

K.P. Sadanandan Vs. the State

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Court : Kerala

Decided On : Sep-22-1989

Reported in : 1990CriLJ31

Judge : S. Padmanabhan, J.

Acts : Kerala Paddy and Rice (Declaration and Requisitioning of Stock) Order, 1966 - Sections 3(2) and 9; [Essential Commodities Act, 1955](#) - Sections 7(1), 9 and 11; Kerala Foodgrain Dealers' Licensing Order; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 154, 156(3), 161, 173, 173(5), 190, 190(1), 200, 202, 203 and 243(2)

Appeal No. : Criminal Appeal No. 155 of 1989

Appellant : K.P. Sadanandan

Respondent : The State

Advocate for Def. : V. Bhaskara Menon, Public Prosecutor

Advocate for Pet/Ap. : M.N.S. Nayar,; B. Raman Pillai and; S. Vijayakumar,

Disposition : Appeal allowed

Judgement :

S. Padmanabhan, J.

1. Certain interesting questions of law arise in this appeal filed by the sole accused against his conviction and sentence. P. W. 4, Circle Inspector of Police, , Economic Wing, searched the rice mill of the j appellant suspecting storage of undeclared rice illegally transported from the Food Corporation of India godown. That was at 11 p.m. on 12-4-1988. The huge stock found was seized. Case was registered only for the contravention of Clause 3 of the Kerala Paddy j and Rice (Declaration and Requisitioning of j Stock) Order, 1966 (for short, 'Paddy & Rice Order'), which involves only omission to it' declare stock of paddy or rice for which there is a period of three days. The contention of the appellant was that the rice was delivered the same day at 4 p.m. by 'Santhosh Traders' for return after cleaning and hulling under Ext. D1 delivery note and seizure was in the process of so doing. Accepting this contention on the basis of materials collected by investigation the case was referred as mistake of fact. Suspecting the veracity of Ext. D1 and the correctness of the opinion formed by the investigating officer, the Special Judge issued notice to the Public Prosecutor. After hearing him, cognizance was taken for offences punishable under Sections 7(1)(a)(ii) and 9 of the Essential Commodities Act for having contravened Sections 3(2)(c) and (d) 9 thereof read with Clause 3 of the Paddy and Rice Order and Clauses 7A and 8 of the Kerala Foodgrain Dealers' Licensing Order (for short 'Licensing Order'). Appellant was convicted under both sections and sentenced under Section 7(1)(a)(ii) to simple imprisonment for three months and to pay a fine of Rs. 1,000/- with a default sentence of simple imprisonment for two more weeks. No separate sentence was awarded under Section 9.

2. The legality of the cognizance, in view of the refer report, was under serious challenge. Investigation involves not only collection of materials, but also formation of opinion and filing of the report under Section 173 of the Code of Criminal Procedure. That is the function of the police. On the materials, the police officer can place the accused for trial for the offence disclosed or if the materials are found insufficient, he can file a refer report also. When once the report is filed, then it is the realm of the court. Several particulars are necessary in the report and several relevant materials collected during investigation will have to be produced in court along with the report. Court is not bound by the opinion formed by the investigating-officer. The opinion alone is not the report. The court can peruse the

report and materials produced along with it in order to form an opinion as to what action is to be taken. It is immaterial whether the final report is a charge-sheet or refer report. If the materials are insufficient to disclose the offence, the court can refuse to take cognizance on the charge-sheet. If some other offences are disclosed, cognizance could be had for these offences. Likewise, if the refer report is found to be incorrect and the materials found to disclose some offence, cognizance could be had for that offence ignoring the refer report. If the investigating agency is given a long rope by making his advise binding on the court as final and conclusive and the court is deprived of the judicial discretion to decide whether cognizance is to be taken or not, it would be a travesty of justice opening the flood gates for corruption.

3. *Abhinandan Jha v. Dinesh Mishra*, AIR 1968 SC 117 : (1968 Cri LJ 97) and *H. S. Bains v. State*, AIR 1980 SC 1883 : (1980 Cri LJ 1308) were rendered on cases instituted on complaint and referred under Section 156(3) for, investigation. In those cases, the Supreme Court said that when the police submitted a final report to the effect that no offence was disclosed, the Magistrate might either (i) decide that there is no sufficient ground for proceeding further and drop action, or (ii) he may take cognizance of the offence under Section 190(1)(b) and issue process without being bound in any manner by the conclusion of the police, or (iii) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. He can proceed under Section 200 or Section 202 if he thinks fit and dismiss the complaint under Section 203 or issue process under Section 204 only if he adopts the third alternative by which alone he is proceeding on the complaint. If he is adopting the second alternative, it is as if on a police report. Such a course he can adopt even if the police report on which action is taken is not on the basis of investigation under Section 156(3) but on the information under Section 154 and investigation On its basis.

