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Court : Mumbai

Decided On : Dec-12-1961

Reported in : AIR1962Bom263; (1962)64BOMLR274; ILR1962Bom483

Judge : Patel and ;Shah, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 4(1), 155, 155(2), 529 and 537 ; Prevention of Corruption Act, 1947 - Sections 3, 5, 5(2) and 5A; Indian Penal Code (IPC), 1860 - Sections 161; General Clauses Act, 1897 - Sections 26

Appeal No. : Criminal Appeal No. 764 of 1961

Appellant : Gulab Singh

Respondent : State

Advocate for Def. : V.T. Gambhirwalls, Asstt. Govt. Pleader

Advocate for Pet/Ap. : T.V. Sharme ;C.S. Narayanamurthi, Advs.

Judgement :

Patel J.

(1) This is an appeal by the accused who has been convicted by the learned Special Judge Nanded, under S. 161 of the Indian Penal Code and S. 5(2) of the Prevention of Corruption Act, 1947., for each of which offences he has been sentenced to one year's rigorous imprisonment and the sentences are directed to

run concurrently.

(2) The accused held the post of a Station Master at Bhokar Railway Station on the Central Railway. As such Station Master, he had also to perform the duties of booking goods for transport by railway either in wagon loads or in smaller loads. It was alleged by one Deorao Sambhaji that he used to send foodgrains to several places from Bhokar, that on every occasion whenever he was allotted a wagon he paid Rs. 10 to the Station Master in the past. On 17th June 1959, he has requisitioned one wagon for Nanded and on 24th June 1959, he had requisitioned another wagon for Jalna. On 18th July 1959, he was assigned two wagons and he loaded both these wagons. In the wagon which was to go to Jalna he had loaded 175 bags of rice. The railway receipt that was given by the accused showed the name of one Kisan as consigner. When questioned, the accused told Deorao not to worry about that. Thereafter according to Deorao not to worry about that. Thereafter according to Deorao, Abdul Nabi who was in his service, told him that the accused was demanding Rs. 20 for the two wagons which he had assigned to Deorao. The accused repeated the demand at least twice or thrice. On the last occasion, i.e., on 31st July or 1st August 1959, Deorao sent Abdul Nabi with goods for being booked. But Abdul Nabi came and informed him that the accused was demanding Rs. 20 and told him that unless he gave that amount the goods would not be booked. Deorao then instructed Abdul Nabi to go to Nanded for contacting Anti Corruption Inspector, Deshmuckh. On 1st August 1959, Abdul Nabi lodged his complaint with Inspector Deshmukh who recorded it at about 3 p.m. Thereafter Inspector Deshmukh sent the complainant Abdul Nabi, with his report and the complaint, to the Judicial Magistrate First Class, Nanded for obtaining the necessary sanction for investigation, which was duly accorded to him. A trap was then laid on 2nd August 1959. Inspector Deshmukh, Abdul Nabi, Panch Motilal and some Police Officers left Nanded for Bhokar by the morning train. They got down at an earlier Station, Therban. The first panchnama was made near the well of one Kondiba, at which the usual matters were attended to. Two currency notes of Rs. 10 each, which Abdul Nabi supplied, were smeared with anthracene powder. Thereafter all of them washed their hands and tested their hands by the ultra-violet lamp. After this, the complainant was sent towards the Station, along with two Panchas, and Inspector Deshmukh with two constables followed them

and stood near a nala. Motilal, one of the Panchas, stood near a window of the room where the accused was working. The complainant went inside. Some constables are alleged to be standing somewhat outside. The other Panch Ahmad Ali went there only for a minute or two and then left for the place where Inspector Deshmukh was standing. After the amount was demanded by the accused and paid by Abdul Nabi, Abdul Nabi came out and gave a signal. Immediately the police officers and the Panchas entered the office and thereafter Inspector Deshmukh questioned the accused. His hands were examined, and the powder was found on some of his fingers. There were traces of powder on the oil-cloth on the table. The accused denied that he had taken any amount from the complainant. On being questioned, Panch Motilal told Inspector Deshmukh that he had seen the accused placing the amount in the drawer of his table. Inspector Deshmukh, therefore, opened the drawer and Motilal took out the money which was wrapped in a piece of yellow paper. All these were examined and were found to have anthracene powder. A panchnama was duly drawn up, a copy of which was handed over to the accused. After the investigation was completed, the accused was charge-sheeted before the Special Judge for offences under S. 161, Indian Penal Code and S. 5(2) of the Prevention of Corruption Act. The accused denied to have committed the offence and said that he had been falsely involved because of enmity.

