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Krishen Kumar Vs. the State

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Court : Punjab and Haryana

Decided On : May-03-1954

Reported in : AIR1955P& H151; 1955CriLJ1101

Judge : Harnam Singh,; Falshaw and; Dulat, JJ.

Acts : Prevention of Corruption Act, 1947 - Sections 5A; Prevention of Corruption (Amendment) Act, 1952; Code of Criminal Procedure (CrPC) , 1898 - Sections 75, 156 and 537; Indian Penal Code (IPC) - Sections 161, 165 and 165A; Criminal Law Amendment Act, 1952 - Sections 8

Appeal No. : Criminal Appeal No. 25-D of 1953

Appellant : Krishen Kumar

Respondent : The State

Advocate for Def. : Bishambar Dayal, Adv. for; Adv. General and; Kartar Sing

Advocate for Pet/Ap. : R.L. Anand, Adv.

Judgement :

Harnam Singh, J.

1. In Criminal Appeals Nos. 25-D and 434 of 1953 the question given, hereunder has been referred to the Full Bench for decision:

'Whether the failure to comply with Section 5A of the Prevention of Corruption Act, 1947, in respect of investigation, is an illegality which vitiates the whole proceedings in the trial or bars a trial, or whether it is merely an irregularity curable under the provisions of the Code of Criminal Procedure?'

2. Shortly put, the facts of the cases out of Which Criminal Appeals Nos. 25-D and 434 of 1953 have arisen are these: In Corruption Case No. 3 of 1953 Krishan Kumar was prosecuted under Section 5(2), Prevention of Corruption Act, 1947, hereinafter referred to as the Act, on the charge ghat he, being a public servant, committed the offence of criminal misconduct by dishonestly and fraudulently misappropriating wagon-load of iron and steel, weighing 550 maunds worth rupees 11,141/8/- on 2-10-1950. Sub-Inspector Sumair Shah Singh investigated that case without the order of a Magistrate of the first class as required by Section 5(4) of the Act. In 1951 Shri Atam Parkash Magistrate of the first class took cognizance of the offence under Section 190, Criminal P. C., hereinafter refered to as the Code, on the report of Sub-Inspector Sumair Shah Singh. On the commencement of the Criminal Law Amendment Act, 1952, the Magistrate forwarded for trial to the-Special Judge under Section 10 of that Act the case, 'State v. Krishan Kumar'. In the Court of the Special Judge, Shri P.C. Gera P. W. 1 was examined on 1-5-1953 and by the judgment under appeal in Criminal Appeal No. 25-D of 1953 the Special Judge has convicted Krishan Kumar under Section 5(2) of the Act and sentenced him to suffer rigorous imprisonment for one year and six months.

In corruption Case No. 30/2 of 1952 Mohindar Singh was prosecuted under Section 161, Penal Code, and Section 5(2) of the Act on the charge that on 31-10-1952 he, being a public servant, accepted rupees 50/- by way of bribe from Madan Lal P. W. 1. Sub-Inspector Hargopal Singh P. W. 7 investigated the case under order of Sardar Sant Singly P. W. 3, Magistrate second class, passed on the 31st of October, 1952, Exhibit P-M/1. By the judgment under appeal in Criminal Appeal No. 434 of 1953 the Special Judge has convicted Mohindar Singh under Section 161, Penal Code, and Section 5(2) of the Act and sentenced him to suffer rigorous imprisonment for six months under Section 161, Penal Code. No sentence has been imposed on Mohindar Singh under Section 5(2) of the Act.

3. In Corruption Case No, 3 of 1953 objection as regards contravention of the provisions of Section 5(4) of the Act was neither raised in the Court of the Magistrate nor in the Court of the Special Judge. In corruption Case No. 30/2 of 1952 objection as regards the contravention of the provisions of Section 5A the Act was raised in the trial Court but the Special Judge finding that there was no suggestion that investigation by Sub-Inspector Hargopal Singh has in fact occasioned a failure of justice has overruled the objection.

4. In approaching the matter, I think it proper to reproduce herein the provisions of the Act bearing on the question referred to us for decision, and the amendments made in those provisions by the Criminal Law Amendment Act, 1952, and the Prevention of Corruption (Second Amendment) Act, 1952. In Corruption Case No. 3 of 1953 the provisions of Section 5(4) of the Act applied to the investigation. Section 5(4) of the Act provided:

'Notwithstanding anything contained in the Code of Criminal Procedure, 1898, a police officer below the rank of a Deputy Superintendent of Police shall not investigate any offence punishable under Sub-section (2) without the order of a Magistrate of the first class or make any arrest therefore without a warrant.'

