

**Mohd. Bashir and ors. Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/899003](http://sooperkanoon.com/899003)

**Court :** Jammu and Kashmir

**Decided On :** May-26-2006

**Judge :** J.P. Singh, J.

**Appellant :** Mohd. Bashir and ors.

**Respondent :** State

**Disposition :** Petition dismissed

**Judgement :**

**J.P. Singh, J.**

1. Petitioners invoke the Revisional as also the inherent jurisdiction of this Court to set aside order dated 15.05.2006 of learned Sessions Judge, Poonch, whereby petitioners had been charged under Sections 302, 120B, 34 I.P.C. and 7/27 Arms Act.

2. Sh. R.P. Sharma, learned Counsel appearing for the petitioners, submits that the trial Court has erred in rejecting the prayer of the petitioners for re-investigation of the case and dropping the proceedings in the absence of sanction under Section 197 of the Code of Criminal Procedure. Learned Counsel refers to Sankaran Moitra v. Sadhna Das and Anr. reported as 2006 (3) SCALE 414 in support of his submissions that the proceedings before the learned Sessions Judge, Poonch, need to be quashed in the absence of sanction under Section 197

of the Code of Criminal Procedure. I have considered the submissions of the learned Counsel for the petitioners.

3. Learned Sessions Judge, Poonch, has written an elaborate order dealing with the contentions raised by the petitioners for re-investigation of the case and regarding issue of sanction under Section 197 of the Code of Criminal Procedure.

4. While dealing with the contention of the petitioners regarding re-investigation, learned Sessions Judge, Poonch, has held as follows:

The grievance of the accused is that the driver of the police vehicle which carried the accused and other S.P.Os. to spot has not been arrested or examined as well as the vehicle has not been seized and investigating officer has not examined all the S.P.Os. accompanying the accused. Apparently these grounds cannot be taken into consideration for directing re-investigation. Moreover, there must be grievance generally from the complainant or the prosecution. Once the complainant and prosecutor are satisfied about the investigation, it does not lie in the mouth of the accused persons to ask for re-investigation, whatever are the grievance of the accused. These are nothing but defence available to the accused. The defences of an accused persons cannot be a ground for asking re-investigation of the case. The accused have no grievances that so far they are concerned, the investigation is defective. In fact they have grievances that some other person involved in the crime have not been sent for trial. Who are those persons have not been disclosed by them so that Court could have considered that fact for arriving a conclusion that further investigation or re-investigation is required. The non-examination of all the Special Police Officers and the driver of the police vehicle does not afford any ground to the accused for asking re-investigation. If there are some lacunas in the prosecution case the accused cannot ask the Court to fill up such lacuna and nor Section 173(8) Cr.P.C. takes within its ambit such a defects and lapses.

The judgments cited by the Ld. Defence counsel in support of his request for re-investigation are distinguish with the facts of the present case and are of no assistance to him. In all the judgments cited by him the investigation and further investigation was directed when the complainant moved the Court for defective

investigation.

In 2001 CrI.L.J. 5190 an investigation launched against Commissioner Income Tax and other persons about his involvement in a corruption case was closed by C.B.I. At the time of submitting the final report to the Court the C.B.I. wanted the Court to initiate prosecution proceedings against the complainant for offences under Sections 182 and 211 of the Indian Penal Code.

The Special Judge on receipt of the final report issued noticed to the complainant and after hearing him directed re-investigation of the case by the C.B.I. This action of the Special Judge was upheld by the Supreme Court. Thus, apparently the facts of the case are different to the facts of the present case.

