

(2023) 09 BOM CK 0035

In the Bombay High Court

Case No : Criminal Writ Petition No.548 Of 2023

Hussain Alias Bantu Mohd. Bashir

APPELLANT

Vs

Deputy Police Commissioner And Others

RESPONDENT

Date of Decision : 21-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 21
Maharashtra Police Act, 1951 — Section 56, 56(1), 56(1)(a), 56(1)(b), 56(1)(bb),
56(1)(c), 58, 59, 135
Bombay Police Act, 1902 — Section 27(1), 56, 59
Indian Penal Code, 1860 — Section 188, 269, 270, 390
Epidemic Diseases Act, 1897 — Section 3
Disaster Management Act, 2005 — Section 51(b), 51(3)
Code Of Criminal Procedure, 1973 — Section 154, 258, 439
Arms Act, 1959 — Section 4, 25
Evidence Act, 1872 — Section 114(c)
Maharashtra Witness Protection And Security Act, 2017 — Section 6, 7, 8, 9, 11, 12

Citation : (2023) 09 BOM CK 0035

Hon'ble Judges : Anil L. Pansare, J

Bench : Single Bench

Advocate : B. Dafle, S. Haider

Final Decision : Allowed

Judgement

Anil L. Pansare, J

1. Rule. Rule is made returnable forthwith. Heard finally by consent of learned counsels for the parties.

2. The challenge is to the order dated 31.01.2023 passed under Section 56 of the Maharashtra Police Act, 1951 (Hereinafter referred to as the, "Act") by the respondent No.1-Deputy Commissioner of Police, Zone No.5, Nagpur, as also the order dated 26.07.2023 passed by respondent No.4-Divisional Commissioner, Nagpur in Appeal No.5/2023, thereby dismissing the challenge to the aforesaid order. The petitioner has been externed by order dated 31.01.2023 for a period

of one year from the date of order. The petitioner has challenged the impugned orders on several counts.

3. Before I delve upon the merits of the case, I will refer to some of the authorities, which summerises the scope and ambit of Section 56 and Section 59 of the Act and pre-requisites while passing the externment orders and these principles are important and relevant as to what caution and circumspection should be exercised while passing such orders as also to test legality and propriety of such orders.

4. The Supreme Court in the case of Gurbachan Singh Vs. The State of Bombay and anr.; reported in 1952 AIR 221, has, while determining the procedural reasonableness of the restriction in the light of Article 19 of the Constitution of India, held that the provisions of Section 27(1) of the Bombay Police Act, 1902, (which is *pari materia* to Section 56 of the Act), is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitutes a menace to the safety of the public residing therein.

5. The Supreme Court, in the case of Pandharinath Shridhar Rangnekar Vs. Dy. Commissioner of Police, the State of Maharashtra, reported in 1973 SCC (1) 372, in the context of the challenge to the constitutionality of Section 56 of the Act, has held that although Section 56 makes a serious inroad on personal liberty, but such restraints have to be suffered in the larger interests of the society. The care must be taken to ensure that the terms of Sections 56 and 58 are strictly complied with. It is further held that an externnee is entitled, before an order of externment is passed under Section 56, to know the material allegations against him and general nature of those allegations. The Court says that the externnee is not entitled to be informed of specific particulars relating to the material allegations, for the reason that the full and complete disclosure of particulars such as is requisite in an open prosecution will frustrate the very purpose of externment proceeding. The Court then referred to the judgment passed in Bhagubhai Dullabhabhai Bhandari Vs. The District Magistrate, Thana and Ors., Reported in AIR 1956 (SC) 585, wherein it has been held that in order to attract operation of Section 56 of the Act, the officer concerned has to satisfy himself that witnesses are not willing to come forward to give evidence in public. It is not necessary that all the witnesses must be found thus unwilling to give evidence. The Court states that the circumstance, therefore, that in the two criminal cases certain witnesses came forward to depose against the appellant in public cannot falsify the assertion that the witnesses were unwilling to give evidence against the appellant in public. The Apex Court added that the Court must ensure that the terms of Sections 56 and 59 are strictly complied with and that the slender safeguards, which those provisions offer, are made available to the proposed externnee.

