

R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 6TH DAY OF SEPTEMBER, 2022

BEFORE

THE HON'BLE MR.JUSTICE MOHAMMAD NAWAZ

CRIMINAL REVISION PETITION NO.298 OF 2019

BETWEEN:

1. PRIYAMSHU KUMAR,

2. ALOK KUMAR,

... PETITIONERS

[BY SRI. AIYAPPA FOR SRI. ASIM MALIK, ADVOCATES]

AND:

1. THE STATE OF KARNATAKA,
BY MAHADEVAPURA PS.,
BENGALURU.
REPRESENTED BY

STATE PUBLIC PROSECUTOR,
HIGH COURT BUILDING,
AMBEDKAR VEEDHI,
BANGALORE-560 001.

2. MR. MOHAMMED M.A.,
S/O. NOT KNOWN TO THE PETITIONERS,
AGE: ABOUT UNKNOWN,
OCC: POLICE OFFICER,
ADDRESS:HAL AIRPORT TRAFFIC POLICE,
HAL, BENGALURU-560 017. ... RESPONDENTS

[BY SRI. S.VISHWA MURTHY, HCGP FOR R1
R2-SERVED]

* * *

THIS CRIMINAL REVISION PETITION IS FILED UNDER SECTION 397 R/W 401 OF CR.P.C., PRAYING TO SET ASIDE THE ORDER DATED 26.10.2018 PASSED BY THE COURT OF THE XLIII A.C.M.M., MAYO HALL UNIT, BANGALORE IN C.C. NO.57847/2017 THEREBY DISCHARGING THE PETITIONERS FOR THE OFFENCES P/U/S 323 P/W 32 OF IPC.

THIS CRIMINAL REVISION PETITION COMING ON FOR FINAL DISPOSAL, THROUGH VIDEO CONFERENCE/PHYSICAL HEARING, THIS DAY THE COURT MADE THE FOLLOWING:

ORDER

In this revision petition, petitioners have called in question the impugned Order dated 26.10.2018, passed by the Court of XLIII Additional Chief Metropolitan Magistrate, Mayo Hall Unit, Bengaluru, in C.C. No.57847/2017, rejecting their application filed under Section 239 of Cr.P.C. and thereby refusing to discharge them for the offence punishable under Section 353 r/w 34 of IPC.

2. Heard the learned counsel for petitioners and the learned High Court Government Pleader for respondent/State and perused the material on record.

3. Brief facts leading to filing of this revision petition are as under:

On 09.04.2017, during night hours, the first informant viz, the Police Inspector, HAL Airport Traffic Police Station, Bengaluru, while on patrolling duty, received an information that few persons have damaged a car near Big Bazar at Doddanekkundi. Immediately, he went to the spot, but found that those persons had fled away. The beat Police as well as the Hoysala vehicle had also come to the spot. Thereafter, at about 3.00 a.m., he noticed a person [A2] moving in a suspicious manner on a motorcycle bearing reg. No.KA-03/JK-1178. When he was being enquired, the said person secured his friend by name Priyamshu Kumar-[A1]. Accused No.2 had consumed alcohol and refused to accompany the Police to the Police Station and tried to escape. His friend, accused No.1, slapped on the face of the first informant and both of them

prevented him from discharging his duty. Therefore, with the help of the public, both the accused were apprehended and a case of drunken driving was registered and the bike was seized.

4. On the basis of a complaint lodged by the Police Inspector of HAL Airport Traffic Police Station, a case was registered in Crime No.155/2017 of Mahadevapura Police Station, against accused Nos.1 and 2 for the offence punishable under Section 353 r/w 34 of IPC. Charge-sheet was filed against them for the said offence.

5. The application filed by the petitioners under Section 239 of Cr.P.C. seeking their discharge was dismissed by the trial Court, which is under challenge in this revision petition.

6. The learned counsel for the petitioners would contend that first of all, the ingredients of the offence alleged against the petitioners are not made out. He submits that there is a circular issued by the Office of the Additional Commissioner of Police [Traffic], according to

which, under no circumstances, fine amount could be collected by the traffic Police in a case of drunken driving and the Hon'ble Court is the authority which decides the fine amount. He submits that as per the said circular, the checking activity should be videographed. He submits that, in the present case, admittedly, the incident was not videographed and the Police have imposed the fine for drunken driving without any authority. He therefore contends that at no stretch of imagination, it could be said that the complainant was discharging his official duty and therefore, the ingredients of Section 353 of IPC are not made out.

7. The learned counsel for the petitioners would further contend that according to the prosecution, there were several public present at the spot. However, none of them are cited as witnesses. The charge-sheet is filed only on the basis of the statements of the first informant and two other Police Constables, without naming any eye-witnesses.

8. It is also contended by the learned counsel that at the stage of considering an application for discharge, the Court is required to evaluate the material on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence and for this limited purpose, the Court can sift the evidence.

9. The learned High Court Government Pleader on the other hand, would support the impugned order contending that the petitioners have prevented the first informant from discharging his duty and accused No.1 has slapped on his face and therefore, the ingredients of the offence under Section 353 r/w 34 of IPC have been made out. It is his contention that at this stage, the pros and cons of the allegations cannot be gone into and the Court has to see as to whether there is a *prima facie* case which according to him is clearly made out and therefore, seeks to reject the petition.

10. A careful perusal of the complaint averments would go to show that the first informant received a

credible information that few persons are involved in damaging the car at Doddanekkundi and therefore, he rushed to the spot. However, he did not find anyone there as those person/s had fled away the scene. Thereafter, at about 3.00 a.m., the first informant saw accused No.2 on a motorcycle moving in a suspicious manner. Since he was under the influence of alcohol, he was questioned, but, accused No.2 secured his friend i.e, accused No.1 and refused to accompany the police to the Police Station. Accused No.1 slapped the first informant on his face and they prevented him from discharging his duty.

