

A. F. R.

Court No. - 53

Case :- APPLICATION U/S 482 No. - 19835 of 2019

Applicant :- Nazim And 4 Others

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Devendra Dahma, Sanjay Mishra

Counsel for Opposite Party :- G.A., Ravi Prakash Singh

Hon'ble Umesh Chandra Sharma, J.

1. Heard Sri Sanjay Mishra, learned counsel for the applicant, Sri Pankaj Kumar Tripathi, learned A.G.A for the State as none appeared for opposite party no. 2 and perused the material available on record.

2. This application under Section 482 Cr.P.C has been moved by the applicant-accused persons to quash the order dated 26th July, 2018 passed by A.C.J.M Ist, Aligarh in Criminal Case no. 1021 of 2018 arising out of Criminal Case No. 222 of 2017 and order dated 16.04.2019 passed by the learned Sessions Judge, Aligarh in Criminal Revision No. 331 of 2018 - Shahnawaz and others Vs. State of U.P. under Section 147, 323, 324, 504, 506 and 326 I.P.C, Police Station Kotwali City, District Aligarh, pending in the Court of A.C.J.M Ist, Aligarh, by which both the courts below have passed the order against the applicant and the learned A.C.J.M Ist, Aligarh took the cognizance under the aforesaid Sections and the learned Sessions Judge dismissed the criminal revision against such order on 16.04.2019.

3. In brief, facts of the case are that opposite party no. 2 lodged N.C.R No. 58 of 2017, under Sections 323 and 506 I.P.C on 15.05.2017 at 11:40 p.m. against the

applicant nos. 2 to 5, later on, which was converted into F.I.R on 26.05.2017 under Sections 323, 324 and 506 I.P.C as Crime No. 222 of 2017 against them. The opposite party No. 2 was medically examined on 16.05.2017 and supplementary medical report was prepared on 09.06.2017. Evidences were recorded under Section 161 Cr.P.C and a charge-sheet no. 194 of 2018 dated 29.06.2018 under Sections 147, 323, 324, 326, 504 & 506 I.P.C was submitted in the Court of A.C.J.M Ist Aligarh, who took cognizance by the order dated 26th July, 2018.

4. The petitioner no. 1 was married with opposite party no. 2 as per Muslim rites and ritual on 22.04.2014 and she left her matrimonial house without any sufficient cause and started living separately with her parents whereupon applicant no. 1 filed a petition for restitution of conjugal rights being case no. 873 of 2014 - Naazim Vs. Smt. Rukhsana in the Court of Principle Judge Family Court, Aligarh, but opposite party no. 2 did not appear and the petition was later on dismissed as withdrawn. The divorce petition between the petitioner no. 1 and opposite party no. 2 took place on 13.06.2017 and the petitioner no. 1 was again married on 11.05.2017 with Allia D/o Shamshad as per Muslim rites and rituals.

5. It appears that the opposite party no. 2 got annoyed after hearing the news of second marriage of the petitioner with Allia and therefore lodged a false report. The petitioner no. 1 is the husband of opposite party no. 2 (as per para 8 of the affidavit, she was divorced on 13.06.2017). The petitioner nos. 2 and 3 are *Dewar*, petitioner no. 4 is mother-in-law and petitioner no. 5 is

sister-in-law (*nanad*) of opposite party no. 2. The petitioner no. 1 lodged a report against opposite party no. 2, Ayyub and Kaisar sons of Saeed, Parvez and Belal sons of Abrar Ahmad on 15.05.2017 in Case Crime No. 207 of 2017 under Sections 147, 148, 307, 452 and 504 I.P.C at P.S Kotwali Nagar, Aligarh. In the aforesaid incident Sharfaraz petitioner no. 2 sustained grievous injury and was medically examined on 15th May, 2017 and an x-ray report was also prepared on 16.05.2017.

6. The J.M Ist, Aligarh, summoned the accused persons including opposite party no. 2 by order dated 09.04.2018 as well as one Sultan for facing trial in the aforesaid Sections and rejected the final report no. 13 of 2017 dated 20th November, 2017. The opposite party no. 2 and other accused persons filed criminal revision no. 230 of 2018 - Rukhsana and others Vs. State of U.P and others which was dismissed on 17.09.2018.