5. By Section 6 Criminal Law Amendment Act, 1952, the State Governments were empowered to appoint by notification in the Official Gazette Special Judges to try offences punishable under Sections 161, 165 or 165A of the Indian Penal Code or Sub-section (2) of Section 5 of the Act.

6. By the Prevention of Corruption (Second Amendment) Act, 1952, proviso to Section 3 & Section 5(4) of the Act were omitted and after Section 5 of the Act Section 5A was inserted. Section 5 A provides 'inter alia':

'5A. 'Investigation into cases under this Act'. Notwithstanding anything contained in the Codeof 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 (Act 45 of 1860) 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 he, or make any arrest therefore without a warrant.'

7. In these proceedings the points that arise for decision are ;

1. whether investigation of an offence under Section 161, Section 165 or Section 165A of the Indian Penal Code or under Sub-section (2) of Section 5 of the Act by a police officer below the rank of a Deputy Superintendent of Police without the order of a Magistrate of the first class bars the trial based on the report made by that police officer;

2. whether investigation of .an offence under Section 161, Section 165 or Section 165A of die Indian Penal Code or Sub-section (2) of the Act by a Police Officer below the rank of a Deputy Superintendent of Police without the order of a Magistrate of the first class vitiates the whole proceedings in the trial based on the report made by that police officer or is a mere irregularity curable within Section 537 of the Code of Criminal Procedure; and

3. whether the arrest of an offender for offence punishable under Section 161, Section 165 or Section 165A of the Indian Penal Code or Sub-section (2) of Section 5 of the Act without warrant vitiates the whole proceedings in the trial.

In 'State v. Krishan Kumar', the Magistrate took cognizance of the offence under Section 190 of the Code of Criminal Procedure and forwarded the case for trial to the Special Judge on the commencement of the Criminal Law Amendment Act, 1952. ^ 'State v. Mohindar Singh', the Special Judge took cognizance of the offence under Section 8 of the Criminal Law Amendment Act, 1952.

8. Section 8 of the Criminal Law Amendment Act, 1952, empowers a Special Judge to take cognizance of offences punishable under Section 161, 165 or 165A of the Indian Penal Code or Sub-section (2) of Section 5 of the Act without the

accused being committed to him for trial.

9. Section 6 of the Act provides 'inter alia' that the Court shall take cognizance of an offence punishable under Section 161 or Section 165, Penal Code, or Sub-section (2) of Section 5 of the Act alleged to have been committed by a public servant except with the previous sanction of the authorities mentioned in that section. In case the intention of the Legislature was to prevent Special Judges from taking cognizance of offences under Sections 161, 165 or 165A of the Indian Penal Code or Sub-section (2) of Section 5 of the Act when the investigation was by a police officer of lower rank than the Deputy Superintendent of Police without the order of a Magistrate of the first class, Section 8 of the Criminal Law Amendment Act, 1952, ought to have provided that no Special Judge shall take cognizance of such offences unless the investigation was by Deputy Superintendent of Police or by a police officer of lower rank than the Deputy Superintendent of Police without the order of a Magistrate of the first class.

10. On the 19th of March 1891, Section 561 was added to the Code of Criminal Procedure, 1882, by Act 10 of 1891. That section provided;

'561(1). Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall

(a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife, or

(b) commit the man for trial for the offence.

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a police officer, with respect to such an offence as is referred to in Sub-section (21), no police officer of a rank below that of police inspector shall be employed either to make, or to take part in, the investigation.'

11. In -- 'Queen Empress v. Mehri', 1895 All WN 9 (A), it was contended that investigation by a police officer who was not empowered by law to investigate an offence of rape where the sexual intercourse was by a man with his own wife

vitiated the proceedings. In repelling that contention Knox J. said ;

'The Magistrate of the District has jurisdiction to take cognizance of an offence under Section 376 of the Indian Penal Code upon any kind of information that may come before him which he considers sufficient to warrant him in taking further proceedings and the fact that that information can he based on an illegal investigation will not take an offence out of the cognizance of the Magistrate.'

12. That the construction placed upon Section 561 of the Code of Criminal Procedure, 1882, was accepted by the Legislature is borne out by the fact that in the Code of 1898 Section 561 of the Coder of 1882 was re-enacted without any modification. In my judgment 1893 All WN 9 (A), is good authority under Section 561 of the present Code.

13. In 1951 Shri Atam Parkash Magistrate of the first class took cognizance of the offence under Section 5(2) of the Act on the report of Sub-Inspector Sumair Shah Singh.