(3) At the trial, the accused made an application (Ex. 4) where he raised several contentions in regard to the sanction given by the learned Magistrate for investigation and contended that the proceedings were bad and, therefore, the charge-sheet should be quashed. His application was considered on merits and the learned Judge dismissed it and set down the case for hearing. A revisional application was filed to this Court, which was dismissed on the ground that it was at an interlocutory stage and there were no special or exceptional reasons for interfering with the order. We are told that an application for special leave to appeal to the Supreme Court was rejected by this Court and an application under Article 136(1) (c) of the Constitution was also rejected by the Supreme Court. Thereafter the learned Special Judge proceeded with the trial and held the accused guilty of the offences, as stated above.

(4) Mr. Sharma, learned advocate for the appellant, has raised several points before us, which formed the subject-matter of the decision of the application (Exh. 4). The first point that was raised is that an offence under S. 161, Indian Penal Code, is not a cognizable offence and, therefore, the police officer had to obtain sanction of a Maigstrate having jurisdiction under s. 155 of the Criminal Procedure Code. No such sanction having been asked for, the whole proceedings are vitiated. In the first place, it is not possible to accept the contention that the offence under Section 161, Indian Penal Code is not a cognizable offence 'Cognizable offence' has been defined in S.4(1) (f) of the Criminal Procedure Code, to mean an offence for which a police officer, within or without the presidency towns, may, in accordance with the second schedule or under any other law for the time being in force, arrest without warrant. In the second schedule, the offence under S. 161 is shown as being one where the police m,ay arrest an offender without warrant. Originally of offence under S. 161 was not one where a police officer was entitled to arrest the alleged offender without a warrant. Under the Prevention of Corruption Act, 1947, by S. 3, it was provided that offences punishable under Ss. 161, 165 and 165A of the Indian Penal Code, shall be deemed to be cognizable offences for the purposes of the Code of Criminal Procedure, 1898, notwithstanding anything to the contrary contained therein. Thereafter, by Act 26 of 1955, S. 114(b), in respect of Ss. 161 to 165, necessary amendment was made in the Criminal Procedure Code by placing these offences along with other offences, showing them as cognizable. In view of this amendment, it was no longer necessary to continue S. 3 of the Prevention of Corruption Act, in the form in which it was originally enacted in Act II of 1947 and, therefore, by Act 50 of 1955 it was recast in the present form, by which it was enacted that an offence punishable under S, 165A of the Penal Code, shall be deemed to be a cognizable offence for the purpose of the Code of Criminal Procedure.

(5) It is argued that whatever be the position under the Criminal Procedure Code, inasmuch as S. 3 of the Prevention of Corruption Act, has been amended and the offences under Ss. 161 to 165 are taken out from S. 3, it must be deemed that to that extent the provision of the Criminal Procedure Code is repealed. This argument cannot possibly be sustained. Act 50 of 1955 does not repeal Act 26 of 1955, in respect of offences under Ss. 161 to 165. The reason for amending S. 3

of the Prevention of Corruption Act, is as we have stated, that due provision having been made in the Criminal Procedure Code itself, it was no longer necessary for continuing the provision of S. 3 to the same effect, as it was redundant. It is impossible, therefore, to accept the contention that the offence under S. 161, Penal Code, is not a cognizable offence.

(6) It is then further contended that even though in the Criminal Procedure Code, it is stated to be a cognizable offence, by S. 5A of the Prevention of Corruption Act, a limitation has been placed on the power of the police officers to make an arrest for any offence under S. 161, S. 165 or S. 165A of the Indian Penal Code or S. 5(2) of the Prevention of Corruption Act. Section 5A, so far as is material, provides that no Police Officer below the rank of a Deputy Superintendent of Police (outside the presidency towns) shall make any arrest without a warrant. This provision does not in terms touch the definition of 'cognizable offence', but only limits the power of certain police officers to make arrest. It is not possible, therefore, by inference to hold that it was intended that these offences must be taken out of the category of cognizable offences. Again, the second schedule to the Criminal Procedure Code, in respect of offences under other laws, provides that in respect of offences punishable with death, imprisonment for life, for imprisonment for three years and upwards the police officers may arrest without warrant. In view of the facts that an offence under S. 161, S. 165 or S. 165A of the Indian Penal Code, or S. 5(2) of the Prevention of Corruption Act, is punishable with seven years imprisonment, clearly the offence is a cognizable offence. Our attention, however, is drawn to a decision of the Indore Bench in Union of India v. Maheshchandra, AIR 1957 Madh B. 43. There it was held that

'an offence under S. 161, Indian Penal Code, and one under S. 5A in the Prevention of Corruption Act, is cognizable so far as the officers of the rank of the Deputy Superintendent of Police and above are concerned, but so far as the officers below the rank of a Deputy Superintendent of Police are concerned, the said offences are non cognisable in so far as they cannot investigate them without the permission of a Magistrate of the first Class.'