7. Opposite party no. 2 and three others filed criminal misc. application no. 37751 of 2018 in the High Court, challenging both the above orders passed by A.C.J.M. Ist and the Revisional Court and further proceedings of the aforesaid case has been stayed *vide* order dated 22.10.2018.

8. The petitioner preferred criminal revision no. 331 of 2018 - Shahnawaz Vs. State of U.P in the Court of Sessions Judge, Aligarh, challenging the order dated 26.07.2018, passed by the learned Magistrate, and the dismissal order passed by the revisional court / Sessions Judge, Aligarh, *vide* order dated 16th April, 2019. Both the orders are

illegal, arbitrary, without jurisdiction and are the abuse of process of the court and deserve to be quashed to secure the ends of justice.

9. The medical and supplementary report of opposite party no. 2 do not make out any offence under Section 326 I.P.C, therefore, the orders passed by the learned Magistrate and the revisional court are wholly illegal, arbitrary and are liable to be quashed.

10. The opposite party no. 2 did not appear for re-medical examination before the Medical Board despite the order dated 23.04.2018 of the S.S.P. Aligarh. The C.M.O, Aligarh by letter dated 04.05.2018 informed the S.S.P. regarding her non-appearance before the medical board for re-examination to ascertain the gravity and nature of injury sustained by her and lastly the C.M.O. by letter dated 21.05.2018 informed the S.S.P, Aligarh, that no useful purpose would be served by re-medical examination of opposite party no. 2 after a lapse of more than a year from the date of sustaining the alleged injury by her. The District Magistrate, by letter dated 30.05.2018 forwarded the aforesaid report of C.M.O to the S.S.P. Aligarh, therefore, nature of injury sustained by the opposite party no. 2 does not come within the purview of grievous injury under Sections 320 I.P.C and therefore, no offence is made out under Section 326 I.P.C.

11. Otherwise also entire proceeding initiated against the petitioners are malicious and is counterblast to the F.I.R. and summoning of opposite party nos. 2 and 3 and others on the basis of report lodged by the applicant no. 1. The

petitioners are peace loving and law abiding person and have no criminal history to their credit. They are apprehending their arrest in pursuance of N.B.Ws issued against them in the present case, therefore, it is prayed that further proceedings of the present case lodged by the opposite party no. 2 described above and N.B.Ws be stayed.

12. The opposite party no. 2 has filed counter affidavit (though it is not available on record), denying the contentions and allegations of the petition, and has said that the F.I.R lodged by her is true and correct and it is not a counterblast to the report lodged by the applicant and has said that a correct F.I.R has been lodged by the applicants and the impugned order passed by A.C.J.M. Ist and the learned Sessions Judge in revisional capacity are not liable to be quashed and the proceedings of the present case is not liable to be quashed.

13. Contrary to that the petitioners have filed rejoinder affidavit denying the para-wise contents of the counter affidavit and have reiterated the facts already mentioned in the petition. Heard and perused the record.

14. It transpires that both the parties have lodged the F.I.R against each other.

15 The F.I.R lodged by the applicant no. 1 against the opposite party no. 2 and others for an offence alleged to be committed on 15.05.2017 as per Crime No. 207 of 2017, under Sections 147, 148, 307, 452 & 504 I.P.C, P.S. Kotwali Nagar, Aligarh, has been stayed by this Court *vide* order dated 22.10.2018 passed in Criminal Application

Nos. 37751 and 377 of 2018 under Section 482 Cr.P.C - Smt. Rukhsana and three others vs. State of U.P and another.

16. It also transpires that a N.C.R No. 58 of 2017 under Sections 323 and 506 I.P.C, has also been lodged for an offence alleged to be committed on 15.05.2017 against the applicants, which was later on converted into F.I.R as Crime No. 245 of 2017, considering the medical report of opposite party no. 2 and after investigation a charge-sheet under Sections 147, 323, 324, 325, 506 and 506 I.P.C had been submitted against the applicants of the present petition. It also transpires that there was discussion and dispute about the addition / non-addition of Section 326 I.P.C. during the investigation. Since the opposite party no. 2 did not appear for her re-medical examination as required by the C.M.O, District Magistrate, and the S.S.P, the I.O. had not submitted the charge-sheet under Section 326 I.P.C.

