
(2014) 11 BOM CK 0004

In the Bombay High Court

Case No : Criminal Writ Petition No. 2366 of 2014

Shyam Sunder Phoolchand Agrawal

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-11-2014

Acts Referred:

Atomic Energy Act, 1962 — Section 24(1)(a)

Criminal Procedure Code, 1973 (CrPC) — Section 173, 239, 240

Evidence Act, 1872 — Section 27

Citation : (2014) 11 BOM CK 0004

Hon'ble Judges : A.M. Thipsay, J

Bench : Single Bench

Advocate : A.H.H. Ponda, D. Joshi and Milan A. Hebballi, Advocate for the Appellant; S.S. Kaushik, Additional Public Prosecutor, Advocate for the Respondent

Judgement

A.M. Thipsay, J.—Rule. By consent, Rule made returnable forthwith. By consent, heard finally forthwith.

2. The applicant is one of the five accused i.e. accused No. 5 in R.C.C. No. 200 of 2010 pending before the Judicial Magistrate, First Class at Panvel. The allegation against the petitioner and other accused is that they have committed an offence punishable under section 24(1)(a) of the Atomic Energy Act, 1962. The petitioner had made an application before the learned Magistrate seeking discharge on the ground that there was no material to frame a charge against him. This application was rejected by the learned Magistrate by an order dated 30/03/2013. Aggrieved by the said order, the petitioner approached the Court of Sessions by filing an application for revision. The learned Sessions Judge, Raigad dismissed the revision application by an order dated 28/03/2014. Being aggrieved thereby, the petitioner has approached this Court invoking its constitutional jurisdiction, and inherent powers, praying that the orders passed by the learned Magistrate, as also by the learned Sessions Judge, be set aside and the petitioner be discharged.

3. I have heard Mr. A.H.H.Ponda and Mr.D.Joshi, learned Counsel for the petitioner and Mrs.S.S.Kaushik, learned Additional Public Prosecutor for the State.

4. The case of the investigating agency, as can be seen from the "brief facts of the case", as mentioned in the printed prescribed proforma of the police report, is as follows.

5. That, one Premsing (accused No. 1) was, on 13/11/2009, found to be possessing a lump of URANIUM, weighing about 5 kgs, with him. He was apprehended as the possession was in contravention of the provisions of the Atomic Energy Act and amounting to an offence punishable thereunder. Inquiries were made with him, in which, he stated that he had received the same from one Shrinivas Phoryar (accused No. 2). On the basis of this information, Shrinivas was apprehended, and when inquiries were made with him, he disclosed that he had received the URANIUM lump from one Tulsidas Bhanushali (accused No. 3). On the basis of this information, the said Tulsidas was apprehended, and inquiries were made with him, when he disclosed that he had received the URANIUM lump from one Sipattarsingh (accused No. 4). Accused No. 4 was apprehended, and in the inquiries that were made with him, he disclosed that he had received the said URANIUM lump from the present petitioner. It is, under these circumstances, the petitioner came to be arrested.

6. It is obvious that the petitioner came to be arrested on the basis of the statements made by a co-accused before the police in the course of investigation. No further material to support this theory could be collected by the investigating agency, during the investigation.

7. Since the URANIUM lump, possession of which, amounts to an offence punishable under section 24(1)(a) of the Atomic Energy Act, was not actually found with the petitioner, it was necessary for the investigating agency to have collected some material to indicate that at a time prior to the apprehension of the accused No. 1- Premsing, the petitioner was possessing the URANIUM lump. However, there is absolutely no such material.

8. The learned Additional Public Prosecutor in fact, had repeatedly sought adjournments in the matter to keep the investigating officer present, and verify this aspect of the matter viz-that except the statement of the co-accused, there is no other material to connect the present petitioner with the alleged offence. It is conceded before me today, that there is no material against the petitioner, except the statement allegedly made by a co-accused before the police in the course of the investigation.

9. The statement made by a co-accused before the police in the course of the investigation, can obviously, not be considered as material on which a charge would be framed. The petitioner was, therefore, entitled to be discharged.

10. That, there was no other material against the petitioner was noticed by the learned Magistrate, as also by the learned Sessions Judge. However, they still

refused to discharge the petitioner. That, the statements of co-accused allegedly made by them before the police in the course of investigation could not be considered as material on the basis of which a charge could be framed, is quite an elementary proposition, but in view of the fact that even the Sessions Judge refused to discharge the petitioner inspite of noticing that there was nothing else except the statements allegedly made by the co-accused against him; it would be proper to consider the provisions relating to discharge somewhat elaborately. It would be appropriate to reproduce here Sections 239 and 240 of the Code of Criminal Procedure :

239. When accused shall be discharged --- If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless , he shall discharge the accused, and record his reasons for so doing

240. Framing of charge --- (1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(Emphasis supplied)

11. The word "groundless" used by the legislature in Section 239 of the Code and the word "ground" used in Section 240 of the Code are significant. According to Black's Law Dictionary, the word "ground" connotes "foundation or basis". In criminal cases it means basis for charging the accused or foundation for admissibility of evidence. The word "groundless" connotes no basis or foundation. When a police report under Section 173 is submitted to a Magistrate along with the statements recorded in the course of investigation, the Magistrate may take it, that the persons whose statements have been recorded in the course of investigation, would be stating the facts revealed by them in their statements recorded by the police, before the Court in the course of trial. It is the anticipation of such evidence being adduced during the trial that provides a ground to the Magistrate for proceeding against an accused by framing a charge. Obviously, the prosecution would not be examining and cannot be permitted to examine the co-accused, as witnesses for the prosecution. Therefore, the facts allegedly stated by the co-accused before the police, would never come before the Court, as and by way of evidence. It was nobody's case that any part of what was allegedly stated by the co-accused, would be admissible under section 27 of the Evidence Act.

12. The matters which were never to come before the Court as evidence, cannot form any basis for framing of the charge against an accused. As aforesaid, this is quite elementary, and rather a matter of common sense, for a legal mind, but

since even the learned Sessions Judge has decided to accept this material as basis for framing o f charge, it has been felt necessary to discuss this.

13. The approach adopted by the learned Magistrate as also by the learned Sessions Judge is not proper or legal.

14. The learned Magistrate observed, without dealing with the contentions taken by the petitioner that "during the investigation, chain has been completed". Where was the occasion to consider "whether the chain was complete or not", is difficult to understand. The learned Magistrate overlooked that statements of the co-accused could be acted upon only in the course of investigation, and would be good enough for that purpose, but not for the framing of charges since they could not be received or given in evidence. The learned Sessions Judge also unnecessarily emphasized on the aspect that "possession of URANIUM was an offence under the Atomic Energy Act", though nobody has contended otherwise, instead of focusing on the question "whether there was material to indicate that the petitioner was at any time in possession of the URANIUM lamp in question".

15. The impugned orders are patently illegal and contrary to law. The same are, therefore, required to be quashed and set aside by exercising the constitutional jurisdiction of this Court.

16. The petition is allowed. The impugned orders are quashed and set aside. The petitioner stands discharged.

17. Rule is made absolute in the aforesaid terms.