This limitation on the nature of cognizable offences by reference to the category of a Police Officer who cannot arrest without warrant would appear to us to be unjustified in view of the terms of the Criminal Procedure Code. It seems to us with respect, that no reference has at all been made in that case to the entries in schedule II of the Criminal Procedure Code, in respect of offences under other laws, nor are the words in S. 4(1) (f) given their natural meaning. The requirements that in a cognizable offence, a police officer should be able to arrest without warrant, is without any limitation and S. 5A cannot be split up to mean that an offence can be cognizable in reference to one officer and not in reference to another. The learned advocate also relied on the case. Md. Yakub v. Emperor : AIR1932 All73 which is against his contention. Sulaiman J. Observed in that case that under S. 50, U. P. Excise Act, any officer of the police, not below a rank prescribed by the local Government, may arrest without warrant, and the offence was, therefore, a cognizable one. This contention must, therefore, be rejected.

(7) It is then contended that the charge is in respect of an offence of 2nd August 1959, while the sanction is obtained on 1st August 1959 on the allegation that demand was made on the previous day of that day; that the accused is not charged with the offence of 1st August but is charged with the offence of 2nd August 1959, and the sanction to investigate is, therefore, in reality an anticipatory sanction and, therefore, a bad sanction. It was contended that there was no sanction for investigation after 2nd August 1959. In respect of this contention the learned advocate relied on Shyamlal Sharma v. Kind Emperor : AIR1949 All483 and Labhshankar v. State, AIR 1955 Sau 42. The Allahabad case was decided under S. 155(2) of the Criminal Procedure Code, and it was held that the Magistrate was not empowered to pass an anticipatory order to investigate an offence which had not been committed. That, however, is far from saying that the subsequent proceedings as a result of the investigation are rendered completely nugatory. The other case was also decided under S. 155(2) of the Criminal Procedure Code and it was stated:

'If the police officers investigate such offence without a valid order, they act without jurisdiction and the report submitted on such investigation is, in our opinion, not a report upon which the Magistrate can take cognizance of the offence under S. 155

of the Criminal Procedure Code and the entire trial is vitiated as without jurisdiction'. In the first place, the position of a demand and acceptance of a bribe or illegal gratification is entirely different from that of other offences under the Penal Code. It is no doubt true that under S. 161, Indian Penal Code, demand by itself is made an offence; but where that demand has been effectively carried out by compelling payment and acceptance of money, the whole series of transactions from one offence, demand being the beginning and acceptance the end. It is impossible to contend that at the stage when sanction was asked for in this case, i.e., immediately after the demand, in fact there was no offence in respect of acceptance and, therefore, no sanction could be given and that sanction should have been obtained only after the payment was made, and the investigation commenced thereafter. We agree, therefore, with the learned Special Judge when he says that the sanction is not anticipatory in fact. It seems to us that this is for the first time that such a point has been taken. Hundreds of cases are decided under S. 161 of the Penal Code and S. 5(2) of the Prevention of Corruption Act, and in every case that wwe have come across sanction has always been obtained after demand is made and complaint is made to a notice officer, and thereafter investigation is completed. No second sanction has ever been asked for nor required by any Court, after moneys are accepted in pursuance of the demand. Even otherwise, we do not see any reason to construe S. 155 of the Criminal Procedure Code and S. 5A of the Prevention of Corruption Act in this restricted manner. The duty of the police is not only to detect offences but to prevent their commission. In order to effectuate the intention of the Legislature for fuller and proper investigation of offences, we think the words of the sections must be held to include 'an intended offence or offence imminently likely to take place'.

(8)Even assuming that we are wrong and the sanction is anticipatory and the police officer had no right to investigate into the offence of the 2nd of August, we are of the opinion that the subsequent entertainment of the complaint by the learned Judge and its ultimate trial and conviction of the accused cannot be affected, and to that extent, we are in disagreement with the learned Judges of the Saurashtra High Court. Mr. Sharma relied ona majority decision of the Supreme Court in Delhi Administration v. Ram Singh : [1962]2SCR694 . It was a case which arose under the Suppression of Immoral Traffic in Women and Girls Act, 1956. In

that case, the offence was investigated not by a Special Police Officer, as required by the Act, but by Sub-Inspector who was subordinate to him. After he submitted the charge-sheet the learned Magistrate quashed the charge-sheet from which a revision application was taken to the High Court which failed, and an appeal to the Supreme Court also failed. The learned Judges considered the scheme of the Act and said:

'. . . . . . The special police officer is competent to investigate and that he and his assistant police officers are the only person competent to investigate offences under the Act and that police officers not specially appointed as special police officers, cannot investigate the offences under the Act even though they are cognizable offences.'