4. The Full Bench decision in *Kuli Singh i v. State of Bihar* 1978 Cri LJ 1575 and the single Bench decision in *Gyanendra Kumar Gupta v. State*, 1980 Cri LJ 1349 (All) were on cases instituted on police report. The legal position canvassed in these cases was that after the 1973 Code came into force when a police officer

submits a final report under Section 173 after forming an opinion that no offence is committed or when he does not send a particular accused for trial, the Magistrate is bound to accept the report as such and if not the only other course open to him is to order further investigation. That contention was rejected following the Supreme Court decisions. The argument that in such a case cognizance without further investigation could be had only if a protest complaint was filed was also rejected. Section 190(1)(b) empowers a Magistrate to differ with the police report, be it a charge-sheet or be it a final report, so called, referring the case. That power is implicit in Section 190(1)(b) itself and it is not necessary to look into Section 190(1)(c) for that power. The Magistrate cannot confine to the final report alone for considering whether an offence has been committed or not. Even if the report in terms of Section 173 is cryptic, the Magistrate would be fully justified, rather he is expected to apply himself to the case diary and all the relevant materials for considering whether any offence appears to have been committed or not. If he is satisfied on perusing all the materials forwarded to him, a] Magistrate will be well within his jurisdiction to act in terms of Section 190(1)(b) to take cognizance in spite of the opinion of the police officer that no offence is made out. Despite the adverse report of the police, after considering materials and documents submitted under Section 173(5), the Magistrate is fully competent to take cognizance of the disclosed offences under Section 190(1)(b). That is also the effect of what the Supreme Court said in *Kamlapati Trivedi v. State of West Bengal*, 1980 SCC (Cri) 347 : (1979 Cri LJ 679) and *Kamala. ati Trivedi y. State of West Bengal*, AIR 1979 SC 777 : (1979 Cri LJ 679). Further investigation need be ordered only when the investigation is found to be improper or the materials insufficient. Therefore, there is no illegality merely because of the cognizance in spite of the refer report.

5. But courts should always be conscious of the fact that taking cognizance is a judicial act. It has to be with due care and caution and due application of the judicial mind keeping in view the mental, physical and financial harassment likely to a person who is asked to stand a trial. Due weight will have to be given to the opinion formed by the investigating officer who collected and assessed the materials. Against an adverse report, cognizance could be taken only when materials disclose an offence and the investigating officer went wrong in the formation of his opinion. The materials made available under Section 173 alone

could be looked into for that purpose and cognizance could be only for offences disclosed by those materials. Clauses 7A and 8 of the Licensing Order are concerned with omission to display stocks and prices and contravention of conditions of licence, etc. by a licensee dealing in foodgrains. There was no case and no material that appellant is a dealer in foodgrains or a licensee, or he violated Clauses 7A and 8. From the vacuum the Special Judge took cognizance for these violations. Even though these violations are mentioned in the particulars of offences stated to the appellant, the judgment is silent about it and there is no discussion also. Section 9 of the E. C. Act deals with the offence of giving false statement or furnishing false information. The first information report or final report or materials collected during investigation do not disclose any such offence. Yet the Special Judge took cognizance and convicted the appellant for that offence without even caring to assign the materials or evidence in support of it. It appears that the Special Judge took cognizance for all comprehensive charges without reference to the final report or the materials produced along with it so that omission of a charge need not stand on the way at the final stage. Even regarding violation of Clause 3 of the Paddy & Rice Order, the cognizance in disagreement with the opinion formed by the investigating officer does not appear to be judicial. The violation involved is omission to declare the stock. It is true that burden is on the possessor to show when he came into possession of stock. That he explained. His explanation substantiated by the materials including Ext. D1 was that he got the stock only that day at 4 p.m. Even if he was bound to declare stock, he had three days time for it. All these facts were accepted by the investigating officer. But the Special Judge disregarded them only because Ext. D1 was produced only the next day. Cognizance against the opinion in the final report and against the materials is illegal.

6. But I cannot agree with the appellant in his argument that whatever be the position of cognizance under Section 190 of the Code, Section 11 of the E.C. Act operates as a restriction or limitation in taking cognizance and cognizance could be had only accepting the opinion of the public servant or other person. Five decisions were relied on. Four of them are single Bench decisions of this court, out of which three are unreported. They are in Criminal Appeal Nos. 256, 329 and 500 of 1988 and the reported decision is in *Nazeer v. State*, (1989 (2) Ker LT 326.

None of these decisions deals with cognizance in disagreement with refer report or the limitation imposed by Section 11 of the E. C. Act in that respect even though Section 11 was considered generally. *Lakhan Prasad Gupta v. State of Bihar*, 1980 Cri LJ 537 is directly to the point. That decision went to the extreme extent of holding that a report from a public servant on his satisfaction tht that the facts constitute an offence is an essential condition precedent to taking cognizance under Section 11 of the E. C. Act and the court has no jurisdiction to substitute its satisfaction to that of the public servant. The reason alleged is that the purpose of the section is avoidance of harassment at the hands of unscrupulous rival traders.

