

A. Gopalakrishna Naik Vs. State

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Court : Karnataka

Decided On : Apr-14-1961

Reported in : 1962CriLJ55

Judge : K.S. Hegde and ;Ahmed Ali Khan, JJ.

Appellant : A. Gopalakrishna Naik

Respondent : State

Judgement :

1. The appellant who was the Inspector of Motor Vehicles in Raichur District between January and April 1958 was tried and convicted in Criminal Case No. 2/2 of 1958 on the file of the learned Special Judge, Raichur, under Section 161 I.P.C. and under Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act (which shall be hereinafter called the 'Act') and sentenced to suffer simple imprisonment for four months and to pay a fine of Rs. 100, in default to suffer further one month's simple imprisonment.

2. The prosecution case is that when P.W. 4 (Mallikarjun Maski) the agent of Sharan Baswaraj (P.W. 3) went to the appellant on 14.4.1958 for the issue of a fitness certificate to lorry No. MYQ, 432 belonging to P.W. 3, the appellant demanded illegal gratification of Rs. 50 before certifying to the fitness of the lorry in question; P.W. 4 duly informed this fact to P.W. 3; P.W. 3 was not willing to pay any bribe; he (P.W. 3) desired to bring to book the appellant; therefore he gave a

sum of Rs. 50 to P.W. 4 and asked him to contact the Anti-Corruption Police; accordingly P.W. 4 contacted P.W. 8 (Rama Rao Paga) Anti-Corruption Police Inspector on the 15th; after obtaining necessary permission from the learned Magistrate, P.W. 2 (Sri Adivachar Sowdikar) a trap was arranged and P.W. 4 was asked to pay Rs. 50 to the appellant in case he demanded; P.W. 4 took the lorry on the afternoon of the 15th for inspection; then again the appellant insisted on getting Rs. 50 as bribe; then the currency notes, which were treated with phenolphthalein powder earlier, were passed on to the appellant; then he (P.W. 4) gave the pre-arranged signal; at once the Police rushed to the scene and tried to catch the appellant who was at that time testing lorry No. MYQ. 126; immediately the appellant threw the notes in question into the road through the opening in the gear box; but the same was noticed by P.Ws. 8 and others; they were picked up at once; when the fingers and the coat pockets of the appellant were tested, they were found to contain phenolphthalein powder; the appellant was arrested and sent to remand; after due enquiry a charge-sheet was laid.

3. At this stage itself we may summarise the contentions advanced on behalf of the appellant. According to the appellant, P.W. 3 is one of the Zamindars of that place; he is known as Raja Sharan Basavaraja; taking advantage of his position in life, he was running his lorry No. MYQ. 432 without paying the tax due; this came to the notice of the authorities; therefore P.W. 3 submitted an intimation on 2.4.1958 intimating that he is not using his lorry No. MYQ. 432; on that application, the R.T.O. issued a memo to the appellant on 4.4.1958 to the following effect:

ORDER

The M.V.I. Richur.

He should report whether the vehicle No. MYQ. 432 was actually off the road from 24.1.1958. Your report should reach this office by 15th April, 1958;

the same day another memo was issued to P.W. S which says:

You have intimated the non-use of the vehicle MYQ. 432 with effect from 24.1.1958. As such you have to pay the tax of January 1958 amounting to Rs. 176

and penalty of Rs. 658/50 to the delay in payment of tax due for January for the months from January 58 to March 58, the above arrears should be paid early.

On 10.4.1958, the appellant saw lorry No. MYQ. 432 being used for the transport of cotton; he forthwith charge-sheeted the driver for the illegal use of the lorry the said case was pending at the time of the occurrence with which we are concerned in this case and the same ended in conviction on 18.4.1958; between the 10th and, 14th of April the appellant was touring with the R.T.O.; he returned to the Headquarters only on the 14th; on the 15th noon, lorry No. MYQ. 432 was brought to his house for inspection; he inspected the same, on his way from his house to the office and after going to the office he submitted his report called for as per the memo dated 4.4.1958; in the said report he had mentioned that as the owner of the lorry had not mentioned clearly where the vehicle was kept, it was not possible to make the necessary enquiries regarding the vehicle; he had also informed in that report about the detection of the unlawful use of the lorry on 10.4.1958. His further case is that after sending that report he came out of the office and checked first the lorry No. MYQ. 472 and thereafter lorry No. MYQ. 126; when he was checking the lorry No. MYQ. 126, P.W. 8 stopped his lorry and asked him to get down; at the same time P.W. 6 (Habib Ahmed) was asked to get under that lorry and he picked up from under the lorry a sum of Rs. 50,