6. In the case of Prem Chand Vs. Union of India and Ors; reported in 1981 SCR

(1) 1262, the Apex Court, while dealing with the scope of "Power of externment", in the context of provisions under Delhi Police Act, 1978 held in paragraph 9 thus:

"9. The provisions of the statute ostensibly have a benign purpose and in the context of escalation of crime, may be restrictions which, in normal times might appear unreasonable, may have to be clamped down on individuals. We are conscious of the difficulties of detection and proof and the strain on the police in tracking down criminals. But fundamental rights are fundamental and personal liberty cannot be put at the mercy of the Police. Therefore, Ss. 47 and 50 have to be read strictly. Any police apprehension is not enough. Some ground or other is not adequate. There must be a clear and present danger based upon credible material which makes the movements and acts of the person in question alarming or dangerous or fraught with violence. Likewise, there must be sufficient reason to believe that the person proceeded against is so desperate and dangerous that his mere presence in Delhi or any part thereof is hazardous to the community and its safety. We are clear that the easy possibility of abuse of this power to the detriment of the fundamental freedoms of the citizen persuades us to insist that a stringent test must be applied. We are further clear that natural justice must be fairly complied with and vague allegations and secret hearings are gross violations of Articles 14, 19, and 21 of the Constitution as expounded by this Court in *Maneka Gandhi* (1978) 2, SCR 621. We do not go deep into this question for two reasons: there is another petition where the constitutionality of these identical provisions is in issue. Secondly, the counsel for the State has fairly conceded that no action will now be taken even by way of surveillance against the petitioner. In an age when electronic surveillance and (sic) midnight rappings at the door of ordinary citizens remind us of despotic omens, we have to look at the problem as fraught with peril to constitutional values and not with lexical Laxity or literal liberality."

The Court has concluded the judgment in the following words:

"10.By this judgment what we mean is not to tell the Police to fold up their hands and remain inactive when anti- social elements suddenly grow in wealth but to be activist and intelligent enough to track down those who hold the nation's health, wealth, peace and security in jeopardy. The only insistence is that the means must also be as good as the ends."

7. In the case of *Lt. Governor, NCT and Ors. Vs. Ved Prakash alias Vedu*, reported in 2006 (5) SCC 228, while dealing with the externment orders, the Apex Court has held that if subjective satisfaction of the authority is based on objectivity, the Court would not ultimately interfere with the externment order. The court, however, would safeguard the externnee's rights under Article 21 of the Constitution of India and can examine the records to satisfy itself that prescribed procedural safeguards had been complied with.

8. The Supreme Court in the case of *Deepak Dongre Vs. The State of Maharashtra*; reported in 2022 SCC Online SC99, while setting aside the order of

externment held in paragraph 10 as under:

"10. There cannot be any manner of doubt that an order of externment is an extraordinary measure. The effect of the order of externment is of depriving a citizen of his fundamental right of free movement throughout the territory of India. In practical terms, such an order prevents the person even from staying in his own house along with his family members during the period for which this order is in subsistence. In a given case, such order may deprive the person of his livelihood. It thus follows that recourse should be taken to Section 56 very sparingly keeping in mind that it is an extraordinary measure. For invoking clause (a) of sub-section (1) of Section 56, there must be objective material on record on the basis of which the competent authority must record its subjective satisfaction that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to persons or property. For passing an order under clause (b), there must be objective material on the basis of which the competent authority must record subjective satisfaction that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or offences punishable under Chapter XII, XVI or XVII of the IPC. Offences under Chapter XII are relating to Coin and Government Stamps. Offences under Chapter XVI are offences affecting the human body and offences under Chapter XVII are offences relating to the property. In a given case, even if multiple offences have been registered which are referred in clause (b) of sub-section (1) of Section 56 against an individual, that by itself is not sufficient to pass an order of externment under clause (b) of sub-section (1) of Section 56. Moreover, when clause (b) is sought to be invoked, on the basis of material on record, the competent authority must be satisfied that witnesses are not willing to come forward to give evidence against the person proposed to be externed by reason of apprehension on their part as regards their safety or their property. The recording of such subjective satisfaction by the competent authority is sine qua non for passing a valid order of externment under clause (b)."