7. With due respect, I am not in a position to subscribe to that view. I do agree that one of the objects of Section 11 E.C. Act is avoidance of frivolous prosecutions. But that object or purpose will only be defeated by giving a long rope to the public servant and placing his opinion beyond the purview of judicial scrutiny. Vindication of justice by bringing an offender to justice in a deserving case is also one of the purposes of Section 11. Whether it be a charge-sheet or a refer report or a complaint, the sufficiency of the materials for taking cognizance is solely subject to judicial review. The final say in that matter is that of the court. That power or jurisdiction under Section 190 of the Code consistently recognised by judicial pronouncements is not abridged by Section 11 of E.C. Act. The only restriction or limitation imposed on the cognizance under Section 190 of the Code by Section 11 E.C. Act is concerning the source of information on which cognizance could be taken. Under Section 190, cognizance could be on a complaint, on a police report or on other information from any person other than a police officer or upon his own knowledge of facts which constitute the offence. Even though wording of Section 11 is slightly different cognizance is on information of facts which constitute an offence. Whether the facts brought to the notice of the court by a report or complaint or other information constitute an offence is not a matter left to the sweet will and pleasure of the public servant to decide even under Section 11 of the E.C. Act. Report contemplated therein is also of facts constituting an offence and not the opinion formed by the public servant alone. Under Section 11, cognizance could be had only on report of facts constituting the offence received from a public servant or an aggrieved person or a recognised consumer association. The sufficiency or otherwise of those facts for the purpose of

constituting an offence is within the discretion of the court to decide. If the opinion of the public servant on the insufficiency of the materials to constitute an offence is made binding on the court, the effect is that judicial discretion is being surrendered to the opinion of the public servant however wrong or biased it may be. Such a course will be opening the flood gates of corruption, favouritism or nepotism. That cannot be what the legislature intended. I am of the view that even under Section 11, E.C. Act, the final discretion is that of the court.

8. But in this case, cognizance was without any offence being disclosed by the materials available to court. Unfounded suspicion regarding the genuineness of Ext. D1 was the sole basis of the cognizance on various counts of offences not disclosed. P.W. 3 is the Rationing Inspector who took custody of the rice from PW 4 as per orders of the District Collector and PW 2 is the ration dealer to whom it was entrusted for distribution to card-holders. Their testimony did not prove any offence. PWs 1 and 4 alone then remain. PW 1 is an employee of the appellant. He only disproved the prosecution case and proved the defence. In fact, there is no prosecution case against the appellant. The case is only in the particulars of offence stated to the appellant by the Special Judge. In chief examination, seizure of rice by PW 4 alone was brought out from him. Seizure is admitted and proof of seizure will not prove any offence. I think it was so done cautiously because further questions would have been damaging to the prosecution. In cross-examination, he said that the rice seized from the appellant was delivered to his mill only that day under Ext. D1 by Santhosh Traders for cleaning and hulling. In re-examination, without even asking a single question or confronting him with any statement under Section 161, permission was sought to declare him hostile and it was readily granted. Even then, he was not contradicted or discredited with any previous statement. That may be because his previous statement was in accordance with what he said in court. Defence did not have any opportunity to contradict him with any previous statement or prove the same through PW 4 because there was nothing to be contradicted. When it was attempted to be brought out by the cross-examination of PW 4 that the rice was brought the same day on the basis of Ext. D1, the questions were disallowed as relating to information collected by investigation. Anyhow, PW 4 had to admit Ext. D1. His evidence is nothing more than saying that the rice was seized because it was not

declared. He did not say when the rice was brought. He is the officer who reported that no offence is made out. His evidence was very much guarded probably fearing displeasure of court. When the appellant raised a contention and adduced evidence that rice was brought under Ext. D1 on the same day, it was incumbent on the prosecution to rebut the evidence and show that the rice came to the possession of the appellant more than three days back. Then only an offence for violation of Clause 3 of the Paddy & Rice Order could be established. No such evidence was even attempted, probably because it is not possible.

9. Every accused is entitled to a fair trial. In this case, not only cognizance, but trial was also unfair. Prosecution evidence has attempted to conceal facts. Materials favourable to the appellant were not only suppressed, but opportunity of proving them was denied. Accused was not given a fair chance to elicit facts from PW 4 under the cover of Section 162 of the Code on matters on which that bar will not apply. For the simple reason that in the absence of his counsel he said while questioned under Section 313 that he has no defence evidence, his subsequent request for permission to adduce evidence was rejected saying that it is unnecessary. The materials proved during trial did not establish any offence at all. Denial of the chance to adduce evidence without proper reason and for incorrect reasons is flagrant violation of Section 243(2) of the Code.

Criminal Appeal is allowed and the conviction and sentence are set aside. Appellant is found not guilty and acquitted. His bail bonds are cancelled and he is set at liberty forthwith.

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