SUPREME COURT OF INDIA

Rizwan Ahmed Javed Shaikh

Vs.

Jammal Patel

Crl.A.No.823 of 1994

(R.C. Lahoti and N. Santosh Hegde JJ.)

12.05.2001

JUDGMENT

R.C. Lahoti, J.

1. One Faijuddin Jainuddin lodged a complaint against Rizwan Ahmed, Ramchandra Kasbe and Afzalkhan, the three appellants before us, complaining that the appellants and some other unknown persons had gathered dangerous weapons and abducted the complainant, Faijuddin Jainuddin and assaulted him. The police registered offences punishable under Sections 142, 144, 147, 148, 365, 368, 324/149 IPC against the appellants and commenced investigation. On 28th March, 1986 at about 8.30 p.m. the respondent no.1 who was a sub-inspector attached to Chembur police station, along with other policemen, came to the residence of the appellants and forced the three appellants to accompany them to Chembur police station where they were put up in the lock-up. At about 2 a.m. on 29.3.1986 they were put up in a police van and brought to Bhandup police station and placed in the lock-up. On 30.3.1986 the appellants were produced before the Holiday Magistrate at Bhoiwada (Dadar) who ordered them to be produced before the regular court on 31.3.1986. Later on they were released on bail. On 16th July, 1986 the appellants filed a complaint before the Metropolitan Magistrate, 27th Court, Mulund, Bombay impleading two sub-inspectors, two senior police inspectors and a police inspector attached with Chembur and Bhandup police stations complaining of offences under sections 220, 342 of IPC and 147 (c) (d) and 148 of Bombay Police Act, 1951. The complaint also alleged the appellants having been mercilessly beaten while they were wrongfully confined at Chembur police station. The learned Magistrate in the inquiry held under section 202 Cr.P.C.recorded the statement of complainant and one witness, took cognizance under Sections 220 and 342 IPC and Sections 147 and 148 of Bombay Police Act and directed the accused to be summoned.

2. The accused-respondents appeared before the learned Magistrate and raised an objection to the maintainability of the complaint under Section 197 (2) of Cr.P.C. relying on a notification which will be reproduced shortly hereinafter. The learned Magistrate formed an opinion that the complaint could not have been filed without the requisite sanction and therefore directed the accused-respondents to be discharged. The appellants preferred a

petition under Section 482 of Cr.P.C. and Article 226 of the Constitution before the High Court of Bombay which was dismissed. The appellants have filed this appeal by special leave.

3. The relevant notification dated 2.6.1979 reads as under:-

> "NOTIFICATION Home Department Mantralaya, Bombay - 400 032
>
> No. CR.P.O./78/9845/POL-3. In exercise of the power conferred by sub-section (3) of section 197 of the Code of Criminal Procedure, 1973 (II of 1974), the Government of Maharashtra hereby directs that the provisions of sub- section (2) of that Section shall apply to the following categories of the members of the force in the State charged with the maintenance of public order wherever they may be serving, namely:-
>
> (1) All police officers as defined in the *Bombay Police Act, 1951* (Bom. XXII of 1951), other than the Special or Additional Police Officers appointed under section 21 or 22 of that Act;
>
> (2) All Reserve Police Officers as defined in *Bombay State Reserve Police Force Act, 1951 (Bom. XXXVIII of 1951)*."

4. It is submitted by the learned counsel for the appellants that in order to claim protection under the notification it is necessary that the accused must be a police officer as defined in the Bombay Police Act, 1951 and must be charged with the maintenance of public order at the relevant time. In other words, if a police officer is discharging a duty referable to law and order only as distinguished from the maintenance of public order he cannot claim protection under the notification. In the case at hand the police officers had arrested the appellants, kept them in confinement and assaulted them which are acts referable at the most to the duty of a police officer related to maintenance of law and order but not the maintenance of public order and therefore the benefit of the notification is not available to the respondents. The learned counsel submitted that the orders of the learned Magistrate as also of the High Court deserve to be set aside and the learned Magistrate directed to proceed ahead with hearing of the complaint made against the accused persons.

5. Sub-sections (2) and (3) of Section 197 of the Cr.P.C. which are only relevant for our purpose read as under :-

> "197. Prosecution of Judges and public servant.
>
> (1) xxx xxx xxx
>
> (2) No Court shall taken cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression Central Government occurring therein the expression State Government was submitted.

