

State Circle Inspector of Excise and ors. Etc.

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Court : Kerala

Decided On : Aug-01-1991

Reported in : 1992CriLJ570

Judge : M.M. Pareed Pillay and; K.G. Balakrishnan, JJ.

Acts : [Narcotic Drugs and Psychotropic Substances Act, 1985](#) - 36, 36A(1), 36D, 37 and 53; [Narcotic Drugs and Psychotropic Substances \(Amendment\) Act, 1988](#); [West Bengal Criminal Law Amendment \(Special Courts\) Act, 1949](#); [Evidence Act](#) - Sections 25; [Code of Criminal Procedure \(CrPC\) , 1974](#) - Sections 4(2), 9, 173, 190, 190(1), and 193 , 193, 200, 202 and 202(2); [Code of Criminal Procedure \(CrPC\) , 1898](#); [Abkari Act, 1077](#) - Sections 50, 57 and 57A

Appeal No. : Crl. Ref. Nos. 3 and 5 of 1990

Appellant : State Circle Inspector of Excise and ors. Etc.

Advocate for Pet/Ap. : Thomas John, Public Prosecutor for Party No. 1, ; K.T. Sankaran, Amicus Curiae for Parties Nos. 2 t

Judgement :

K.G. Balakrishnan, J.

1. These two criminal references have been referred to the Division Bench, as it was felt that the decision in State v. Moidu, (1990) 2 Ker LJ 202 : 1991 Cri LJ 800

is in conflict with the decision of the Full Bench reported in *Moideenkutty Haji v. Kunhikoya*, (1987) 1 Ker LT 635 : 1987 Cri LJ 1106.

2. In criminal reference No. 5/90 the question that arises for consideration is whether in a complaint filed under the provisions of the [Narcotic Drugs and Psychotropic Substances Act, 1985](#) (for short the Act) the Magistrate should conduct enquiry contemplated under Section 202(2) of the Criminal P.C. (for short the Code) and commit the case to Sessions Court or whether the Sessions Court empowered under Section 36D to try cases under the N.D.P.S. Act itself is competent to take cognizance of the offence as if it is a court of original jurisdiction. The learned single Judge in *State v. Moidu*, (1990) 2 Ker LJ 202 : 1991 Cri LJ 800 held that in a prosecution for offences punishable under the N.D.P.S. Act the Magistrate need not conduct an enquiry under Section 202 of the Code before committing the case to the Sessions Court.

3. In *Rajkumar Karwal v. Union of India*, (1990) 2 SCC 409 : 1991 Cri LJ 97, the Supreme Court held that even if an officer is invested under any special law with powers analogous to those exercised by a police officer-incharge of a police station investigating a cognizable offence, he does not thereby become a police officer under Section 25 of the Evidence Act, The Court further held (at pp. 107-108 of Cri LJ):

The important attribute of police power is not only the power to investigate into the commission of cognizable offence but also the power to prosecute the offender by filing a report or a charge-sheet under Section 173 of the Code. There is nothing in the provisions of the Act to show that the legislature desired to vest in the officers appointed under Section 53 of the Act, all the powers of Chapter XII, including the power to submit a report under Section 173 of the Code.

So, in the matter of offence punishable under the Act it is not the report under Section 173 of the Code that is filed, but a complaint by the investigating agency. However, it is to be noted that in the trial of offences under the Act Section 36 of the Act says that there shall be special Courts for the trial of the offence under the Act. Section 36D says that until a special Court is constituted under Section 36, any offence committed under this Act or after the commencement of the N. D. P.

S. (Amendment) Act, 1988 shall notwithstanding anything contained in the Code be tried by a Court of Session. So, the Court of Session shall exercise the powers of a special Court until special Court under Section 36 of the Act is constituted. Under Section 37 of the Act it is stated that every offence punishable under the Act shall be cognizable. Section 36A(1)(d) further says that a special Court may take cognizance of that offence without the accused being committed to it for trial.