9. What follows from the above judgments is that the provisions of Section 56 of the Act makes a serious inroad on personal liberty and, therefore, the competent authority as also the Court must ensure that the terms of Sections 56 and 59 are strictly complied with and slender/limited safeguards offered to the externee are made available in its true spirit. Further, the competent authority, and not any other officer, must satisfy himself that the witnesses are not willing to come forward to give evidence in public. The mere presence itself of the externee, in identified areas, constitutes a menace to the safety of the public residing therein. There must be clear and present danger which makes movements or acts of the externee alarming or dangerous or fraught with violence. The competent authority is, accordingly, supposed to record its subjective satisfaction on the basis of objective material as regards movements or acts of the externee, whether are alarming, dangerous or fraught with violence and/or as regards the reasonable grounds for believing that such person is engaged or is about to be

engaged in the commission of an offence involving force or violence or offence punishable under Chapter XII, XVI or XVII of the Indian Penal Code, 1860.

10. Section 56 of the Act reads as under:

"56. Removal of persons about to commit offence. Whenever it shall appear in Greater Bombay and other areas for which a Commissioner has been appointed under Sec. 7 to the Commissioner and in other area or areas to which State Government may, by notification in the Official Gazette, extend the provisions of this section, to the District Magistrate, or the sub. Divisional Magistrate specially empowered by the State Government in that behalf-

(a) that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to person or property, or

(b) that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapters XII, XVI, or XVII of the Indian Penal Code (XLV of 1860), or in the abetment of any such offence, and when in the opinion of such officer witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property,

(bb) that there are reasonable grounds for believing that such person is acting or is about to act (1) in any manner prejudicial to the maintenance of public order as defined in the Maharashtra Prevention of Communal, Antisocial and other Dangerous Activities Act, 1980, or (2) in any manner prejudicial to the maintenance of supplies of commodities essential of the community as defined in the Explanation to sub-section (1) of Sec. 3 of the Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act, 1980 (VII of 1980), or

(c) that an outbreak of epidemic disease is likely to result from the continued residence of an immigrant, the said officer may, by an order in writing duly served on him or by beat of drum or other wise as he thinks fit, direct such person or immigrant so to conduct himself as shall seem necessary in order to prevent violence and alarm or such prejudicial act] or the outbreak or spread of such disease or to remove himself outside the area within the local limits of his jurisdiction or such area and any district or districts, or any part thereof, contiguous thereto by such route and within such time as the said officer may prescribe and not to enter or return to the said area or the area and such contiguous districts, or part thereof as the case may be from which he was directed to remove himself."

11. As could be seen from Section 56(1) (a), (b) (bb) and (c) of the Act, there are various grounds for passing an order of externment. In the present case, the authorities have invoked grounds under Clauses (a) and (b), which broadly relate to the dangerous movements or acts of a person and of his engagement in commission of an offence involving force or an offence punishable under

Chapters XII, XVI or XVII of the Indian Penal Code, 1860. The pre-requisite for invoking the grounds under clause (b) is that the competent authority, who is empowered to pass an order of externment should satisfy itself that the witnesses are not willing to come forward to give evidence in public against such person because of his apprehension as regards the safety or property of a witness.

12. To record this satisfaction, the authorities below have relied upon the following cases registered against the petitioner:

Sr. No

Name of police station & crime no.

Sections

Registration of offences

Date of arrest

Case No.

Case status

1

Juni Kamptee, 108/2019

3/25, 4/25 of Arms Act r/w Sec.4, 5

Maharashtra Prevention of Gambling Act

08.04.2019

08.04.2019

269/2020

26.11.2020

Pending

2

Juni Kamptee, 357/2020

4/25 of Arms Act

22.06.2020

22.06.2020

262/2020

25.11.2020

Pending

3.

Juni Kamptee, 359/2020

188, 269, 270

of I.P.C. r/w 3 of Epidemic

Act, 1867,

51(b) of

Disaster Management Act, 2005, 135

of Maharashtra Police Act

22.06.2020

--

756/2020

02.12.2020

Disposed

4.

Juni Kamptee, 196/2021

294, 323, 352,

506 of IPC.

22.06.2021

24.06.2021

881/2021

20.08.2021

Pending

5.

Juni Kamptee, 11/2021

110 of Cr.P.C.

28.06.2021

-

89/2021

29.06.2021

Released on bond but petitioner again committed

offences at sr.

nos.6 & 7

6.