17. At the time of taking cognizance an exhaustive order has been passed by the learned A.C.J.M, Ist, Aligarh on 26.07.2018, concluding that there was hole in the drum of the left ear of the injured opposite party no. 2 Smt. Rukhsana, hence, it is also a case of Section 326 I.P.C and accordingly took cognizance against the applicants adding Section 326 I.P.C alongwith rest of the Sections under which the charge-sheet had been submitted. This order had been challenged by the applicants through criminal revision no. 331 of 2018 - Shahnawaz & 4 Ors. Vs. State of U.P. in which the first informant had not been arrayed as opposite party. According to this Court, the opposite party

no. 2 was the necessary party to the aforesaid revision and an opportunity of hearing was required to be provided to her also. However, the learned Sessions Judge dismissed the criminal revision affirming the order passed by A.C.J.M Ist Aligarh, on 16.04.2019 and concluded that it was not necessary for the Magistrate to be in consonance with the result of the I.O. The Magistrate has discretion to see as to which offence is made out against the accused persons at the time of taking cognizance and when the learned A.C.J.M Ist came to the conclusion that on the basis of material available on record, the accused should also be summoned under Section 326 I.P.C, he took cognizance against the accused persons under Section 326 I.P.C also, which cannot be said to be bad in the eye of law.

18. Being aggrieved, this petition has been preferred by the accused-applicants on the grounds that firstly, it is counter blast case lodged by the applicants against the opposite party no. 2 and other accused persons. Secondly, the medical report and the supplementary medical report of opposite party no. 2 did not make out any offence under Section 326 I.P.C as opposite party no. 2 did not appear for her re-medical examination before the medical board despite the order of the S.S.P and C.M.O, for the ascertainment of the nature of injury, therefore, the C.M.O Aligarh, informed the S.S.P. that after a lapse of more than a year from the date of occurrence if the injured is re-examined by the medical board, no useful purposes would be served. It has also been contended by the learned counsel for the applicants that the learned A.C.J.M Ist, Aligarh, was not competent enough to take the cognizance under Section 326 I.P.C, when no charge-sheet had been

submitted under this Section. The learned counsel for the applicants contended that such an addition or alteration can be made only at the time of framing of charges and not at the stage of taking cognizance. The learned A.C.J.M. Ist has discussed Section 320 and Section 326 I.P.C and was of the opinion that the right ear injury sustained by the opposite party no. 2 falls under the category of grievous hurt under the third ingredient of Section 320 I.P.C according to which if there is permanent privation of hearing of either ear, the injury would be called to be grievous hurt.

19. The trial Court and the Revisional Court concluded that the victim's injury in the drum of the right ear as a hole would be caused to be grievous hurt under Section 320 I.P.C and according to Section 325 I.P.C if grievous hurt is caused voluntarily by means of any instrument for shooting, stabbing or cutting, or any instrument, which used as a weapon of offence is likely cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance, which it is deleterious to the human body to inhale, to swallow, or to receive into blood, or by means by any animal, shall be punishable with imprisonment for life, or with imprisonment of either description for a term, which may extend to ten years and shall also be liable to be fine and would be punishable under Section 326 I.P.C.

20. As per the F.I.R dated 15.05.2017 at about 5:30 p.m when opposite party no. 2 went to her matrimonial house, her relatives did not permit her to enter into the house

and *Dewar* Sarfaraz, mother-in-law Anisha, and sister-in-law Farha beat her by their legs and fists and *Dewar* Shahnawaz attacked with knife, due to which she received injuries.

21. The last I.O. Dinesh Kumar, concluded that since no injury had been caused by any dangerous weapon in the drum of the right ear of the victim (opposite party no.2) and there is no loss of complete hearing capacity of her right ear, hence, Section 326 I.P.C would not be attracted and accordingly added Section 325 I.P.C.

22. Learned A.C.J.M Ist discussed Sections 320 and 326 I.P.C, pointed out the statements of the Doctor and opined that the injuries caused to the victim is grievous in nature and in the opinion of E.N.T Surgeon there was a hole in the **right ear drum**, hence, it was a grievous hurt. In respect of Section 326 I.P.C, the learned A.C.J.M.Ist was of the opinion that by the attack of stick and *lathi*, grievous fetal injury may be caused, but this Court is not inconsonance to the finding recorded by the learned A.C.J.M.Ist because in several other cases, it has been held by the Apex Court and the High Courts that stick and *lathi* are not the deadly weapons and it is nowhere mentioned, under Section 326 I.P.C that if any injury has been caused by stick or *lathi*, it would be covered under Section 326 I.P.C.

