thereby permitted substitution as prayed in the said application.

4. The learned counsel for the petitioner submits that, on 22.3.2001 deceased Asif Patel was at Bidkin in the house of his mother's sister. Respondents no. 2 to 4 who were attached to Newasa Police Station and working as Police Sub Inspector and Police Constables, respectively at the relevant time, came in a private commander jeep to the house of the petitioner's mother's sister. Immediately, they started assaulting deceased Asif Patel by taking him out of the house. As a result, he had sustained many injuries. Thereafter, he was taken to the Hospital, where his one hand and leg was tied with the help of a chain and he was again brutally assaulted by respondents 2 to 4. Deceased Asif Patel was

thereafter taken to Hospital and even after his complaint recorded by the Magistrate, he was again referred for medical examination to Civil Surgeon, Ahmednagar. During the course of inquiry, the learned Magistrate has also recorded statements of certain witnesses. From the statements of the said persons and medical certificate issued by Dr. Zarekar, it is quite clear that the possibility of sustaining those injuries by deceased Asif Patel while evading his arrest is completely ruled out. Learned counsel submits that any form of torture, cruel, inhuman or degrading treatment to the accused by the police while discharging their official duties cannot be and could not be said to have any connection with the official duty and therefore cannot be protected under section 197 of the Code of Criminal Procedure. However, the courts below failed to appreciate the same. It is unbelievable that deceased Asif Patel would suffer injuries as mentioned in his medical certificate while running away by evading his arrest. The learned counsel submits that when there is a word against word, the proper course would have been to consider all these questions including one of the requirement of the sanction to prosecute the respondents 2 to 4 at the trial instead of deciding the same at the interim stage. Learned counsel submits that, there is a prima facie evidence to show and establish even at the interim stage that deceased Asif Patel was tortured by the respondents no. 2 to 4 and therefore they are not entitled to claim immunity from prosecution for the offence under 330 of the Indian Penal Code.

5. Learned counsel for the petitioner, in order to substantiate his submissions places reliance on the following cases :-

- i. Anjani Kumar v. State of Bihar and another reported in 2008 (2) SCC (Cri) 582.
- ii. Ashwin Nanubhai Vyas v. The State of Maharashtra and another reported in AIR 1967 Supreme Court 983.
- iii. Arnesh Kumar v. State of Bihar and another. Reported in AIR 2014 Supreme Court 2756.

6. Learned counsel for respondent No. 2 submits that, respondents No. 2 to 4 are the police officers and alleged offence had taken place while discharging their duties as public servants. Deceased Asif Patel was an accused in Crime No. 39/2001 for having committed an offence punishable under Sections 147, 148, 307 and 436 of Indian Penal Code. On 22.3.2001, respondents No. 2 to 4 proceeded towards Police Station Bidkin by making an entry to that effect in the Station Diary of Police Station, Newasa. At about 02.00 a.m. on 23.3.2001 they reached the police Station Bidkin and entry to that effect was made in the Station Diary of the Police Station, Bidkin. On reaching there, they took the help of the local police to go to village Sonpuri in order to arrest the deceased Asif Patel. At about 3.00 to 3.30 a.m. they reached village Sonpuri at the house of the relative of deceased Asif Patel. By seeing police party, deceased Asif Patel started running in the dark and therefore fell down at 3 to 4 places and sustained injuries. Respondent No. 2 PSI Jaiswal and Respondent No. 4 Police Constable

Pardeshi also sustained injuries when deceased Asif Patel tried to evade his arrest. Even, in the Station Diary entry is taken to the effect that, while evading arrest, deceased Asif Patel ran away in the darkness and thus sustained injuries by fall. He was brought to the police station Bidkin and entry to that effect was made in the Station Diary at about 04.05 a.m. Therefore, he was brought to the police station, Newasa. In the morning, he was produced before the Medical Officer, PHC Newasa at about 10.15 a.m. The Medical Officer Dr. Zarekar examined deceased Asif Patel and also recorded history from deceased Asif Patel to the effect that he had sustained injuries while running away. Learned counsel submits that, there is a reasonable nexus between the Act complained and the official duty of respondents No. 2 to 4. Therefore, sanction is required as provided under section 197 of the Criminal Procedure Code.

7. Learned counsel for respondent no. 2 in order to substantiate his contention, places his reliance on following cases :-

i. D.T. Virupakshappa v. C. Subhash reported in AIR 2015 Supreme Court 2022.

ii. Matajog Dobey v. H.C. Bhari reported in AIR 1956 Supreme Court 44.

iii. Gauri Shankar Prasad v. State of Bihar and another reported in AIR 2000 Supreme Court 3517.

iv. Center for Public Interest Litigation and another v. Union of India and another reported in AIR 2005 Supreme Court 4413.

v. State of U.P. v. Paras Nath Singh reported in 2009 AIR (SCW) 3712.