4. Regarding the power of the special Court to take cognizance the Supreme Court had occasion to consider the same in A.R. Antulay v. R. S. Nayak, AIR 1984 SC 718 : 1984 Cri LJ 647. The Court held (paras 27, 28):

The Court of a Special Judge is a Court of original criminal jurisdiction. As a Court of original criminal jurisdiction in order to make it functionally oriented some powers were conferred by the statute setting up the Court.

Except those specifically conferred and specifically denied, it has to function as a Court of original criminal jurisdiction not being hide bound by the terminological status description of Magistrate or a Court of Session. Under the Code it will enjoy all powers which a Court of original jurisdiction enjoys save and except the ones specifically denied.

The Court of a Special Judge, once created by an independent statute, has been brought as a Court of original criminal jurisdiction under the High Court because Section 9 confers on the High Court all the powers conferred by Chapters XXXI and XXXIII of the Criminal P.C. 1898 on a High Court as if the Court of Special Judge were a Court of Session trying cases without a jury within the local limits of the jurisdiction of the High Court. Therefore, there is no gainsaying the fact that a new criminal Court with a name, designation and qualification of the officer eligible to preside over it with powers specified and the particular procedure which it must follow has been set up under the 1952 Act. The Court has to be treated as a Court of original criminal jurisdiction and shall have all the powers as any Court of original criminal jurisdiction has under the Criminal P.C. except those specifically excluded'.

5. In an earlier decision of the Calcutta High Court in *Ajit Kumar v. State*, AIR 1961 Cal 560 : 1961 (2) Cri LJ 617 (FB)), while considering the provisions of the West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949) it was held that the provisions of the Criminal P.C. taking cognizance of the offences are not applicable to the Special Courts under the Act. The Special Court is therefore not confined to the statutory methods recognised and prescribed under S. 190(1) of the Code. The special Court can therefore assume cognizance independently of these sections of the Code.

6. The word 'cognizance' has not been defined in the Code. Taking cognizance is a well-known but undefined conception in criminal jurisprudence. Judicial decisions have indicated the character and nature of cognizance in criminal jurisprudence. In *Ajit Kumar v. State of W. B.*, AIR 1963 SC 765 :

(1963 (1) Cri LJ 797), the Supreme Court observed that (para 19):

The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means becomes aware of and when used with reference to a Court or Judge, to take notice of judicially. Taking cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence. Where the statute prescribes the materials on which alone the judicial mind shall operate before any step is taken obviously the statutory requirement must be fulfilled. But statutory provision apart, there is no set material which must exist before the judicial mind can operate. In an earlier decision in *Chari v. State of U.P.*, AIR 1951 SC 207, at page 210 : 1951 (52) Cri LJ 775 at p. 777, the Supreme Court made an authoritative pronouncement on the term 'cognizance'. It reads: what is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a) of the Criminal P.C. he must, not only apply his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this chapter -- proceeding under Section 200 and thereafter sending it for enquiry and report under Section 202.

When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this chapter, but for taking action of some other kind, e.g. ordering an investigation under Section 156(3), or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of the offence.

7. As regards the power of the special Court to take cognizance of an offence the Supreme Court while considering the provisions of the West Bengal Criminal Law Amendment (Special Courts) Act (21 of 1949) in *Ajit Kumar's case* (1961 (2) Cri LJ 617) (Cal) (FB), held that the special Court constituted under the West Bengal Criminal Law Amendment (Special Courts) Act has power to take cognizance of an offence without there being a committal proceedings. That decision is applicable on all fours since similar provision is contained in the Act. In Section 36A(1)(d) it is specifically provided that a special court may, upon a perusal of police report of the facts constituting an offence under this Act or upon a complaint made by an officer of the Central Government or a State Government authorised in this behalf, take cognizance of that offence without the accused being committed to it for trial. So, there cannot be any doubt that the special Court is empowered to take cognizance of the offence under the Act without there being a committal proceedings.