The contention of the appellant is the the entire trap was a stage managed affair, got up by P.W. 8 in collusion with P.W. 3 and his friends. It is urged on behalf of the appellant that P.W. 3 might not have relished the action taken by the appellant in booking his lorry on the 10th; he might have also suspected that he would report adversely as regards the alleged¹ non-use of the lorry; hence he wanted to teach the appellant a lesson so that not only that he may not trouble him later but other officers may also realise his position and power.

4. Before dealing with the respective contentions of the parties, it is necessary to consider the legal objections taken on behalf of the appellant. Our decision on those objections have an important bearing on the appreciation of evidence in this case.

5. Sri C.K. Govinda Bhat, the learned Counsel for the appellant, strongly urged that P.W. 8 was incompetent to investigate into the case and that he had taken up the investigation only to oblige P.W. 3. He asked us to look upon that investigation with suspicion. Is this contention well founded? As mentioned earlier P.W. 8 is only an Inspector of Police. Under Section 5A of the 'Act' it is provided:

Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no police officer below the rank

(a) in the presidency towns of Madras and Calcutta, of an Assistant Commissioner of Police,

(b) in the presidency town of Bombay, of a superintendent of police, and

(c) elsewhere, of a deputy superintendent of police,

shall investigate any offence punishable under Section 161, Section 165 or Section 165A of the Indian Penal Code or under Sub-section (2) of Section 5 of this Act, without the order of a presidency magistrate or a magistrate of the first class, as the case may be, Or make any arrest therefor without a warrant:

The scope of this section has come up for consideration in several cases both before the High Courts and before the Supreme Court. In *H.N. Rishbud v. State of Delhi* : 1955 CriLJ526 , the Supreme Court observed that Section 5A is a mandatory provision and any investigation conducted in violation thereof bears the stamp of illegality. Jagannadhadas, J. who delivered the judgment of the Court observed:

When the Legislature has enacted in emphatic terms such a provision it is clear that it had a definite policy behind it.

x x x Having regard therefore to the peremptory language of Sub-section (4) of sec 5 of the Act a (veil as to the policy apparently underlying it, it is reasonably clear that the said provision must be taken to be mandatory.

It is no doubt true that in this decision it was also laid down that a contravention of Section 5A is curable under Section 537 Cr.P.C., if no prejudice is caused to the

accused. But naturally the evidence gathered by an incompetent officer is bound to be looked with suspicion. In such a situation the bona fides of the investigation is likely to be in issue. It is in fact so in this case. But it is urged on behalf of the State that P.W. 8 had in fact obtained the permission of P.W. 2 for investigating into the case. P.W. 2 was examined to speak to the permission granted by him. But the order granting the permission in question was not marked as an Exhibit in the case. In the course of his deposition P.W. 2 spoke to the existence of such an order. But no such order seems to have been placed before the lower Court. Thinking that the same might not have been produced by mistake, we asked the learned Government Pleader to find out from the file whether any such order exists. No such Order is traceable.

Sri Bhat's contention that P.W. 4 was examined before P.W. 2 only to get the numbers of the currency notes noted down by the learned Magistrate and he is now pushed forward to speak to the fact that he had granted permission under Section 5A, though at first sight looks to be an extreme contention, on deeper consideration we think that there is some force in it. The prosecution has not placed before the Court the application said to have been filed by P.W. 8 before P.W. 2, seeking his permission to investigate into the case. No explanation is forthcoming for its non-production. If that application had been produced, we could have known the grounds on which the permission was sought. The learned Magistrate (P.W. 2) frankly admitted during the course of his cross-examination that he did not apply his mind as to why P.W. 8 an officer below the rank of Deputy Superintendent of Police should be permitted to investigate into the case. He stated that he merely considered the question whether on the facts placed before him, there was a case for investigation. He says that his conclusion on that point was in the affirmative.