8. I have also heard the learned APP for the State.

9. It is a matter of the record that deceased Asif Patel was an accused in Crime No. 39/2001 for the offences punishable under section 147, 148, 307, 436 of the Indian Penal Code. Respondents No. 2 to 4 were deputed to arrest him and accordingly, they had gone to Bidkin Police Station. It also reveals from the various entries in the Station Diary that respondents No. 2 to 4 obtained help from the local Police and went to village Sonpuri for effecting the arrest of deceased Asif Patel.

10. Deceased Asif Patel, when his statement was recorded by the Magistrate, had stated that, he was taken out from the house of his relative at the said village by respondents No. 2 to 4 and thereafter, he was beaten with the butt of gun and also respondent No. 2 PSI Jaiswal gave a blow of his revolver on his mouth and therefore, his mouth was torn. He was also beaten with the butt of the revolver on his back and his right eye. He had, therefore, sustained injuries. On perusal of injury certificate of Asif Patel, I find history of fall while running is recorded by Dr. Zarekar attached to Primary Health Center, Newasa. Only three injuries have been found on the person of deceased Asif Patel and those three injuries are simple in nature. There is no injuries on mouth as alleged by deceased Asif Patel. Further, on the same day, and same time, Dr. Zarekar also

examined respondent No. 2 P.S.I. Jaiswal and recorded near about five injuries on his person with the history that said PSI Jaiswal sustained injuries while catching the accused. Further, the injuries on the person of respondent no. 4 Police Constable Pardeshi also recorded with the history of sustaining of the injuries while catching the accused. Accordingly, MLC came to be issued by Dr. Zarekar.

11. Learned counsel for the petitioner submits that, in view of the provisions of Section 46 of the Criminal Procedure Code, though the police officers are permitted to actually touch or confine the body of the person to be arrested, the police officers are not permitted to extend the beating to the person to be arrested. However, it appears from Sub Section (2) of Section 46 of the Code that, if the person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

12. Learned counsel for respondent No. 2 brought to the notice of this Court various documents to substantiate his contention that there is a reasonable nexus in the act complained and official duties of respondents No. 2 to 4.

13. In the case of D.T. Virupakshappa v. C. Subash, (supra) relied upon by the learned counsel for respondent No. 2, the Supreme Court in paragraph No. 6 of the order has referred the case of Omprakash and others v. State of Jharkhand, through the Secretary, Department of Home, Ranchi 1 and another reported in (2012) 12 SCC 72, and quoted paragraphs 32 and 41 of the said judgment. Paras 32 and 41 read as under :-

"32. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (K. Satwant Singh). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (Ganesh Chandra Jew). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood.

(Emphasis supplied)

41. The upshot of this discussion is that whether sanction is necessary or not has

to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea. ..."

14. In the case cited above, question of sanction whether is necessary or not arises at the inception and there were unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It has also observed in paragraph no. 41 that, it is not possible for the Court to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception.

15. The Supreme court while examining the issue of "police excess" during investigation and requirement of sanction for prosecution in this regard also referred the case of State of Orissa Through Kumar Raghvendra Singh and others v. Ganesh Chandra Jew reported in (2004) 8 SCC 40 and quoted para 7 of the said case. Said para 7 reads as under :-

"7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been

committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty..."

(Emphasis supplied).

16. It is true that, protection given under section 197 of the Code has certain limitations and is available only when the alleged act of the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. It has also observed that, if a police officer in doing his official duty, acted in excess of his duty but there is reasonable connection between the act and performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the said protection.

17. In the instant case, it is not disputed that respondent nos. 2 to 4 were discharging their duties at the material time and even respondent no. 2 P.S.I. Jaiswal and respondent No. 4 P.C. Pardeshi had sustained the injuries while effecting arrest of deceased Asif Patel. There are entries in the Station Diary of Police Station, Newasa and Police Station, Bidkin, demonstrating sufficiently that respondents no. 2 to 4 were discharging their official duties while effecting the arrest of deceased Asif Patel. It is also a part of record that, deceased Asif Patel himself had stated before the Medical officer that he had sustained injuries while running away for evading his arrest at the hands of respondents no. 2 to 4. It further appears that, deceased Asif Patel had exaggerated the things when his statement was recorded by the Magistrate. There were no injuries on his person to show even prima facie that he had sustained injuries inflicted with the help of butt of gun and revolver. Further, there is absolutely no evidence even prima facie to show that, deceased Asif Patel's one leg and one hand was chained in the Police Station. In the backdrop of this, respondents No. 2 to 4 are certainly entitled for the protection as provided under section 197 of the Code of Criminal Procedure. The learned Magistrate has therefore rightly discharged respondents No. 2 to 4 for want of sanction. The learned Additional Sessions Judge has also considered this aspect and accordingly confirmed the order passed by the Magistrate. No interference is required. I do not find any substance in the present Criminal Writ Petition. Hence, order.

ORDER

I. Criminal Writ Petition is hereby dismissed.

II. Rule discharged. sd/-