8. The central question that arises for consideration is whether the Sessions Judge who is empowered under Section 36D of the Act is entitled to take cognizance of the offence without there being a committal proceedings. Section 36D is a transitional provision and it mandates that until a special Court is constituted under Section 36 any offence committed under the Act shall be tried by a Court of Session. Power under Section 36D has been given notwithstanding anything contained in the Code. It may also be noticed that Section 4(2) of the Code specifically states that all offences under any law other than Indian Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. It is important to note that the purpose and object of the enactment of the Act is to have a speedy trial of all offences. That is why the

special Courts are allowed to take cognizance of the offence, without there being a committal proceedings. So, the Court of Session empowered to try the case during the transitional period shall be deemed to be a special Court having power under Section 36A(1)(d) of the Act to take cognizance of the police report or upon a complaint made by an officer of the Central or State government authorised in this behalf. Section 193 of the Code has no application as the entire trial is conducted in accordance with the provisions of the Act.

9. So, in Crl. Ref. 5/90 in answer to the reference made by the District Judge we hold that the Court of Session by virtue of the provisions contained in Section 36D of the Act is competent to exercise the power under Clauses (c) and (d) of Sub-section (1) of Section 36A of the Act, as if it is a special Court constituted under Section 36 of the Act, and on the 2nd point we hold that the Court of Session empowered under Section 36D of the Act can take cognizance of the offence without there being a committal proceeding and the method of taking cognizance in the manner laid down in Sections 190 and 193 of the Code is not applicable to the Sessions Court trying offences under Sections 36D of the Act.

10. In Criminal Reference No. 3/90 the matter arises under the Abkari Act. A short narration of facts is necessary to understand the case. The Circle Inspector of Excise, Kannur filed a report before the Judicial II Class Magistrate, Kannur alleging that accused committed offence punishable under Section 57 of the Abkari Act. Section 57A is a newly added provision in the Abkari Act by amendment Act 21/85. It relates to the adulteration of liquor or intoxicating drug with noxious substance. The offence punishable under Section 57A is an offence exclusively triable by a Court of Session. As the offence disclosed in the report was exclusively triable by a Court of Session, the Magistrate committed the case to the Sessions Court without conducting an enquiry as contemplated under Section 202(2) of the Code. The Sessions Judge has referred the matter to this Court to decide whether the order of the Magistrate in committing the case instituted upon a complaint in respect of an offence exclusively triable by a Court of Session, without conducting an enquiry under Section 202(2) of the Code, is legal and proper.

11. In *Moideenkutty Haji v. Kunhikoya*, (1987) 1 Ker LT 635 : 1987 Cri LJ 1106, the Full Bench held that a Magistrate on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, Cr. P.C. has to conduct an enquiry where it appears to the magistrate that the offence complained of is exclusively triable by a Court of Session. It was held that it is mandatory under the proviso to Sub-section (2) of Section 202 that the Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. The Full Bench elaboratively considered the question and held :

It is evident that the legislature intended two different types of enquiries, a discretionary enquiry in ordinary complaint cases and a mandatory enquiry in complaint cases under Section 202. In the discretionary enquiry the Magistrate can either enquire into the case himself or direct an investigation to be made by a police officer or such other person as he thinks fit. But in a mandatory enquiry in a complaint case that discretion is taken away by proviso (a) to Section 202(1). The Magistrate will have to conduct the enquiry himself and he cannot order investigation. It is true that said discretion is absent in another category of cases coming under proviso (b) to Section 202(1) also. But we are not concerned with such cases here. In a discretionary enquiry in ordinary complaint cases Section 202(2) gives the option to the Magistrate to take evidence of witnesses on oath or not as he thinks fit. That means he can even record a summary of the statement of witnesses. But in a mandatory enquiry in a complaint case that discretion is not there and the proviso to Sub-section (2) says that he shall call upon the complainant to produce all his witnesses and examine them on oath.