The Court below thought that in granting or refusing to grant permission under Section 5A the only thing the Magistrates have to consider is whether there is any justification for investigating into the complaint made. This view runs counter to the decision of the Supreme Court in *The State of Madhya Pradesh v. Mubarak Ali* : 1959 CriLJ920 . In that decision the Supreme Court laid down as follows:

These statutory safeguards must be strictly complied with, for they were conceived in public Interests and were provided as a guarantee against frivolous and vexatious prosecutions. While in the case of an officer of assured status and rank, the legislature was prepared to believe them implicitly, it prescribed an additional guarantee in the case of police officers below that rank, namely, the previous order of a presidency magistrate or a magistrate of the first class, as the case may be. The Magistrate's status gives assurance to the bona fides of the investigation, in such circumstances, it is self-evident that a magistrate cannot surrender his discretion to a police officer, but must exercise it having regard to the relevant material made available to him at that stage. He must also be satisfied that there is sufficient reason, owing to the exigencies of administrative convenience, to entrust a subordinate officer with, the investigation.

(Underlining (here in to ' ') is ours)

From the above decision it follows that the Magistrates before granting a permission under Section 5-A should decide two points, i.e. (1) that the fact, placed before them justified an investigation into them; and (2) that there are good reasons, such as administrative exigencies, to permit officers lower in rank than those designated in Section 5A to investigate into the complaints made. In the instant case we think that P.W. 2 acted mechanically, if ever he acted under Section 5A. If there was a written order as contended by the prosecution the oral evidence of P.W. 2 about the same is inadmissible in law. If P.W. 2 was used by P.W. 8 merely to give an air of respectability to the trap planned by him, then we have to remind the concerned persons the view expressed by the Supreme Court in Shiv Bahadur Singh v. State of Vindhya Pradesh : 1954 CriLJ910 , wherein H was observed that:

The Magistrate should not be employed by the police as witnesses of police traps. The independence of the judiciary is a priceless treasure to be cherished and safeguarded at all costs against prefatory activities of this character and it is of the essence that public confidence in the independence of the judiciary should not be undermined by any such tactics adopted by the-executive authorities.

In this case it is not proved that any permission under Section 5A had been given. Even if any such permission had been given it was vitiated by the fact that the learned Magistrate (P.W. 2) did not apply his mind to the requirements of the law and that he acted mechanically.

6. Sri Bhat has also assailed the propriety of the investigation in this case from another angle. He says that P.W. 8 had deliberately incorporated the statements of witnesses in the panchanamas prepared and taken the signatures of the witnesses to those panchanamas which are really speaking statements under Section 162 Cr.P.C. It was mentioned at the bar that those statements were put into the hand, of the witnesses before they gave evidence in Court with the ostensible purpose of proving them but the real purpose being to remind the witnesses that there are their signed statements and they can go back on them only at their peril. It cannot be said with any justification that Exs. P-3 and P-4 are mere observation panchanamas. The statements of the panch witnesses in their entirety had been included in those panchanamas. This is rather a very unusual feature. P.W. 8 was not new to his job. He must be presumed to be well aware of the mandate given under Section 162 Cr.P.C. It is reasonable to assume that he also knew how to prepare observation panchanamas as they are called.

The learned Government Pleader was not able to tell us why the statements of the panch witnesses were incorporated in Exhibits P-3 and P-4. From the undue interest P.W. 8 had taken in this case, to which we shall make reference hereinafter, it is more than likely that P.W. 81 wanted to coerce the witnesses to stick to a particular version by taking their signatures to their statements. As held by the Judicial Committee in *Zahiruddin v. Emperor* AIR 1947 PC 75, that a mere contravention of Section 162(1) Cr.P.C., does not invalidate an investigation but it may cast doubt on the evidence adduced. Lord Normand delivering the opinion of the Judicial Committee observed:

It appears to their Lordships that the effect of a contravention of the section depends on the prohibition which has been contravened. If the contravention consists in the signing of a statement made to the police and reduced into writing, the evidence of the witness who signed it does not become inadmissible. There

are no words either in the section or elsewhere in the statute which express or imply such a consequence. Still less can it be said that the statute has the effect of vitiating the whole proceedings when evidence is given by a witness who has signed such a statement. But the value of his evidence may be seriously impaired as a consequence of the contravention of this statutory safeguard against improper practices. The use by a witness while he is giving evidence of a statement made by him to the police raises different considerations. The categorical prohibition of such use would be merely disregarded if reliance were to be, placed on the evidence of a witness who had made material use of the statement when he was giving evidence at the trial. When, therefore, the Magistrate or presiding Judge discovers that a witness has made material use of such a statement it is his duty under the section to disregard the evidence of that witness as inadmissible.