Similarly in 2001 CrI.L.J. 1192, which is by full Bench of Dehli High Court a woman was killed whereafter an FIR was registered in the Police Station and finally challan under Sections 498A/306 IPC produced before Metropolitan Magistrate. The brother of the deceased was not satisfied with the investigation so he addressed a letter to the Chief Justice of Dehli High Court that despite the fact that his sister was murdered, the Police registered an FIR under Sections 498A/306 IPC whereupon this letter was treated as Criminal Writ Petition which was disposed off by making an observation that brother of the deceased had an alternative remedy of moving the Magistrate for relief and the Magistrate was competent to order further investigation. Thus in this case there was some complainant coming forward with specific allegations. But in the present case being handled by the Court there is no complaint on the part of family members of deceased or prosecutor making severe allegations against the investigator. The son of the complainant had grievance about the previous investigator of Police whereupon re-investigation was directed by the DGP which was concluded by Crime Branch. So in this background the judgment of the Hon'ble Dehli High Court cited by the Ld. Defence counsel is of no assistance to him. Without burdening this judgment any more with re-petition of the facts of the other cases cited by the Ld. Defence counsel it is suffice to say that such judgments do not help the accused because in such judgments the complainant had approached the Court for re-investigation of the case. The Court is also of the considered opinion after going

through the record that there is no necessity of re-investigating the case, the accused have grievances about some other persons who have not been booked by the police which can be looked into, when evidence comes on record during the trial, by this Court. The accused have no right to ask the court on flimsy grounds to direct re-investigation.

5. While dealing with the question as to whether or not sanction was required under Section 197 of the Code of Criminal Procedure, learned Sessions Judge, Poonch, has held as follows:

Coming to the question of sanction Under Section 197 Cr.P.C. the Court is of the opinion that this section is not applicable to the facts of the present case. It is not every public servant for whose prosecution a sanction Under Section 197 Cr.P.C. is required. The Section is attracted only in respect of a public servant who is removeable by or with the sanction of State Government, so far a SPO is concerned, he is appointed by Sr. Superintendent of Police and can be only dismissed by him. For removal of S.P.O. no sanction of the State Government is required. Further more the prosecution case against public servant must be that while acting or purporting to act in discharging of his duties he committed an offence. The prosecution case is not that the accused No. 3 was sent to spot by any Superior Officer or the accused was no spot while acting in a discharge of his duty. The accused No. 3 has also not come forward with an admission that he committed the offence while acting or purporting to act in the discharge of his official duties. There is no material on record to suggest that accused No. 3 was deputed to spot to apprehend or kill the militant. The accused have also not placed on record any copy of the daily register suggesting that the accused along with other S.P.Os. was sent to spot. The prosecution is, however, that accused No. 3 hatched a conspiracy with other accused persons and without informing the police station concerned went to spot and killed the deceased. Thus the prosecution case suggest that accused No. 3 has misused his official position. Had the accused come forward with an application that he really killed the deceased but while acting and purporting to act in discharge of his duties the situation would have been otherwise. The court is not award that what will be the defence adopted by the accused when charge is framed against him and trial proceeds. In all the

judgments cited by the Ld. Defence counsel in respect of sanction Under Section 197 Cr.P.C., the accused persons had come forward with a written plea that they committed the offence while acting or purporting to act in discharge of their duties. Thus, these judgments are of no assistance to the accused No. 3. The accused No. 3 has claimed the protection under Sections 76, 79 and 80 IPC by submitting that whatever he did was by mistake of fact believing himself bound by law. The Ld. Defence counsel has submitted that accused No. 3 was not aware that it is the deceased Sub-Inspector who was inside the room. Instead he was told by the officers at Police Station, Surankote that some militant is hiding inside the room and as such, when the door was opened by the deceased, taking him the militant the accused shot him dead.

At the outset it may be submitted that it is the defence raised by the accused No. 3. It is not the prosecution case that an information had been received in Police Station, Surankote about the presence of militant in the house of the deceased Sub Inspector and the accused No. 3 was sent to spot to kill or apprehend the militant. Rather as per prosecution case accused Mohd Bashir with his son hatched conspiracy with accused No. 3 and on 6th August, 2004 went to Commando Group, Surankote and requested the accused No.3 and other S.P.Os. to follow him to his house from where the accused persons of the present case along with other S.P.Os. went to spot. As per P.W. Ashiq Hussain, S.P.O., when all the S.P.Os. reached the house of Mohd Bashir after taking meals accused No. 1 and 2 along with accused No.3 discussed some matters separately and thereafter went to the house of the deceased. According to P.W. Naresh Kumar, S.P.O., after reaching the house of the deceased the accused No. 1 accompanied by accused No. 3 knocked the door of the room where the deceased was sleeping and as soon as the door was opened accused No. 3 fired two gun shots on him and thereafter they along with other S.P.Os. came back to the house of accused Mohd Bashir. It is also in the evidence of the above two S.P.Os. that other S.P.Os. were standing far away from the house of the deceased along with accused Zahir Abas.

