

M. Butt and ors. Vs. State

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Court : Allahabad

Decided On : Sep-26-1972

Reported in : 1973CriLJ886

Judge : P.N. Bakshi, J.

Appellant : M. Butt and ors.

Respondent : State

Judgement :

ORDER

P.N. Bakshi, J.

1. The applicant Sri Mahmood Butt, I.A.S. was the Administrator of the Nagar Mahapalika. Allahabad in the month of July, 1969. On 29.7.1969 a number of persons belonging to the Nagar Mahapalika staff went to the Sangam area, for realizing boat tax and for seizure of the boats. The Station Officer, Daraganj who was present in that area advised the Mahapalika authorities not to make recoveries of tax, or to seize boats as 29th July happened to be a bathing day (Purnamashi). Next morning i.e. on 30.7.1969 at about 9.30 a.m. the Nagar Mahapalika staff as well as the present applicant Sri M. Butt went to the Sangara area for the recovery of boat tax and seizure of boats if necessary. The Station Officer, Daraganj was given prior information by the Nagar Mahapalika that his assistance might be required on that day. It appears that the boatmen refused¹ to

pay the tax and they also resisted the attempt made by the Nagar Mahapalika staff to seize their boats. Brick-batting was resorted to by the boatmen which injured four persons belonging to Nagar Mahapalika party namely Sri M. Butt, Adtrrinistrator, Sri K.N. Joshi, Licensing Officer and two other employees Sri Onkar Nath Sharma and Sri Krishna Kant Sharma. The further case on behalf of Nagar Mahapalika was that the boatmen also indulged in the use of fire-arms which resulted in injuries to Chandrase-khar, and to Chianti Lai who died subsequently. In self defence. Sri Jitendra Nath Pandey fired his revolver and Sri Onkarnath Sharma fired his gun in the air. The boatmen thereafter ran away. The Nagar Mahapalika party returned along with two boats which they had seized during this incident.

2. The first information report at this incident was lodged by Sri J.N. Pandey, Licensing Officer at 11-15 a.m. on, 30.7.1969 at police station Daraganj. A case No. 148 of 1969 was duly registered against the accused at the said police station under Sections 147/148/149/307/332, I.P.C. Investigation was commenced immediately by Sri Raghubir Singh, Station Officer. He reached the place of occurrence, made enquiries at the spot and prepared a site plan the same day. Early in the morning at about 1-30 a.m. on 31.7.1969 he made a search for the accused but they were not traceable. The statements of witnesses were recorded at about 9.30 a.m. on 31.7.1969. The investigation continued thereafter.

3. On 31.7.1969 a memorandum was presented by Sri Jaipal Singh Keshay on behalf of the boatmen to Sri G.C. Chaturvedi the then District Magistrate, Allahabad. On this memorandum the District Magistrate directed the City Magistrate to hold an enquiry into the afore said incident. The order passed by Sri G.C. Chaturvedi. District Magistrate runs as follows:

It has been reported to me that while the Corporation authorities were checking boats plying without licence at Sangam yesterday they were subjected to brick batting and also firing by country made pistol and they had to resort to firing in self defence. On the basis of the report of Sri J.N. Pandey, Licensing Officer a case under Sections 147/148/149/307/332, I.P.C. (has already been registered at Police Station Daraganj. On behalf of the boatmen an application has been presented to

me today in which they have given their own version of the incident and have made very serious allegations against the Corporation staff. A Magisterial probe in this appears necessary. I, therefore order that the city Magistrate will kindly hold an enquiry into this incident and submit fish report to me.

Sd. G.C. Chaturvedi, I.A.S.

July 31, 1969, District Magistrate,

Allahabad.