There is no material on record to support the contention of Sri Bhat that the witnesses had in their hands the panchanamas which they had signed, at the time of giving evidence. It is not known whether those panchanamas were proved after the other evidence of the witnesses was recorded. In the Court below the learned Counsel for the accused did not object to the admissibility of the evidence of the panch witnesses on the ground urged before us now. Therefore, we are not in a position to agree with Sri Bhat that the evidence of P.Ws. 3 to 7 should be excluded from consideration. But we agree with him that they had little choice to depose voluntarily in view of the earlier commitments made in Exs. P-3 and P-4.

A case similar to the one that we are considering now, came up for consideration before a Full Bench of the Kerala High Court *State of Kerala v. Samuel* : AIR1961 Ker99 (FB). In that case their Lordships observed:

It cannot be said that in view of the mandatory provisions of Section 5-A of the Prevention of Corruption Act, insisting on the investigation of the case by an officer not below the rank of a Deputy Superintendent of Police, any enquiry that is made by a Circle Inspector of Police does not have the legal effect of an investigation and as such the taking of signed statements during such enquiry by him is not hit by Section 162 Cr.P.C. which only prohibits the taking of such statements during

investigations. It will be a travesty of justice, if a provision which was introduced was the definite object of safeguarding the interests of public servants is to be used as a weapon against them, so that the investigating officer by deputing his function to an officer incompetent to investigate can rely upon that incompetence to deny the public servant even the general safeguards provided by Section 162 Cr.P.C. The Circle Inspector acts in violation of Section 162 Cr.P.C. when he takes down the statement of the witnesses and gets their signatures thereto.

In fairness to the learned Government Pleader we must mention that he did not take up the stand that the enquiry made by P.W. 8 did not fall under Chapter XIV of the Criminal Procedure Code.

7. The contentions advanced on behalf of the appellant (summarised earlier) are probalised by the several circumstances appearing in this case. It may be noted that the appellant originally belonged to the old Madras State; he came over to the Mysore State after State Reorganization he took charge at Raichur, a District which was part of the old Nizam State on 6.1.1958; as mentioned earlier this incident took place on 15.4.1958. P.W. 3 appears to be an influential man of the locality. As noticed earlier he appears to have been running his lorry MYQ. 432 without paying taxes for the same. He notified the non-user of his lorry some time in February 1958. In that connection a memo had been issued to him by the R.T.O. on 4.4.1958 demanding from him over Rs. 800 as taxes and penalty; the appellant had been asked to enquire into the truth of the allegation that the lorry was not being used; on 10.4.1958 the appellant had detected that lorry transporting cotton and in that connection he had laid a complaint against the driver of the lorry; on 15.4.1958 he had submitted his report in response to the memo sent to him on 4.4.1958.

From the internal evidence available from the records produced in this case, it is clear that this report must have been submitted before the accused was arrested on 15.4.58. This is clear from the order issued by the R.T.O. on that very date. We are told that the R.T.O's Office and the M.V. Inspector's office at Raichur are situate in the same building. Likely the appellant was not amenable to the influence of P.W. 3 and that P.W. 3 was heading for trouble. Therefore it is not

unlikely that P.W. 3, who might have had his own ways in the past, wanted to teach a lesson to the appellant so that it might serve as a good deterrent to the other officers as well from meddling with his affairs. It is quite clear that P.Ws. 3 and 8 were together on the 15th. In spite of detailing P.W. 4 for taking steps to catch the appellant, P.W. 3 was admittedly near at hand. He claims to have been present when P.W. 4 made efforts to bribe the appellant. He further says that he was present when the appellant was trapped. We have earlier seen that P.W. 8 had taken upon himself the responsibility of laying a trap though under law he was incompetent to do so without obtaining special permission from a Magistrate. There is no evidence on record to show that none of the officers of the rank of Deputy Superintendent and above were available on that day.