14. Section 190 of the Code of Criminal Procedure provides 'inter alia' that except as hereinafter provided, District Magistrate or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence upon a report in writing of facts which constitute such offence made by 'any' police officer.

15. From Section 4(g) and Section 190 of the Code it is plain that in criminal matters the general rule is that any person can set the law in motion by a complaint.

16. Sections 195, 198, 198A, 197, 198, 198A and 199 of the Code enact that no Court shalltake cognizance of the offences specified in those sections except on the satisfaction of the condition precedent stated in each one of those sections. Section 193 of the Code provides that except as otherwise provided by the Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

17. Section 9 of the Code of Civil Procedure provides that a litigant having a grievance of a civil nature has, independently of any statute, a right to institute in some Court or other suit unless its cognizance is expressly or impliedly barred.

18. Section 80 of the Code of Civil Procedure requires that a suit shall only be instituted after the expiry of two months from the date of the delivery of a notice of claim. Section 92 of the Code of Civil Procedure requires the consent of the Advocate-General before the plaintiffs can institute a suit in connection with public trust for the reliefs specified in that section.

19. From a perusal of several Acts passed by the Legislatures in this country we are all of us familiar with the way in which provisions of Acts are drafted to prevent actions being brought at all unless some condition precedent has been fulfilled. In 1952 the draftsman or the Legislature required no obscure language, if they desired to prevent prosecution of offenders under Sections 161, 165 or 165A of the Indian Penal Code or Sub-section (2) of Section 5 of the Act unless the conditions of Section 5A of the Act wore satisfied. But Sections 3 and 10, Criminal Law Amendment Act, 1952, and Section 190 of the Code are not framed in the way in which sections are framed when it is intended that a condition precedent should be satisfied before the prosecution can be maintained.

20. In my judgment, investigation of offences punishable under Sections 161, 165 or 165A of the Indian Penal Code or Sub-section (2) of Section 5 of the Act by a police officer below the rank of a Deputy Superintendent of Police without the order of a Magistrate of the first class does not bar the trial based on the report of that police officer.

21. In -- 'Shivbhat Manjunathbhat v. Emperor', AIR 1928 Bom 162 (B), Fawcett J, (Hirza J. concurring) found that contravention of Rule 27, Sub-rule (2) made under Section 84 of the Indian Railways Act, 1890, does not vitiate the trial. The Rule provides :

'27(1) Whenever an investigation is to be made by the railway police

(a) in a case in which an accident is attended with loss of human life or with grievous hurt as defined in the Indian Penal Code, or with serious injury to property; or

(b) in pursuance of a direction given under Clause (c) of Rule 20, the investigation shall be concluded by the officer-in-charge of the railway police, or, if that officer should be unable to conduct the investigation himself, then by an officer to be deputed' by him.

(2) The officer deputed under Sub-rule (1) shall ordinarily be the Senior Officer available, and shall whenever possible be a Gazetted Officer, and shall in no case be of rank lower than that of Inspector:

Provided that the investigation may be carried out by an officer-in-charge of a police station

(i) in such a case as is referred to in Clause (a of Sub-rule (1), unless loss of life or grievous, hurt has been caused to more persons than one. or injury to property has been caused to a value exceeding rupees 10,000/-, or there is reason to suspect that any servant of the railway has been guilty of a neglect of rules, or .

(ii) in the case referred to in clause (b) of Sub-rule (1; if the District Magistrate so directs.'

22. Section 537 of the Code provides 'inter alia':

'Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal of revision on account

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or any inquiry or other proceedings under this Code, * * * * unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.'

23. In order to bring the case within Section 537 of the Code the conditions specified hereunder must be satisfied

(a) the finding, sentence, or order under review is one passed by a Court of competent jurisdiction;

(b) the error or irregularity is not one which renders the proceedings void under the provisions of the Code contained before Section 537 of the Code;

(c) the error or irregularity complained of was committed in proceedings under the Code before or during the trial; and

(d) the error or irregularity complained of has not in fact occasioned a failure of justice.

24. In an earlier part of this judgment, I have found that investigation by a police officer of lesser rank than the Deputy Superintendent of Police without an order of the Magistrate of the first class does not prevent the Magistrate or the Special Judge from taking cognizance of offences under Sections 161, 165 or 165A of the Indian Penal Code or Sub-section (2) of Section 5 of the Act. If so, the orders under appeal were passed by Courts of competent jurisdiction.

25. But it is said that Section 537 of the Code has no application to cases of disregard or disobedience of the 'mandatory' provisions of the Code. I do not accept the validity of the argument.