11. The entire episode as narrated in the First Information Report goes to show that the petitioners were not apprehended for causing damages to the car which credible information was received by the first informant. On the other hand, it is alleged that accused No.2 was found under the influence of alcohol and he refused to accompany the Police to the Police Station. It is alleged that the said accused secured his friend to the spot and

both of them tried to escape and accused No.1 slapped the first informant on his face.

12. The learned counsel for the petitioner has produced a Circular dated 25.09.2015 at Annexure-'H'. Ongoing through the said circular, it is seen that the concerned Police have to follow certain procedure while booking drunken driving cases. Sub-clauses XIII, XIV and XIX of Clause 2 of the aforesaid Circular are relevant, which are extracted hereunder:

"XIII. The officer should politely inform him the offence he has committed by showing him the Alcometer reading and place before him the legal options. The person is also informed about the procedures followed and that the Hon'ble Court is the authority which decides the fine amount.

XIV. Under no circumstances, fine amount to be collected by the traffic police to pay it on behalf of the accused.

XV. x x x x x

XVI. x x x x x

XVII. x x x x x

XVIII. x x x x x

XIX. The entire drunken driving checking activity should be videographed. If any person tries to misbehave or abuses the Police, the officer should not lose his cool and indulge in argument with the person. It is to be understood that a person under the influence of alcohol will not be in his senses and he will be irritable, argumentative and abusive. However, in case the person tries to physically assault the Police, he should be restrained and the jurisdictional Police should be called to the spot to take custody of the person and take further legal action in the matter."

13. In the present case, the accused were apprehended and they were taken to the Police Station in a Hoysala vehicle and thereafter, a case was registered against them.

14. As per the charge-sheet, C.W.2 and two other Police constables are said to be the eye-witnesses. It is relevant to see that according to the prosecution, there were public present at the spot and they helped the Police to apprehend the petitioners. However, their statements are not recorded and none of them are cited as witnesses in the charge-sheet. The statement of C.Ws.2 and 3 would

reveal that the case was registered against petitioner No.2 for drunken driving and his motorbike was seized. Further, the Police asked him to pay the fine amount for drunken driving.

15. As per the circular noted supra, only the Court which is authorized to decide the fine amount and under no circumstances, fine amount can be collected by the Traffic Police to pay it on behalf of the accused. Further, checking activity has not been videographed. It is also relevant to see that if a person tries to physically assault the Police, he should be restrained and the jurisdictional Police should be called to the spot to take custody of the said person etc. In the present case, none of the procedures were followed while apprehending the accused. Moreover, as already noted, there are no independent witnesses, whose statements are recorded, though it is specifically stated in the complaint that public helped the police in apprehending the accused.

16. It is relevant to refer to a decision of the Hon'ble Kerala High Court in the case of **Poulose Vs.**

State of Kerala reported in **1985 Cri.L.J. 222**. Para 6 and 7 of the said decision are extracted hereunder:

"6. A public servant discharges his duty when he performs the functions of his office and carries on any statutory or executive duty assigned to him. He executes his duty when he carries out some act or course of conduct to its completion. Execution denotes the fulfillment, completion or carrying into operation of any act or direction or order. When statutory orders and executive directions have to be implemented, the public servant acts in execution of his duty. Discharge of duty is therefore an expression of wider connotation while the terms 'execution of duty' is of limited application.

7. S. 353, therefore, postulates that the public servant has jurisdiction to execute and insists that he should be in the process of execution of his duty when he is assaulted or criminal force is used. Legality of the execution of duty is the sine qua non for the application of S.353. When, therefore, a duty is prohibited by statute or by orders of a superior authority, it cannot be said that the public servant acts in execution of his duty, for he was not in duty bound to execute any order. Administrative discipline compels obedience to the orders of the superior authority by the subordinate. A stay of an

order issued by a higher authority, prevents its execution by the subordinate."

17. In the case on hand, though the prosecution has tried to demonstrate that the petitioners have tried to prevent the first informant from discharging his duty and used criminal force etc, but for the reasons mentioned above, I have no hesitation to hold that the ingredients of the offence alleged are not made out. The materials collected by the prosecution are not sufficient to show that the incident as projected by the prosecution has taken place. In normal terms, at the stage of considering an application for discharge, the Court must proceed on the assumption that the material which has been brought on record by the prosecution is true, however, the prosecution has to fulfill the ingredients of the offence committed by placing material. The revisional jurisdiction can be invoked where there is no compliance of the provisions of law and the findings recorded are by ignoring the material placed on record. For the limited purpose, to find out as to whether the material and documents discloses the

ingredients constituting the alleged offence, the Court dealing with an application for discharge can sift the evidence as it cannot be expected even at that initial stage to accept all that prosecution states as gospel truth. It is well-settled that where two views are equally possible and one of them gives rise to some suspicion only, as distinguished as grave suspicion, the Court will be empowered to discharge the accused.

18. In the light of the above discussion and for the foregoing reasons, this Court finds that the material on record are insufficient to proceed against the petitioners and also that the ingredients of the offence alleged are not made out by the prosecution. The petition therefore succeeds. Hence, the following:

ORDER

Revision Petition is allowed.

The Order dated 26.10.2018 passed by the Court of XLIII Additional Chief Metropolitan Magistrate, Mayo Hall

Unit, Bengaluru, in C.C. No.57847/2017 is hereby set aside.

The accused are discharged from the offence punishable under Section 353 r/w 34 of IPC.

**Sd/-
JUDGE**

Ksm*