Juni Kamptee, 175/2022

294, 323,

506(b), 34 of

IPC, r/w Sec.

135 of

Maharashtra Police Act

31.05.2022

–

174/2022

20.07.2022

Pending

7.

Juni Kamptee, 691/2022

427, 447,

506(b), 34 of IPC

07.12.2022

07.12.2022

–

Under investigation

13. The satisfaction has been recorded by the respondent no.1 in the following manner:

"1. I, Shrawan Datt S., the Deputy Commissioner of Police, Zone No. 5, Nagpur City have carefully studied the record in the proposal of externment submitted before me, in the matter of a person named Mohmmad Hussain alias Bantu s/o Mohammad Bashir, aged- 32 years, resident of- House No. 554, Madan Square, in front of Om Grocery, Police Station Old Kamptee, Nagpur City; and I am fully satisfied that you are engaged in the commission of offences, viz., intimidation to and assault on the businessmen and residents from the area, carrying deadly firearms illegally, carrying deadly weapons illegally, illegal gambling, carrying deadly weapons illegally, disobeying orders duly issued by the Public Servant,

negligently doing an act likely to spread contagious disease dangerous to life, doing dangerous act likely to spread contagious disease dangerous to life, violation of prohibitory order, hurling filthy abuses, voluntarily causing hurt, assault or use of criminal force without having grave provocation, criminal intimidation and giving threats of killing, hurling filthy abuses by colluding, voluntarily causing hurt, criminal intimidation and giving threats of killing, violation of prohibitory order, causing damage and mischief by colluding, criminal encroachment, criminal intimidation and giving threats of killing, etc. at Boriyapura, beside the house of Pintu Thakur, Madan Square, Shastri Manch, Gandhi Manch, in front of Chat shop, in front of Samir Hotel, Warispura within the limits of Police Station Old Kamptee, as well as at Ward No. 21, Bharatwada, P. H. No. 17, Khasra Nos. 5/4 and 5/5, within the limits of Police Station Kalmana and at other places, and because of your acts and movements, the feeling of insecurity is caused in the minds of the people and there is strong possibility of causing such feeling of insecurity in future also. Similarly, you have committed the offences punishable under Chapter XVI and XVII of the Indian Penal Code and under Chapter V of the Indian Arms Act, under the provisions of clauses (a) and (b) of sub-section (1) of Section 56 of the Maharashtra Police Act, 1951 and caused the feeling of insecurity in the minds of the people and there is strong possibility of causing such feeling of insecurity in future also."

The respondent no.4, in an appeal against this order, followed the aforesaid reasoning.

14. Both the authorities have recorded their satisfaction of petitioners having been engaged in commission of various offences. The petitioner, however, has been not convicted for any offence. The authorities below have further referred to and relied upon the Criminal Case No.756/2020 for the offences punishable under Sections 188, 269, 270 of the Indian Penal Code, 1860 read with Section 3 of the Epidemic Diseases Act, 1897 read with Section 51(b) of the Disaster Management Act, 2005 read with Section 135 of the of the Maharashtra Police Act to record such satisfaction. This case has been, however, on 09.12.2021 closed under Section 258 of the Criminal Procedure Code, 1973.

15. Thus despite the case relating to the epidemic disease and disaster management having been closed, the authorities below have blamed the petitioner of indulging into the activities causing epidemic disease and to spread such disease. This clearly shows that the authorities below have not applied their mind while passing the impugned orders.

16. That apart, the cause filing FIR in this regard is the birthday celebration held in front of house of the petitioner in the midst of Covid-19 pandemic. The petitioner and his brother on 20.06.2020 have celebrated their birthday in front of petitioner's house by cutting a cake by sword in the presence of friends. This celebration, according to the prosecution, is a negligent act likely to spread contagious disease, dangerous to the life. There is no issue about it. The prosecution, however, registered two FIRs viz. Crime No.357/2020 and 359/2020

under Section 4/25 of the Arms Act, Sections 188, 269, 270 of the Indian Penal Code, 1860 read with Section 3 of the Epidemic Act, 1867, Section 51(3) of the Disaster Management Act, etc. The prosecution has not put forth any justification for having registering two FIRs of a single incident, which is otherwise not permissible. The authorities below have also not applied their mind to this aspect.