(3A) xxx xxx xxx

(3B) xxx xxx xxx

(4) xxx xxx xxx"

6. The Division Bench of the Bombay High Court has placed reliance on a Division Bench decision of Gujarat High Court in *Bhikhaji Vaghaji Vs. L.K. Barot*[1]. The learned counsel for the appellants have on the other hand placed reliance on a decision of Rajasthan High Court in *Jethmal Vs. Khusal Singh*[2] and a decision of Calcutta High Court in *K.K. S. Muhammed Vs. Sasi and 4 Ors.*[3], both Single Bench decisions. We may briefly summarise the interpretation placed by the three High Courts on similar notifications referable to Section 197 (3) of Cr.P.C.

7. In Jethmals case (supra) the State Governments notification dated 31.7.1974 provided that the provisions of sub- section (2) of Section 197 of the Code of Criminal Procedure, 1972 shall apply to police officials, of all ranks, charged with the maintenance of public order, wherever they may be working. The accused police officer while arresting the complainant under Section 41(2) of Cr.P.C. refused to release the complainant on bail though his sureties were present and the bail was offered. The learned Single Judge of Rajasthan High Court formed an opinion that the refusal of bail to the complainant by the accused cannot be said to be in connection with the maintenance of public order and therefore protection under the State notification was not available to him. In the case of K.K.S.Muhammed (supra) the notification dated 6.12.1977 issued by the Government of Kerala under Section 197 (3) of Cr.P.C. provided that the provisions of sub-section (2) of Section 197 shall apply to all members of the Kerala State Police Force charged with maintenance of public order. The learned Single Judge of Kerala High Court drew distinction between the members of Kerala Police Force charged with maintenance of public order and those charged with maintenance of law and order and held that inasmuch as the accused were not members belonging to any class or category of forces charged with maintenance of public order, protection under the notification could not be extended to the accused persons even if they were acting or purporting to act in the discharge of their official duties.

8. In the case of Bhikhaji Vaghaji (supra) the notification dated 15.5.1974 issued by the State Government under Section 197 (3) of the Code of Criminal Procedure provided that the provisions of sub-section (2) of the said section shall apply to the police officers as defined by clause (11) of section 2 of the *Bombay Police Act, 1951*..charged with the maintenance of

public order. The Division Bench held that the phrase charged with the maintenance of public order occurring in the notification dated 15.5.1974 and also occurring in sub- section (3) of Section 197 is obviously an adjectival phrase and it cannot be interpreted to mean a phrase suggesting the time when such members of the police force are to avail themselves of the exemption of protection contemplated by sub-section (2) of Section 197 of the Code. The protection was extended to a member of the police force charged with the maintenance of public order though the act in question which was alleged to be an offence committed by the accused persons was not referable to his duty to maintain public order.

9. We find ourselves in agreement with the view taken by the Division Bench of the Gujarat High Court in the case of Bhikhaji Vaghaji and therefore, also with the view taken by Division Bench of Bombay High Court in the order under appeal. The submission made by the learned counsel for the appellants confuses the issue as to applicability of notification with the span of protective umbrella or the purview or compass of such sub- section (2) of Section 197 of the Code. The person on whom the protection is sought to be conferred by the State Government notification is to be determined by reading the notification and once it is found that the State Government notification applies to the member of the force which the accused is, the scope, purview or compass of the protection has to be determined by reading sub-section (2) of Section 197 of the Code, i.e., by asking a question whether the act alleged to be an offence was done or purports to have been done in the discharge of the official duty of the accused. Such official duty need not necessarily be one related to the maintenance of public order.

10. The accused-respondents are undisputedly members of Bombay Police Force governed by the Bombay Police Act, 1951. The Preamble to the Act provides that it was enacted to consolidate and amend the law relating to the regulation of the police forces and the exercise of powers and performance of functions by the State Government and by the members of the said force for the maintenance of public order. It is an empty truism to state that the members of the police force are persons charged with the maintenance of public order. In Bhikhaji Vaghajis case, the Division Bench of Gujarat High Court has observed (vide para 9) :-

> "..The Preamble of the Bombay Police Act itself sets out that the Act was enacted to consolidate and amend the law relating to the Regulation of the Police Force and the exercise of powers and performance of the functions by the State Government and by the members of the said force for the maintenance of public order (emphasis supplied by us). It is, therefore, too much to say that the members of the Police force are not persons charged with the maintenance of public order. Section 5 of the Bombay Police Act also mentions that the Police force shall have such powers, functions and duties as the State Government may by general or special order determine. The above quoted Government notification, apart from other general trend, can be said to be the Governments direction or declaration that members of the Police Force, styled as Police officers as defined by section 2(1) of the Bombay Police Act, are persons charged with the maintenance of public order. It is a truism to state that it is the duty of every member of the Police force to see that public order is maintained. This is the

general duty of every member of the Police force, styled as Police officer in the Bombay Police Act."