12. Distinguishing the above decision the learned single Judge in *State v. Moidu*, (1990) 2 Ker LJ 202 : 1991 Cri LJ 800 held that the procedure prescribed under Section 202 of the Code must be confined to private complaints disclosing sessions offence and not complaints filed by a public servant acting or purporting to act in discharge of his official duties coming under Clause (a) of Section 200 of the Code. The learned single Judge was of the view that in the case of complaint filed by Superintendent of Central Excise Special Preventive Unit or officers like that there would be an investigation and enquiry into the alleged offence and the

contraband articles, if any, would be seized under mahazar duly attested by person and all other procedural formalities such as, questioning of the accused, examining the article by the chemical examiner etc. would be done during the investigation stage and therefore the accused cannot complain that he is prejudiced due to dearth of material for a fair and adequate defence and the learned single Judge on these premises in paragraph 15 at page 210 (of Ker LT) : (at p. 806 of Cri LJ) held:

In my view, the Full Bench decision does not apply to a complaint laid by an authorised officer under the Act on the basis of materials which were collected during investigation enquiry into the offence. The Full Bench decision must be understood in the context in which it was rendered and held applicable only to private complaint cases and not to complaint cases filed by a public servant acting under Section 190(1), where there had been an enquiry prior to the complaint and materials had been collected for prosecution.

13. But, it may be noticed that under the Abkari Act for filing a report under Section 50 it is not necessary that there shall be an investigation and enquiry regarding the offence. Section 50 only says that the Abkari Inspector shall forward to the Magistrate a report setting forth the name of such person and the nature of the offence with which he is charged and the name of the person who appear to be acquainted with the circumstances of the case and shall send to the said Magistrate any article which it may be necessary to produce before him. Section 50 further says that upon receipt of such report the Magistrate shall enquire into such offence and try the person accused thereof in like manner, as if the complaint had been filed before him as prescribed in the Criminal P.C., 1898. Unlike the N.D.P.S. Act, no provisions have been made in the Abkari Act for enquiry and trial of offence under Abkari Act. From Section 50 of the Abkari Act it is clear that the Abkari Inspector need only file a report as indicated therein disclosing the necessary details regarding the nature of the offence and the names of the persons who appeared to be acquainted with the circumstances of the case. It is for the Magistrate to enquire into such offence and try the same in accordance with the provisions of the Code. The procedure to be adopted for the enquiry and trial of the case is as contemplated under the provisions of the Criminal P.C. Going

by the decision of the Full Bench reported in Moideenkutty's case, (1987 Cri LJ 1106) (Kerala), it is mandatory that the Magistrate shall conduct an enquiry under the proviso to Section 202, Cr. P.C. and the Magistrate shall call upon the complainant to produce all his witnesses and shall examine them on oath and only after complying with this mandatory enquiry the Magistrate can commit the case to the Sessions Court. No specific procedure for enquiry or trial is prescribed under the Abkari Act.

14. In fact in the decision reported in State v. Moidu, (1990) 2 Ker LJ 202 : 1991 Cri LJ 800, the question that came up for consideration was whether there shall be an enquiry contemplated under the proviso to Section 202 of the Code in a case triable by the Sessions Court under Section 36D of the N.D.P.S. Act. So, whatever stated by the learned Judge so far as it relate to the question of complaints filed by other public servants before the Magistrate under Section 200(a), Cr. P.C. were not precisely relevant to the issues in that case and made only as part of the general reasoning.

15. So, we hold that the decision of the learned single Judge reported in State v. Moidu, (1990) 2 Ker LJ 202 : 1991 Cri LJ 800 is not a binding authority so far as it relates to the complaint/report made by the public servant under Section 200(a) of the Criminal P.C. as per the provisions of the Abkari Act. We hold that if the complaint/report filed under Section 50 of the Abkari Act discloses an offence exclusively triable by the Sessions Court, the Magistrate shall conduct the mandatory enquiry contemplated under proviso to Section 202(2) of the Code by calling upon the complainant to produce all the witnesses and examine them on oath. Thereafter the case shall be committed to the Sessions Court. The procedure of committal as explained in Moideenkutty Haji v. Kunhikoya, (1987) 1 Ker LT 635 : 1987 Cri LJ 1106, is to be followed in such cases.

Therefore, we direct the Sessions Judge to transmit the case to the Magistrate concerned to conduct enquiry under Section 202(2), Cr. P.C. and commit the case to the Sessions Court, in accordance with law. The criminal references are disposed of as stated above.