26. Section 537 of the Code does not make any distinction between an 'illegality' and an 'irregularity'. In all such cases, the point that arises for decision is whether the infringement of the provisions of the Code is such as to render the proceedings void under the provisions of the code appearing before Section 537 of the Code or whether the infringement is such as has in fact occasioned a failure of justice.

27. In -- 'Abdul Rehman v. Emperor', AIR 1927 PC 44 (C), Lord Philimore found that non-compliance with the 'mandatory' provisions of Section 360 of the Code would not by itself be ground sufficient for quashing a conviction.

28. In -- 'Zahir-ud-Din v. Emperor', AIR 1947 PC 75 (D), Lord Normand found that the contravention of the 'mandatory' provisions of Section 162(1) of the Code does not vitiate the whole proceedings.

29. In Tara Singh v. The State', AIR 1951 SC 441 (E), Bose J. (Fazal Ah, Patanjali Sastri and Das JJ. concurring) held that contravention of the mandatory provisions of Section 342 of the Code vitiates the trial 'if prejudice occurs or is likely to occur'.

30. In these provisions of the Code there is nothing which renders the proceedings void when the trial proceeds upon the investigation conducted by a police officer not empowered by law to make that investigation. In these circumstances the sole point that arises for decision is whether investigation by an officer not empowered by law to make investigation by itself affects the result of a trial.

31. In -- 'Emperor v. Vinayak Damodar Savarkar', 35 Bom 225 (F), a Full Bench of the Bombay High Court found that illegality of the arrest of an accused person is irrelevant in determining the guilt of the accused at the trial.

32. In AIR 1928 Bom 162 (B), Fawcett J. (Mirza J. concurring) said:

'I think the main tiling to bear in mind is that a conviction or acquittal does not depend upon the question what particular officer actually conducts the investigation which results in his trial. That is determined mainly by the evidence that is given at the trial and considered; and the question whether that evidence has, in the first place been elicited by an Inspector or by a Sub-Inspector is of very minor importance and does not really effect the result of a trial, except to this extent that the theory is that the higher the rank of the Police Officer investigating, the more careful and unimpeachable his enquiry is likely to be. I certainly can see, in a case of this kind, no sufficient reason why the irregularity should not be held to fall under Section 537 of the Criminal Procedure Code.'

33. In the authorities which have construed the proviso to Section 3 of the Act there is conflict in the High Courts of Allahabad and Calcutta.

34. In -- 'Sudhir Kumar v. The State', AIR 1953 Cal 226 (G), K.C. Das Gupta J. (Debabrata Mookerjee J. concurring) found that non-compliance with the proviso to Section 3 of the Act is an illegality vitiating the entire proceedings based on the report of police-officer, not empowered by that provision of law to investigate.

35. In AIR 1953 Cal 226 (G), no reference is to be found to the provisions of Section 537 of the Code and the decision in that case proceeds upon the assumption that non-compliance with the 'mandatory' provisions of the Code in all cases vitiates the trial.

36. Finding as I do that the contravention of the provision of Section 5A of the Act is curable under Section 537 of the Code, I cannot persuade myself to accept the rule laid down in AIR 1953 Cal 226 (G); AIR 1951 SC 441 (E), is an authority for theproposition that contravention of 'mandatory' provisions of the Code does not vitiate the trial no prejudice occurs or is likely to occur.

37. In -- 'Promod Chandra Sekhar v. Rex', AIR 1951 All 546 (H), Mootham J. (Wanchoo J. concurring) found that non-compliance with the proviso to Section 3 of the Act is an irregularity coming within Section 156(2) of the Code. In that case the opinion expressed in AIR 1928 Bom 162 (B), the a conviction or acquittal does not depend upon the question that particular officer conducts the investigation which results in his trial was cite with approval.

38. Section 156(1) of the Code provides to any officer in charge of a police-station may, without the order of a Magistrate, investigate at cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or to under the provisions of Chapter XV relating the place of inquiry or trial.

39. Section 156(2) of the Code provides that it proceeding of a police officer to any such case show at any stage he called in question on the ground that the case was one which such officer was not 'empowered under Section 156(1) of the Code investigate'.

40. Section 551 of the Code provides that police officers superior in rank to an officer in charge a police station may exercise the same power throughout the local area to which they are all pointed, as may be exercised by such officer within the limits of his station.

41. Plainly, the irregularities in investigation which fall within Section 156(2) of the Code are :

1. When the powers to investigate a cognizable case given to a police officer in charge of police station are exercised by him outsidethe territorial limits specified in Section 156(1)the Code, and

2. when the investigation in a cognizable case is made by a police officer inferior in regard to an officer in charge of a police station.