17. As regards the opinion of the authorities below that the witnesses are not willing to come forward to give evidence in public against the petitioner by reason of apprehension, the authorities below have relied upon the incamera statement of two witnesses; (A) and (B).

18. Notice dated 11.10.2022 refers to these two witnesses and their statements. Witness (A) has, upon a condition that he will not present himself before a Government office or Court and upon assurance of keeping his name secret, stated that he is a labour and is acquainted with the petitioner, who is known to be a notorious person. He states that, in the second week of May, 2022, while he was coming back to his house in the night, after completing the work, the petitioner stopped him near Madan Chowk and abused him by saying that he is showing off too much in the vicinity and gave him life threats and gave fist blows. He also removed knife from his waist to threaten the witness. There is absolutely no reason whatsoever indicated as to why the petitioner has hurled abuses and given life threat and also given fist blows. It is difficult to further understand as to what show off or attitude a labourer can show in the vicinity that will be prejudicial to the petitioner.

19. Witness (B) states that he is manufacturer and seller of RO water filter and has his shop in the house itself. The petitioner, in the third week of February came to his shop and asked for RO water filter. The witness showed RO water filter worth Rs.12,000/-. The petitioner took the water filter and was leaving the house. The witness asked him for money, to which the petitioner abused him by asking him whether his shop should be closed down. The petitioner further caught hold of his collar and slapped him 2-3 times, took out knife from his pant's pocket and said that he will not pay any amount and if the report is lodged with police, the petitioner will kill him.

20. If one goes through the particulars of the incident as disclosed to the petitioner through the notice dated 11.10.2022, the very purport of recording in camera statement has been defeated, as both the witnesses could be easily identified by the petitioner. Further, the original record show that, in the reply filed by R-1 in appeal filed by the petitioner against his order dated 31.01.2023, the respondent No.1 has stated that these two witnesses viz. witnesses (A) and (B) were summoned by him.

However, the Senior Police Inspector has replied that the witnesses have refused to appear to verify their statements because during inquiry by Senior Police Inspector, they have narrated the incident on the condition that they will not appear before any Government office or the Court. It is further mentioned in the

reply that the Assistant Police Commissioner has visited the spot and inquired with the neighboring persons who have stated that the incident has occurred and the occurrence of the incident has been verified through the secret informant as well.

21. Thus, the respondent no.1, who had passed the externment order, has not verified the correctness of the statement made by the witnesses to form his opinion about their unwillingness to come forward to give evidence against the petitioner in public. His reply also indicates that the Assistant Commissioner of Police has verified the incident from the neighboring persons. However, the Assistant Commissioner of Police has not stated that those persons are also not willing to come forward to give evidence in public against the petitioner. As against, the verification noted on the back page of the statement of witnesses does not indicate that the Assistant Commissioner of Police, has inquired with the neighbours as regard occurrence of the incident. In that sense, the opinion/satisfaction of unwillingness of the witnesses has been formed, on the basis of the statement of the victims and not other witnesses/neighbours.

22. On this point, the learned counsel for the applicant has relied upon judgments in the case of Nawabkhan Abbaskhan Vs. State of Gujarat; reported in AIR 1974 SC 1471, the Gujarat High Court had, vide order dated 16.07.1968 quashed the externment order. The question before the Supreme Court was;

".....can a person against whom an order of externment under section 56 of the Bombay Police Act has been issued disobey the said order and contravene the directions contained therein with impunity if subsequently the order is quashed."

23. The Supreme Court, while dealing with the aforesaid question, has quoted the reasons noted by the Gujarat High Court while quashing the order of externment. The said part of the reasoning of the High Court reads thus:

"There is also a second ground on which we- must hold the externment order to be invalid. It is well settled that it is a mandatory requirement of section 56 that the externing authority must form a subjective opinion that witnesses are, not willing to come forward to give evidence in public against the person sought to be externed by reason of apprehension on their part as regards the safety of their person or property. This requirement is clearly not satisfied in the present case it is clear that the opinion formed by the Deputy Commissioner of Police is only as regards the witnesses who are victims of the said incidents and not as regards the other witnesses. This opinion would clearly not be the requisite opinion contemplated by the mandatory requirement of section 56."