In the result, they dismissed the appeal of the State. A Bench of this Court, of which I was a member, had occasion to deal with a case under this very Act (State v. Mainabai : AIR1962 Bom202) and there we have explained the judgment in this case. We have there pointed out that the question as to whether or not the Magistrate could have treated the charge-sheet made by the police as an ordinary complaint and could have proceeded with the trial, was not mooted before their Lordships. We then considered the question and this is what I said:

'The learned Additional Government Pleader relies on Section 156(2) and Seec. 529 of the Criminal Procedure Code and contends that even assuming that the investigation was illegal or irregular that cannot affect the jurisdiction of the Court. He relies on Emperor v. Rustom Ardeshir, 49 Bom LR 821: AIR 1948 Bom 163, which supports his contention. It may be that if a person is illegally arrested, he may be appropriate proceeding get himself released. It may be that if the action of the police officer is illegal or improper he may not be able to protect himself in a proceeding against him. And though the Court may strongly disapprove the illegality of the investigation 'the question' as Lords Tenterdon, C. J. posed is:

' . . . . .Whether is a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice or whether we are to consider the circumstances under which he was brought here.'

He answered it saying: 'I think, and I still continue to think that we cannot enquire into them.' These observations were quoted with approval by Lord Macmillan in Parbhu v. Emperor . The following observations of Lord Chief Justice Cockburn in the charge to the jury in Queen v. Nelson and Brand quoted at p. 839 of 46 Bom Lr: (at p. 75 of AIR) are pertinent. Says he:

' . . . . .We leave you (the party wrongfully brought before the Court) to settle with the party who may have done an illegal act in bringing you into this position; settle that with him.'

(9) It is next contended that even if the report of the police officer be bad qua report, it can still be regarded as a complaint and the Magistrate can proceed with the case. This view has been taken in Emperor v. Shivaswami, 29 Bom LR 742: AIR 1927 Bom 440 and Emperor v. Raghunath, 34 Bom LR 901 : AIR 1932 Bom 610. The contrary view expressed in Emperor v. Chandri, AIR 1925 Bom 131 has been explained in the principle of Shivaswami, 29 Bom LR 742: AIR 1927 Bom 440 and Raghunath's cases, 34 Bom LR 901: AIR 1932 Bvom 610 has been accepted and followed.

(10) The above view is accepted in the pronouncements of the Supreme Court in cases arising under the Prevention of Corruption Act. In H. N. Rishbud v. State of Delhi, (S) : 1955 CriLJ526 , the following observations are pertinent:

'A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190, Criminal Procedure Code, as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190, Criminal Procedure Code, is one out of a group of sections under the heading 'Conditions requisite for initiation of proceedings.' The language of this section is in marked contrast with that of the other sections of the group, under the same heading, i.e., sections 193 and 195 to 199. These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of Section 190(1)

are conditions requisite for taking of cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under clause (a) or (b) of Section 190(1) and in any case cognizance taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537, Criminal Procedure Code is attracted.

If, therefore, cognizance is in fact taken on a Police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of jusitce. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled. AIR 1944 PC 173 and Lumbhardar Zutshi v. The Kind, AIR 1950 PC 26, referred to.

Hence, where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the preceding investigation does not vitiate the result, unless miscarriage of justice has been caused thereby.'

(11) There is nothing in this Act which makes Section 156(2) and Sections 529 and 537 of the Code inapplicable. This being so, we must hold that illegal or improper investigation and arrest does not in any manner affect the jurisdiction of the Magistrate to take cognizance of the offence. It may at best, therefore, be a question of investigation without a sanction or a bad sanction in the present case. Unless the appellant is able to show that prejudice is caused to him because of illegal investigation the appellate Court cannot interfere with the conviction. The rules of procedure are meant to advance the cause of justice and in so far as they are intended to protect a person who is accused of an offence is entitled to take advantage of the same. Those on whom duties are imposed are bound also to discharge their duties in accordance with law. Even so, they must be subservient to the ends of justice. Unless, therefore, we are satisfied that any prejudice is caused to the accused, the findings made by the learned Judge cannot be set aside only on the ground of defect in the investigation. We repeatedly questioned Mr. Sharma to show us what was the prejudice caused to his client, but he evaded answering that question by giving some answer which had no bearing on the point

at issue. This contention mus clearly, therefore fail.