We have further noticed that P.W. 8 in contravention of Section 162 Cr.P.C. had taken the signatures of the witnesses to their statements. That is not all. On 29.4.1958, an application under Sub-section (5) of Section 497 Cr.P.C. was filed before the learned Special Judge for canceling the bail granted to the appellant. In support of that application P.W. 8 had filed an affidavit saying amongst other things that the appellant was intimidating him and that there was danger to his life at the hands of the appellant. He (P. W, 8) got himself examined in that proceedings and in the course of his deposition stated that the appellant was making efforts to murder him. In that case allegations were also made that the appellant was: intimidating P.Ws. 4 and 6. P.W. 6 came forward with^ story that lie had been assaulted by the appellant and that story was backed up by P.W. 8. In the interval it is said that P.W. 6 had committed theft in the house of the appellant. In that connection a case had been registered against P.W. 6 and the same was pending trial when this case was disposed of by the Court below. We do not know what had happened to it.

It is suggested on behalf of the defence that the theft in question was committed with a view to un-nerve the appellant. In the application filed for the cancellation of bail, P.Ws. 4, 6 and 8 were examined in Court as seen from the order of the Court. P.Ws. 4 and 6 supported the version of P.W. 8. It is difficult to believe that an utter stranger like the appellant who had come to the District only a few months before this occurrence could have behaved in the manner that P.Ws. 4, 6 and 8 wanted

the Court to believe. The Court below rightly refused to believe the evidence of any one of those witnesses. In a well considered order (dated 11.5.1959) it rejected the application practically disbelieving all the allegations made. But what is of importance is that P.Ws. 4, 6 and 8 were prepared to come forward with such fantastic stories. The attitude of those witnesses clearly shows that they were vindictive towards the appellant. It looks as if P.Ws. 3 and 8 were out to ruin the appellant. No step was considered by them as improper. Admittedly P.W. 4 is a dependent on P.W. 3; P.W. 7 is, a subordinate of P.W. 8; P.W. 6 appears to be one of those doubtful characters in society. The only seemingly disinterested witness is P.W. 5 (Linganna). But it would not have been beyond the capacity of P.Ws. 3 and 8 to produce a witness of this type. In a case of this nature one must go by the broad probabilities. It leads one nowhere if we get obsessed by individual facets of the case.

8. Now as regards the demand for bribe, the only witness who speaks to it is P.W. 4. We have earlier come to the conclusion that this witness is not a dependable witness. On his own showing he is a hanger on P.W. 3. He had come forward at an earlier stage with false accusation against the appellant. There are numerous contradictions in his evidence but we do not think it necessary to go into them as even otherwise his evidence has not commended itself to us. Similarly for the payment of the bribe in question, we have only his evidence.

9. P.Ws. 3 to 8 speak to the trap laid. For the reasons mentioned earlier it is very unsafe to rely on their evidence. Their evidence is further improbability by the contents of the report submitted by the appellant to the R.T.O. on 15.4.58. This report, as mentioned earlier, must have been submitted before the appellant was arrested. In that report the appellant had mentioned thus:

It (the lorry in question) has been inspected and passed for 6 months. Tax for the present quarter is paid by challan. The insurance is valid. This is for the kind information please.

This means that he had already issued the necessary fitness certificate even before he came to inspect lorries Nos. MYQ. 472 and MYQ. 126. According to the prosecution, money was given to the appellant when he was inspecting lorry No.

MYQ. 126. It is difficult to, believe that an officer who was demanding a bribe from a person who was no friend of his would first issue the certificate asked for then hope to get at a later stage the bribe demanded. We are not at all satisfied with the truth of the prosecution case. It is more than likely that the entire matter is a trumped-up one. All the indications are to that effect.

10. We are conscious of the fact that the public mind is agitated over the prevalence of wide spread corruption amongst the Government servants. There can be no two opinions that corruption must be put down with a strong hand. If that object has to be achieved, it is necessary to man the Anti-Corruption Department with men of sterling character and on whose bona fides the Public and the Courts could rely. There were occasions and they were not few, when we felt that it was extremely unsafe to rely on the testimony of some of the officials of that Department. We are saying all these with the hope that our remarks will have some beneficial effect.

11. In the result, this appeal is allowed, and the appellant acquitted. His bail bonds do stand cancelled. Fine if realised will be refunded to him. Criminal Revision Petition No. 197 of 1960 is dismissed.

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