23. In paras 3 & 4 of the judgment passed in case of ***Dhanai Mahto and Anr. Vs. State of Bihar 2000 AIR SCW 3966-1***, the Apex Court has held that bamboo-stick and *lathies* are not lethal or deadly weapons.

24. In para 3 of the judgment passed in the case of ***Joseph Vs. State of Kerala 1995 SCC (Cri) 165***, it has been held that *lathi* is not a deadly weapon.

25. In paras 10 & 11 of the judgment passed in the case of ***Phool Chand Yadav Vs. State of U.P. 2022 (4) ALJ 56***, it has been held that stick or *lathi* is not a deadly weapons.

26. In para 13 of the judgment passed in the case of ***Ram Singh and other Vs. State of Madhya Pradesh, Gwalior Branch***, MCCR No 5920 of 2018 Section 320 and Section 326 I.P.C have been discussed, in which it has been held that *lathi* is not a dangerous weapons and if any injuries has been caused by *lathi*, it would not be covered under Sections 320 and 326 I.P.C.

27. According to this Court, only an injury in the nature of a hole in the right ear drum of opposite party no. 2 is not covered under Section 320 (thirdly) I.P.C. as there is no medical evidence to establish that there was a permanent privation of hearing of the right ear. It has been seen that if a hole has been made in the **ear drum**, there would not be permanent privation of the hearing capacity of the ear. In that case, certainly there would be some loss in hearing capacity, but it cannot be said that there would be complete loss of hearing capacity. If there is hundred percent loss of hearing capacity on account of such hole injury, certainly Section 320 I.P.C would attract and if any dangerous weapon or means mentioned under Section 326 I.P.C has been used in commission of crime only in that case, Section 326 I.P.C would apply.

28. Opposite party no. 2 Rukhsana has stated to the I.O under Section 161 Cr.P.C that Naazim hit on her right ear due to which blood started flowing from the ear.

29. This Court is of the considered view that if an stick is used in causing hurt or grievous hurt on the ear of a victim, Section 326 I.P.C would not be attracted, if such injury would have been caused by knife, or by other means mentioned in Section 326 I.P.C, such injury would be covered under Section 326 I.P.C provided there is hundred percent loss of hearing capacity of the concerned ear.

30. On the basis of above discussions, this Court is of the considered view that the injuries caused by stick in the right ear of the victim by Naazim can not be said to be a grievous hurt as there is no medical report that there has been permanent loss of hearing capacity of her right ear and also it can not be said that such injury is covered under Section 326 I.P.C.

31. From the above discussions, this Court is of the considered view that the learned A.C.J.M. Ist Aligarh and the then learned Sessions Judge, have been failed in appreciating the facts, the medical reports and the law in right perspective and have wrongly concluded that there was a grievous hurt defined under Section 320 (3) I.P.C to the opposite party no. 2, and punishable under Section 326 I.P.C.

32. The power of taking cognizance regarding taking cognizance has been considered by the Apex Court and the High Courts, and it has been concluded that at the time of taking cognizance, the concerned Magistrate has

limited power and at this stage the learned Magistrate or the concerned Court can not add or alter Section(s), considering the case diary and the charge-sheet. If the concerned Magistrate or the Sessions Judge are of the view that some Section(s) have been left by the I.O, it has power to add or alter the Section(s) at the time of framing the charge, but not at the stage of taking cognizance.

33. On the basis of above, discussion this Court is of the considered view that taking cognizance and summoning the accused applicants under Section 326 I.P.C is bad in the eye of law and the judgment of the Revisional court is also not the correct proposition of law. Hence this application succeeds and is liable to be **allowed**.

ORDER

This application under Section 482 Cr.P.C, is allowed with regard to taking cognizance and summoning the applicants under Section 326 I.P.C by the learned A.C.J.M Ist, Aligarh, affirmed by the Revisional Court are accordingly **quashed**.

Order Date :- 18.04.2023

Vinod.