(12) It is then contended that the sanction given by the learned Magistrate under Section 5A of the Prevention of Corruption Act, is mechanical and has been given without the application of his mind, which is contrary to the principles underlying the requirements of a sanction, and for this purpose reliance is placed on the decisions of the Supreme Court in Jaswant Singh v. State of Punjab : 1958 CriLJ265 , State of M.P. v. Mubarak Ali : 1959 CriLJ920 and P. C. Joshi v. State of U. P. : 1961 CriLJ566 . The sanction in the present case is given below the application or report of the police officer and the word 'sanctioned' is used. It is also stated that though the learned Magistrate was cited as a witness he was not examined. The evidence of Inspector Deshmukh, shows that after he took down the complaint he prepared his own report and sent the complainant along with his complaint and the report to the Magistrate. The Magistrate made an endorsement below the complaint itself that he had gone through the statement and verified it and thereafter the sanction was given on the report of the police officer. It is clear, therefore, that in this case it is not as if only the papers had been sent and investigation was sanctioned. In any case, once the investigation is completed and the accused is tried, objection cannot now be allowed to be taken in view of what we have stated above.

(13) Then it is contended that sanction for the prosecution of the accused given by the railway authorities (Exh. 18) is not a valid sanction. We are asked that when the Chief Operating Superintendent, Central Railway, stated

'And whereas the said acts constitute offence punishable under section 161, of the Indian Penal Code, 1860, and section 5(2) read with section 5(1) (d) of the Prevention of Corruption Act, 1947 (Act II of 1947)'

we should read into them words that the first offence referred to in the earlier paragraph was an offence under the Penal Cod, and the subsequent offence was one under the Prevention of Corruption Act and, therefore, the prosecution as now launched is not valid. That would amount to rewriting the order of the Chief Operating Superintendent, which cannot be done. The order must be read as written and drafted and understood by the person concerned and no interpolation

can be permitted to be made in the same. Evidently the Chief Operating Superintendent intended that prosecution under both the sections should be launched in respect of the entire transaction and not piecemeal, as contended for by the learned counsel. It is then contended that the sanctioning officer did not apply his mind. The evidence of Shrirang Harshe, prosecution witness No. 1 (Exh. 17), shows that when the papers were first submitted to the Chief Operating Superintendent, they were sent back for further query and after the answer was received, the ultimate sanction was given. This can be the best evidence of the application of mind by the officer concerned. There is no doubt that the draft was prepared by the clerk, but in the order itself it is recorded that after fully and carefully examining the material before him, the sanction was given by the Superintendent. There is no substance, therefore, in this contention either. We also do not think that non-compliance with Rule 1064 of the Railway Code, vitiates the sanction since it has no application.

(14) It was then contended by placing reliance on Section 26 of the General Clauses Act, that the accused cannot be prosecuted for both the offences together, because the same set of facts constitute two different offences. A plain reading of Section 26 of the General Clauses Act, cannot support this contention. What is prohibited is punishment for the same set of facts under two sections but not the trial. Mr. Sharma has relied upon Surajpal Singh v. State of U. P. : 1961 CriLJ730 . But this was a case of subsequent complaint with which their Lordships were dealing. Reliance on In re P. S. Aravamudha, AIR 1960 Mad 27, is not also justified, since it deals with a question of punishment and not trial. There is no substance in this contention as well.

(15) (After discussing the merits of the case in paras 15 to 20 the judgment proceeds:)

(21) An appeal is made to us that the sentence is severe and we should reduce the sentence looking to the long service of the accused.Long service of a person or consideration of loss of service or other benefits which are due to him, cannot be a consideration for reducing the sentence. Experience has shown that in spite of the fact that the Prevention of Corruption Act has been in force for upwards of

14 years, these offences have not been infrequent. Imposition of sentence of imprisonment is intended to be more as a deterrent than retribution; and if it is to serve its purpose as such, it must be sufficiently serve and swift. Unfortunately swiftness is not for us, but serve it can be. Taking into account all the circumstances of the case, we are not prepared to say that the sentence of one year's rigorous imprisonment awarded to the accused is in any manner uncalled for.

(22) In the result, the appeal fails and is dismissed. The accused to surrender to his bail.

(23) Appeal dismissed.

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