4. In pursuance of the order of the District Magistrate, an enquiry was conducted by Sri R.R. Shah, I.A.S., City Magistrate Allahabad. He recorded the statements of Chiranji Lal (Since dead) and 17 others on oath. He also examined Sarvsri J.N. Pandey O.N. Sharma and Chandrasekhar. He also took into con-sedation, documentary evidence which had been exchanged between the district authorities and the Nagar Mahapalika with regard to imposition and recovery of boat tax. After considering all this evidence, Sri R.R. Shah, City Magistrate Allahabad, submitted his report dated 12.6.1970 to the District Magistrate. The finding arrived at by Sri Shah as a result of enquiry conducted by him is as follows:

I, therefore, come to the conclusion that in transgressing their jurisdiction on 30.7.1969 and in opening fire upon boatmen in pursuance of their efforts to effect recovery of the boat-tax, the Nagar Mahapalika authorities showed uncalled for zest and their conduct is highly reprehensible. In doing so their officers and men - made themselves liable to the processes of law in their private capacity and they cannot seek the protection of men discharging public functions. Action may be taken to prosecute those, who have subverted law.

Sd. R.R. Shah, I.A.S.

City Magistrate Allahabad.

12.6.1970.

5. On a consideration of the above report of the City Magistrate the District Magistrate Sri G.C. Chaturvedi took cognizance of the offence against Sri M. Butt

and 26 others on 12.10.1970. The operative portion of the order of the District Magistrate runs thus:

All this evidence establishes a strong prim-a facie case under Sections 147/148/149/302 read with 301, I.P.C. 307 and 395, I.P.C. I therefore take cognizance of this offence under Section 190(c), Cr.P.C' Having thus taken cognizance of the case the District Magistrate, Allahabad transferred this case to the Additional District Magistrate (Judicial) Allahabad for taking evidence under Section 208, Cr.P.C.

6. The applicant filed a revision against the aforesaid order of the District Magistrate taking cognizance of the offence under Section 190(1)(c) before the I Additional District and Sessions Judge, Allahabad. Three contentions were raised before him.

(1) That the alleged act was done by the applicant in the due discharge of his public duty or in the purported discharge of his public duty and as such he could not be prosecuted without obtaining prior sanction of the State Government under Section 197, Cr.P.C.

(2) That the order of the District Magistrate taking cognizance under Section 190(1)(c), Cr.P.C. was illegal, because it is not based upon any information contemplated under that section but was based on an illegal magisterial enquiry and findings given by the City Magistrate Allahabad under the orders of the District Magistrate Allahabad, and

(3) Even if the applicant he held liable for having done some act Which. Was punishable, he should be deemed to have acted with bona fide intention and the error of judgment committed by him would be protected under Section 79, I.P.C.

7. The I Additional District and Sessions Judge recorded the following findings:

1. That the act of Corporation Staff complained of even though it may amount to an offence, was done not in dereliction of official duty but in the discharge of it or at least in the course of the performance of such duty howsoever wrongful, illegal, negligent or over zealous it may have been.

2. That Section 197, Cr.P.C. is attracted in this case and the District Magistrate must comply with this provision by obtaining prior sanction of the State Government before prosecuting the applicant.

3. That the District Magistrate, Allahabad had no power to direct any magisterial enquiry in the case if the police investigation, on the report of the Licensing Officer of Nagar Mahapalika lodged on the date of occurrence, at police station Daraganj was going on but there is no evidence to show that such an investigation was going on and the District Magistrate had intervened in that investigation, or had stopped it while ordering magisterial enquiry.

4. That the report of Magisterial enquiry will not cease to be information within the meaning of Section 190(1)(c), Cr.P.C. even if the proceedings before the City Magistrate held in that enquiry is held to be without jurisdiction.

5. That Section 79, I.P.C. is applied when all the facts are known i.e., when the trial is over. It is the protection against conviction and it cannot, therefore, operate before the trial begins.

On these findings the 1st Additional District and Sessions Judge, Allahabad has made a reference on 2.2.1972, for quashing the impugned order of the District Magistrate and for a direction that the prosecution of the applicant should be commenced only after obtaining the requisite sanction under the provisions of Section 197, Cr.P.C.