42. Section 156(2) of the Code has no application to objections which do not fall within Section 156(1) of the Code.

43. In AIR 1951 All 546 (H), the Court found that the proviso to Section 3 of the Act is 'in effect a proviso to Section 156(1) of the Code. In order to bring the case within Section 156(2) of the Code it was not sufficient to find that the proviso to Section 3 of the Act was 'in effect' a proviso to Section 156(1) to the Code. Section 156(2) has no application to the contravention of the proviso to Section 3 of the Act unless it is found that the proviso to Section of the Act 'is in fact a part of Section 156(1) of the Code'. No indication is to be found in the Act or the Prevention of Corruption (Second Amendment) Act, 1952 justifying the conclusion that the proviso to Section 3 of the Act was in fact proviso to Section 156(1) of the Code, or Section 5A of the Act is part of Section 156(1) of the Code.

44. From what I have said above, it is placedthat the contravention of Section 5A of the Act donot fall within Section 156(2) of the Code.

45. In these circumstances, the question that arises for consideration is whether contraventionSection 5A of the Act has in fact occasioned a failure justice.

46. In AIR 1951 All 546 (H), the Court heldat investigation by a police officer of lower rankan that specified in the proviso to Section 3 of theA does not prejudice the case. In that casereliance was placed by the prosecution upon 18951 WN 9 (A), but the Court found that case toof little assistance as no reference was madethat case either to Section 156 or Section 537 of the Code.

47. In 1895 All WN 9 (A), Knox J. found that contravention of Section 561(2) of the Code, 1882 does not affect the merits of the trial. In my judgment, Knox J. in deciding 'Queen Empress v. Mehri (A)', is basing himself on the provisions of Section 537 of the Code.

48. In a criminal case, the conviction or acquittal of the accused proceeds upon the evidence even at the trial. In case there is anything suspicious in the investigation it is for the Court to consider, that matter in determining the truth of the charge. That being the position of matters, investigation by a police officer not empowered by (SIC) to investigate cannot prejudice the accused.

49. For reasons different from those given in AIR 1951 All 546 (H), I find that failure to comply with the provisions of Section 5A of the Act does not (SIC)tiate the conviction of the offender in the trial based on the report of a police-officer not empowered by Section 5A of the Act to investigate.

50. Then it is said that the arrest of the (SIC)ender in each case without a warrant vitiated the trial.

51. In 35 Bom 225 (F), a Full Bench of the Bombay High Court found that illegality of the rest of an accused person is irrelevant in determining the guilt of the accused at the trial.

52. In -- 'Parbhu v. Emperor', AIR 1944 PC (SIC) S (I), the question arose whether the arrest of Parbhu who was a native of Jind State made by Police Officer from British India for an offence ommitted in British India vitiated the trial. In delivering the judgment of their Lordships of the Privy Council, Lord Macmillan observed that the validity of the trial and conviction of the appellant could not be affected by any irregularity in is arrest. Plainly, there is no substance in the argument that the arrest of an offender without arrant for an offence punishable under Sections 161, 165 or 165A of the Indian Penal Code or Section 5(2) of the Act vitiates the trial.

53. In the result, my answers to the points referred to us for decision are :

1. that non-compliance with the provisions of Section 5A of the Act in the matter of investigation does not bar the trial based on the report of a police-officer not

empowered by Section 5A of the Act to investigate;

2. that non-compliance with the provisions of Section 5A of the Act does not vitiate the proceedings based on the report of a police officer not empowered by Section 5A of the Act to investigate;

3. that non-compliance with the provisions of Section 5A of the Act in the matter of investigation is curable within Section 537 of the Code; and

4. that the arrest of an offender for an offence punishable under Sections 161, 165 or 165A of the Indian Penal Code or Section 5(2) of the Act without warrant does not vitiate the proceedings in the trial.

54. Lest there may be some confusion, I make it clear that nothing said in this judgment shall be construed as authorising the Courts to commit irregularities which do not occasion a failure of justice, Section 537 of the Code provides that where an irregularity is committed, such an irregularity is, in the absence of failure of justice, not a ground which can be urged in an appeal or revision or in proceedings under Section 374 of this Code for the reversal or alteration of the finding, sentence or order passed by a Court of competent jurisdiction. Plainly, Section 537 of the Code-cannot be used by the Code of first instance to validate errors or irregularities committed in that Court.

Dulat, J.

55. I agree.

Falshaw, J.

56. For orders see CriminalAppeal No. 434 of 1953.

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