24. The Apex Court has then noted that this finding has attained finality and, as such, has not set aside the said findings. In the present case, the involvement of the petitioner is said to have been established in two distinct offences, through witnesses (A) and (B) who themselves are victims. The Assistant Commissioner of Police has, though said to have verified the occurrence of the incident through neighbours, has not recorded their unwillingness to come forward to give

evidence in public against the petitioner. In fact and as stated earlier, the verification recorded on back page of statement of witnesses (A) and (B), there is nothing to indicate that the Assistant Commissioner of Police has inquired with neighbours about the incident.

25. Learned A.P.P. submits that it is not necessary that all the witnesses must be found unwilling to give evidence as held by the Supreme Court in the case of Pandharinath Shridhar Rangnekar (*supra*).

26. In addition, she has relied upon Santosh Bhagwan Patil .Vs. State of Maharashtra; reported in 2014 ALL MR (Cri) 53, wherein, the Division Bench has held that the law on the point is well settled that if incriminating statement discloses verification about the truthfulness of such statement and the identity of the person concerned to the satisfaction of the officer verifying the same, no challenge can be entertained on the count that the verification was defective. The learned A.P.P. however failed to show that the Bombay High Court has considered the judgment of the Apex Court in the case as relied upon by the petitioner viz. Nawabkhan Abbaskhan's case (*supra*), which has not disapproved the finding of the Gujarat High Court that the opinion formed by the Deputy Commissioner of Police was only as regards the witnesses who were victims of the incident and not as regards the other witnesses and that this opinion would clearly not be the requisite opinion contemplated by the mandatory requirement of Section 56 of the Act.

27. That apart, respondent no.1 had no occasion to meet the witnesses and verify personally the truthfulness of their apprehension. He has relied upon the statement made by the Senior Police Inspector in this regard which has been verified by the Assistant Commissioner of Police. Thus, the opinion of the respondent no.1-Deputy Commissioner of Police as regards unwillingness of the witnesses to come forward is based on the hearsay evidence, which does not comply mandatory requirement of Section 56 of the Act. The aforesaid judgment will therefore be of no assistance to the prosecution.

28. Put all together, the orders passed by the authorities below suffer from more than one perversity. Firstly, the orders suffer from non application of mind, for the reason that the opinion is based on the presumption that the applicant has committed the offence. Secondly, the authorities below have relied upon an offence i.e. Crime No.359/2020, registered with Old Kamptee Police Station, which has been closed by the learned Magistrate under Section 258 of the Criminal Procedure Code, 1973. Thirdly, the authorities below have not inquired into as to how two crimes could be registered for a single offence allegedly committed by the petitioner and his brother. Fourthly, the secret witnesses were not presented before the respondent no1-Deputy Commissioner of Police to facilitate him to form an opinion that these two witnesses are not willing to come forward to give evidence in public, nor has he, inquired with the neighboring witnesses as to their willingness to come forward and give evidence against the petitioner.

29. If this procedure to form opinion is to be approved, the possibility of arbitrariness in handling the cases and passing orders cannot be ruled out. It is so because the so called witnesses whose statements have been recorded in camera are not known to anyone except the Senior Police Inspector. Even the petitioner who could very easily identify these witnesses, has in reply to the show cause notice issued under Section 59 of the Act, stated that these witnesses are imaginary. The Apex Court, in Prem Chand's case (*supra*), opined that there exists every possibility of abuse of this power. This approach and procedure cannot be, therefore, said to be in strict compliance with Sections 56 and 59 of the Act and, therefore, the orders suffer from non application of mind so also arbitrariness.

30. Before parting with the judgment, I may add here my thoughts as to what options were available with the authorities below. The Senior Police Inspector has on reliable information of the occurrence of the incident has approached the witnesses (A) and (B). It means that someone other than the victims had information of occurrence of the incident. The experience shows that the police officers, on the basis of the reliable information swung into action and upon confirmation of the incident, record FIR under Section 154 of the Code and in the most of such cases, the police officers themselves are the informants. There is absolutely no reason why, in the present case and in similar such cases, the FIR under Section 154 is not being registered against the accused person. The statement of witness (B) clearly indicates that the offence, *inter alia*, under Section 390 of the IPC has been committed. It provides for punishment of rigorous imprisonment for a term which may extend to 10 years. Once the FIR is registered the investigation would follow and could be completed without recording statement of witnesses who are not unwilling to come forward and give evidence in public. There could be evidence in the form of CCTV footage supported by other witnesses who are willing to come forward to give evidence against the accused. The recovery of RO water filter would itself be a clinching evidence against the accused, if not for extortion, at least for theft, if read with Section 114(c) of the Indian Evidence Act, 1872. Further, the recovery of weapon used in the crime will also be sufficient to prove offence under the provisions of the Arms Act, 1959 because mere possession of weapon, without license, is an offence punishable under Section 4/25 of the Arms Act, 1959 and is punishable up to five years of imprisonment. The statement of witness (A) also indicates that the petitioner has removed from his waist, the knife and threatened the witness and, therefore, in that case also, the provisions of the Arms Act, 1959, could be invoked.