8. I have heard Sri B.N. Katju, Government Advocate in support of this reference. I have also permitted Sri P.C. Chaturvedi Advocate to argue on points of law as amicus curiae. The first and the foremost submission made before me by counsel supporting the reference is that the procedure adopted by the District Magistrate, in directing a simultaneous enquiry to be conducted under Section 159, Cr.P.C. while the investigation by the Police was already proceeding in respect of same incident is wholly illegal and unwarranted in law. It is submitted that this illegality committed by the District Magistrate vitiates his order dated 12.10.1970 taking cognizance of the offence and transferring the case to the Additional District Magistrate (Judicial) for taking evidence under Section 208, Cr.P.C. On the other

hand, it is contended by Sri P.C. Chaturvedi that the alleged illegal enquiry which is said to have been conducted by the City Magistrate would be covered by the expression 'information received from any person', used in Section 190(1)(c), Cr.P.C. and as such the District Magistrate was quite competent to take cognizance of the alleged offence.

9. I shall now examine the force of these submissions.

10. In the first place, it is necessary to determine whether there was a pending investigation with respect to the incident in question. In the referring order of the Sessions Judge, which I have already quoted above he seems to be of opinion, that there was no evidence to show that investigation by the police was going on, and the District Magistrate stopped that investigation by an order or enquiry, in order to get a clear idea of the factual position in this case. I examined the case diary and the relevant papers connected therewith. It is evident from a perusal thereof that the first information report of the incident in question now popularly known as the 'Sangam Goli Kand' was lodged at the police station Daraganj at 11.15 a.m. by Sri Jitendra Nath Pandey. Licensing Officer of Nagar Mahapalika, Allahabad, Crime No. 148 of 1969 was duly registered at police station Daragani at 11.15 a.m. on 30.7.1969, for offences under Sections 147/148/149/307/332, I.P.C. Investigation was immediately commenced by Sri Raghbir Singh, Station Officer. He visited the place of occurrence, made enquiries, prepared a site plan searched for the accused and even. recorded the statements of the witnesses. All this took place between 30th July 1969 after the case had been registered at the police station until the following morning: as mentioned above. It has been held in : 1955 CriLJ526 H.N. Rishbud v. State of Delhi that under the Code investigation consists generally of the following steps:

I. Proceeding to the spot. (2) Ascertainment of the facts and circumstances of the case (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons and (b) the search of place or seizure of things, and lastly formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial, and if so taking the necessary

steps for the same by the filing of a charge sheet under Section 173, Cr.P.C.

11. Applying the above principles to the facts, it becomes apparent that investigation was proceeding in the present case when the magisterial enquiry was ordered. It would, therefore not be correct to say that there was nothing on the record to indicate that investigation had not commenced on 30.7.1969 after the lodging of the report by Sri J.N. Pandey. The memorandum was lodged by Sri Jaipal Singh Keshav with the District Magistrate, Allahabad on 31.7.1969. From a perusal of the order of the District Magistrate dated 31.7.1969 itself two facts are evident (1) that on the basis of the report of Sri. J.N. Pandey, Licensing Officer, a case No. 148 of 1969 under Sections 147, 148, 149, 307 and 332, I.P.C. had already been registered at police station Daraganj, and (2) that the application filed on behalf of the boatmen, giving different version of the same incident was not deemed sufficient by the District Magistrate to take cognizance of the offence and in his view before such cognizance could be taken a magisterial probe was necessary. It is thus obvious from the facts stated above that the Sangam Goli Kand incident was already being investigated into by the Station Officer, Police station Daraganj when the counter version of the same occurrence was lodged with the District Magistrate. On this premises, therefore we have to consider whether the order of the District Magistrate dated 31.7.1969, directing a magisterial enquiry, was a valid order and if not whether the District Magistrate acted according to law. in taking cognizance of the offence on the basis of this illegal enquiry.