Thus, the evidence on the record suggests that accused No. 3 was not under impression that militant is inside the house and there was some common

understanding with other two accused persons. This evidence has been taken just to reject the contention of the Ld. Defence counsel that accused by mistake of fact killed the deceased. The observation of the Court shall have no bearing on the merits of the case. In the light of the discussion rendered above Section 76, 79 and 80 IPC relied upon by the accused also do not come to the assistance of the accused No. 3. The judgments cited by the Ld. Defence counsel are distinguish with the facts and circumstances of the present case and are not, as such, applicable.

6. Cognizance of an offence is barred only if the facts on records indicate that the person charged with an offence was accused of the offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties.

7. Plea as to whether or not the cognizance was warranted against an accused in the absence of sanction contemplated under Section 197 of the Code of Criminal Procedure may be raised by an accused before a trial Court but on the basis of material collected by the investigating agency during the currency of investigation or on the basis of evidence made available to the Court in a complaint case, as the case may be. If the accused succeeds in satisfying the Court on the basis of available material on the records that cognizance against him was unwarranted in the absence of sanction under Section 197 of the Code of Criminal Procedure, the Court seized of the matter is required to consider such plea and decide as to whether or not Section 197 of the Code of Criminal Procedure was attracted in the case and the process warranted against the accused.

8. Question of necessity of sanction has to be determined from stage to stage as the case progresses. It may be considered at any stage of the proceedings and while considering, it may not be necessary for the Court to confine itself to the allegations in the complaint and the Court can take into consideration all the material on the records at the time the question is raised. Before Section 197 of the Code of Criminal Procedure can be invoked it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the

duty which requires examination so much as the act because the official act can be purported both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this Section would be available if the act falls within the scope and range of its official duties. No universal rule can be laid down to determine that there was a reasonable connection between the act done and the official duties. The surest test in this regard would be to consider if the omission or negligence on the part of public servant to commit the act complained of could have made him answerable for a charge of dereliction of its official duties and the answer to this question is found to be in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant.

9. This was the view which was expressed by Hon'ble Supreme Court of India in case titled Centre for Public Interest Litigation and Anr. v. Union of India and Anr. reported as 2005 (7) Supreme 79.

10. Judgment cited by Sh. Sharma may not be of any help to the petitioners because there does not exist any material on the records on the basis whereof it could be said that the petitioners had committed the alleged offence while acting or purporting to act in the discharge of their official duties. Learned Sessions Judge has detailed the material collected by the investigating agency during the currency of the investigation, which shows that Mohd Bashir accused had ill-will and enmity with the deceased Sub-Inspector of Police Mohd Bashir, who was alleged to have harassed the accused Mohd Bashir and his son Zahir Abas through police and army on the allegations that they had connections with the militants. The evidence indicates that with this background and view both the two accused namely Mohd Bashir & Zahir Abas had hatched a conspiracy with Mohd Iqbal and in pursuance to that conspiracy Mohd Bashir accused had gone to Surankote and on some false pretext brought petitioner/accused No.3 with other S.P.Os. to his house at Mastandra, where Zahir Abas was waiting for them and they stayed at the house of Mohd Bashir till 1.30 and thereafter they with common

object of killing the deceased went to his house, Zahir Abas along with other S.P.Os. remained at some distance, when Mohd Bashir knocked the door and told Mohd Iqbal to shoot the person who opens the door. Mohd Bashir was aware of the fact that deceased was sleeping in the room. On opening of the door by the deceased, Mohd Iqbal pumped bullets in the body of the deceased, who died on spot.

11. I do not find any material at this stage on the records on the basis where a view different from the one taken by the learned Sessions Judge could have been taken in the case.

12. I do not find any material on records for exercise of Revisional and inherent jurisdiction of this Court.

13. This petition is, thus, without any merit, which is, accordingly, dismissed.

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