31. Thus, the scientific and effective investigation is the solution to the threat posed by such dangerous persons. The conviction will lead to imprisonment for up to 10 years. Needless to state that, pending investigation the offender could be remanded to police custody first and magisterial custody later. The application under Section 439 of the Criminal Procedure Code, 1973 filed by the accused could well be opposed on the point of character of such person and it will be

difficult for such person to get relief pending investigation and trial. The police has, by not adopting this mode, in my view, opted for easy but inadequate solution, by passing order of externment, the implementation of which has its own challenges, considering the possibility of these persons continuing their activities even if kept out of boundaries of the territory of the Commissionerate of Police. The appropriate place for such persons is to be behind bars for stipulated period.

32. Further, in the cases where offence is punishable for imprisonment for more than seven years, the investigating agency ought to invoke provisions of the Maharashtra Witness Protection and Security Act, 2017 and encourage the witnesses like witness (B) to come forward and give evidence against the persons like the petitioner. Section 6 of the Maharashtra Witness Protection And Security Act, 2017, provides for protection of witnesses. Section 7 deals with procedure for providing such protection. Section 8 provides for protection during investigation and Section 9 for such protection during trial. Section 11 provides for non disclosure of names of witnesses during investigation. Section 12 provides for measures that may be taken by the Court, which includes recording of evidence of protected witnesses via video link or by any other mode. It further provides to avoid mentioning the names and addresses of witnesses in its orders and judgments or any other record of a case, accessible to the public.

33. Thus, adequate provisions are made to protect the witnesses who have potential threat. The concealment of identity of the witnesses who are not willing to come forward to give evidence in public in terms of Sections 11 and 12 of the Act of 2017 appears to me to be the adequate solution to the problems faced by the investigating agency in the cases against the alleged dangerous persons. In any case, if for want of evidence, the main offence could not be proved, the other offence, like in the present case, the offence of theft or the offence under the Arms Act, could well be proved without the evidence of the victim. As such, if the stolen articles are recovered at the instance of the accused, the victim may, with the hope of getting his articles back, would change his mind and may be willing to give evidence, if he is ensured that his name will be concealed and necessary protection will be provided, in terms of the provisions of the Act of 2017.

34. Further, the police officer should be mindful of the aspect that the order of externment may also be passed pending investigation, once it is found that the victim or witnesses are not willing to come forward to give evidence in public as envisaged under Section 56 of the Act. In a given case, the investigating agency may require to file closure report for want of evidence, however, this mode will rule out the possibility of misuse of power or arbitrariness and the externment order passed in such an eventuality, will have more sanctity than passing order based on secret witnesses like 'A' and 'B'.

35. The police officials, therefore, in a case where secret witnesses disclose commission of fresh crime, may consider adopting aforesaid procedure, which, to

my mind, will be the most effective and appropriate way to deal with the persons who have criminal antecedents and who continue to indulge into criminal activities.

36. The sum and substance of above discussion is that the order impugned suffer from non application of mind as also arbitrariness. Both the orders are liable to be set aside. The petitioner has successfully made out a case in his favour. Hence, following order is passed.

ORDER

(ii) The writ petition is allowed.

(ii) Order dated 31.01.2023 passed by Deputy Commissioner of Police, Zone No.5, Nagpur and order dated 26.07.2023 passed by Divisional Commissioner, Nagpur in Appeal No.5/2023 are set aside.

(iii) The copy of order be supplied to the Director General of Police, Maharashtra, for consideration.

Rule is made absolute in the above terms.