12. The learned Government Advocate has cited before me a case reported in : 1970 CriLJ764 S.N. Sharna v. Bipen Kumar Tewari. In this case their Lordships of the Supreme Court have dealt with the powers of the officer-in-charge of the police station to investigate any cognizable case, without the order of the Magistrate. Reference has been made to Section 156(1) and Section 157 of the Criminal Procedure Code, Their Lordships have also defined the scope of the powers of the Magistrate to hold a preliminary enquiry as contemplated in Section 159, Cr.P.C. In interpreting the aforesaid sections, their Lordships have held as follows:

We, however, feel constrained to hold that the language used in Section 159 does not permit the wider interpretation put forward by counsel for the appellant. This section first mentions the power of the Magistrate to direct an investigation on receiving the report under Section 157 and then states the alternative that if he thinks fit he may at once proceed or depute any Magistrate subordinate to him to proceed to hold a preliminary enquiry into or otherwise to dispose of the case.... It is to be noted that the second alternative does not give the Magistrate an unqualified power to proceed himself or depute any Magistrate to hold the preliminary enquiry. That power is preceded by the condition that he may do so. 'if he thinks fit'. The use of this expression makes it clear that Section 159 is primarily meant to give to the Magistrate the power of directing an investigation in cases where the Police decide not to investigate the case under the proviso to Section 157 (1) and it is in these cases that if he thinks fit he can Choose the second alternative.... The scheme of these sections thus clearly is that the power of the police to investigate any cognizable offence is uncontrolled by the Magistrate and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct the investigation or in the alternative himself proceed or depute a Magistrate subordinate to him to proceed to enquire into that case.

13. Applying the observations of their Lordships of the Supreme Court, I am clear in my mind that the order of the District Magistrate directing an enquiry to be held by the City Magistrate even-though he was aware of the fact that an investigation into the offence in question of which a counter version had been given, was already in progress, is wholly an illegal order. The proper course for the District Magistrate to adopt when he received the memorandum on behalf of the boatmen was to have taken action under Section 156(3) Cr.P.C. and to have sent this counter version to the police of Daraganj for investigation. It is not unusual to find a report of the occurrence being lodged with the police and a counter report of the same incident also being lodged thereof. Both these versions are to be investigated by the police and if there is sufficient ground for proceeding against both sets of accused, the police after due investigation as required by law would submit a charge sheet in connection therewith. In the present case one report of the same incident being already pending investigation before the Station Officer

Daraganj the counter version filed before the District Magistrate should have been directed by him to be forwarded to the Station Officer, Police station Daraganj for investigation. It is surprising that the District Magistrate did not care to follow the procedure prescribed by law and decided to embark upon a parallel magisterial enquiry, regarding the same incident which was being investigated into by the police. I am therefore, clear in my mind that the order of the District Magistrate dated 31.7.1969 directing the City Magistrate to hold an enquiry into the incident in question is wholly illegal and must be set aside, and the entire proceedings are without jurisdiction.

14. Counsel Sri P.C. Chaturvedi has argued that even if it is held that the proceedings of magisterial enquiry were illegal and without jurisdiction yet the District Magistrate is empowered under Section 190(1)(c), Cr.P.C. to take cognizance of an offence upon information received from any person other than a police officer or on his own knowledge or suspicion and as such the result of the magisterial enquiry can be deemed to be such information to the District Magistrate which authorized him to take cognizance of the offence, Reliance has been placed upon AIR 1955 SC 196 : (1955) 1 Cri LJ 526 (Supra). In that case their Lordships were considering the applicability of Section 190(1)(b), Cr.P.C. It was held as follows:

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 P.C. 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.... While no doubt in one sense Clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance it is not possible to say that 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 so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537, Cr.P.C. is attracted.

In that case the trial had concluded and their Lordships were of the view that the invalidity of the precedent investigation does not vitiate the result unless miscarriage of justice had been caused there by. But at the same time their Lordships also observed that:

It does not follow however that invalidity of investigation is to be completely ignored by the court during the trial. When a breach of such a mandatory provision is brought to the notice of the court at a sufficiently early stage, the court while not declining cognizance will have to take necessary steps to get the illegality cured and the defect rectified by ordering such reinvestigation as the circumstances of an individual case may call for.... When the attention of the court is called to such an illegality at a very early stage, it would not be fair to the accused not to obviate the prejudice that may have been caused thereby by appropriate orders at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden under Section 537, Cr.P.C. of making out that such an error has in fact occasioned a failure of justice.

15. To my mind therefore, the ease mentioned above to a large extent supports the contention of the applicant. The illegality in the present case has been brought to the notice of the court at the very earliest stage. Investigation of the Sangam Goli Kand is still pending and the trial has not yet begun. In my opinion therefore it is just and proper that at this early stage the defect in procedure should be remedied and the District Magistrate should be directed to send the report filed on behalf of the boatmen by Sri. Jaipal Singh Keshav for Investigation to the police under Section 156(3), Cr.P.C. so that the law may take its course and the accused may not be prejudiced at the trial, It is also pertinent to observe at this stage that if the result of the magisterial enquiry is eliminated as held above the only material before the District Magistrate on 'the basis of which cognizance could be taken under Section 190, Cr.P.C. is the report of Sri Jaipal Singh Keshav on behalf of the boatmen presented to him on 31.7.1969. Needless to say that the provisions of Section 190, Cr.P.C. do not mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. The word 'may' in Section 190 cannot be construed to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences

may well justify a Magistrate in sending the complaint under Section 156(3), Cr.P.C. to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter 16 of the Code.' The above observations have been made by their Lordships of the Supreme Court in a case reported in AIR 1961 Sc 986 : (1961) 2 Cri LJ 39 Gopaldass Sindhi v. State of Assam.

16. Applying this principle to the facts of the present case we have to decide whether the District Magistrate has or has not taken cognizance of this offence on the basis of the report of Sri Jaipal Singh Keshav dated 31.7.1969. The very fact that he had ordered a magisterial enquiry, indicates, that he has not applied his mind to the facts of the case, for the purpose of proceeding under the provisions of Chapter 16 of the Code of Criminal Procedure. He has not made any observation in his order dated 31st July 1969 that he is taking cognizance of the offence. Therefore to my mind it is crystal clear that the District Magistrate has not taken cognizance of the offence on the report of Sri Jaipal Singh Keshav mentioned above. Moreover, in a cognizable case, the Magistrate ordinarily takes cognizance when the police has completed the investigation and submits its report to him for issue of process. The counter report of Sri Keshav has not yet been investigated into by the police. It is only when the District Magistrate sends this report under the provisions of Section 156(3) for investigation and the police completes its investigation and submits its charge-sheet under Section 173, Cr.P.C. that the stage will arrive for the Magistrate concerned for taking cognizance of the offence and for the commencement of the enquiry or trial as the case may be.

17. So far as the question of sanction under the provisions of Section 197, Cr.P.C. is concerned that would be for the investigating agency to obtain if after due investigation it is considered necessary. In : [1955]28ITR941(SC) Matajog Dobey v. H.C. Bhari their Lordships of the Supreme Court have held as follows:

It is not always necessary that the need for sanction under Section 197 is to be considered as soon as the complaint is lodged and on the allegations therein contained. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial may establish the necessity for sanction.

18. Therefore to my mind it is premature to consider the question of sanction for the obvious reason that the material obtained in the illegal enquiry has got to be excluded and there is no material at present on the record before the court on the basis of which it can be decided whether sanction is in the circumstances necessary. I am asked by Sri B.N. Katju to consider the investigation so far conducted on the report of Sri J.N. Pandey and to decide the question of sanction under Section 197, Cr.P.C. In my opinion at this stage that would not be a fair and correct approach and would not foster the ends of justice. While, therefore, quashing the order of the District Magistrate taking cognizance of the offence in question on the basis of the illegal enquiry, I am not inclined to accept the view of the Sessions Judge that the impugned order should be quashed for want of sanction under Section 197, Cr.P.C. as mentioned above. The question of sanction will be considered at the appropriate stage.

19. For all these reasons while I accept this reference though on ground different to those given by the Sessions Judge. Allahabad I quash the order of the District Magistrate dated 12.10.1970 taking cognizance of the offence in question under Section 190(1)(c), Cr.P.C. and direct that the District Magistrate shall forward the memorandum filed by Sri Jaipal Singh Keshav dated 31.7.1969 to the Station Officer, Daraganj under Section 156(3), Cr.P.C. for investigation.