11. We find ourselves in agreement with the abovesaid observations.

12. We may with advantage quote the following passage from Constitution Bench decision in *Madhu Limaye Vs. S.D.M. Monghyr*[4]:-

13. In dealing with the phrase maintenance of public order in the context of preventive detention, we confined the expression in the relevant Act to what was included in the second circle and left out that which was in the larger circle. But that consideration need not always apply because small local disturbances of the even tempo of life, may in a sense be said to affect public order in a different sense, namely, in the sense of a state of law abidingness vis-à-vis the safety of others. In our judgment the expression in the interest of public order in the Constitution is capable of taking within itself not only those acts which disturb the security of the State or are within ordre publique as described but also certain acts which disturb public tranquillity or are breaches of the peace. It is not necessary to give to the expression a narrow meaning because, as has been observed, the expression in the interest of public order is very wide. Whatever may be said of maintenance of public order in the context of special laws entailing detention of persons without a trial on the pure subjective determination of the Executive cannot be said in other circumstances. In the former case this Court confined the meaning to graver episodes not involving cases of law and order which are not disturbances of public tranquillity but of ordre publique.

14. The phrase maintenance of public order in the context before us need not be assigned a narrow meaning as is assigned to in preventive detention matters. The police officers do discharge duties relating to maintenance of public order in its wider sense.

15. The notification therefore applies to members of Bombay police force. Once it is held that the members of the Bombay police force are the persons to whom the notification issued under Section 197 (3) of the Code applies and if the act which is alleged to be an offence was done in discharge or purported discharge of the duty of the accused persons they will be entitled to the protection extended by sub-section (2) of Section 197 of the Code.

16. The question of applicability of Section 197 (2) of the Code is not free of difficulty. In *S.B. Saha and Ors. Vs. K.S. Kochar*[5] this Court on a review of the case law available on the point held as under:-

> "The words any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the Section will be rendered altogether sterile, for, it is no part of an official duty to commit an offence, and never can be. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is

> performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197 (1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision. As pointed out by Ramaswami, *K. in Baijnath v. State of Madhya Pradesh*[6] at p 222 it is the quality of the act that is important and if it falls within the scope and range of his official duties, the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted."

17. In sum, the sine qua non for the applicability of this section is that the offence charged be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him.

18. While the question whether an offence was committed in the course official duty or under colour of office, cannot be answered hypothetically, and depends on the facts of each case, one broad test for this purpose first deduced by Varadachariar J. of the Federal Court in *Hori Ram v. Emperor*[7] is generally applied with advantage. After referring with approval to those observations of Varadachariar J., Lord Simonds in *H.B. gill v. The King*[8] tersely reiterated that the test may well be whether the public servant, if challenged, can reasonably claim, that what he does, he does in virtue of his office.

19. Speaking for the Constitution Bench of this Court, Chandrasekhar Aiyer J., restated the same principle, thus:

> ..in the matter of grant of sanction under Section 197, the offence alleged to have been committed by the accused must have something to do or must be related in some manner, with the discharge of official dutythere must be a reasonable connection between the act and the discharge of official duty, the act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

20. The real test to be applied to attract the applicability of Section 197 (3) is whether the act which is done by a public officer and is alleged to constitute an offence was done by the public officer whilst acting in his official capacity though what he did was neither his duty nor his right to do as such public officer. The act complained of may be in exercise of the duty or in the absence of such duty or in dereliction of the duty, if the act complained of is done while acting as a public officer and in the course of the same transaction in which the official duty was performed or purports to be performed, the public officer would be protected.

21. In the case at hand cognizance against the accused persons has not been taken under Section 323 of the IPC. It appears that the complaint stated the complainants to have been beaten mercilessly by one of the accused persons whilst in custody but when one of the complainants was examined by the learned Magistrate he stated only this much that one of

the police officers had assaulted him. The statement was too vague to be acted upon and hence cognizance for causing hurt to any of the complainants has not been taken by the learned Magistrate. None of the complainants has made any grievance about it. The cognizance taken is only under Section 220 (commitment for trial or confinement by person having authority who knows that he is acting contrary to law) and Section 342 (wrongful confinement) of Indian Penal Code. Cognizance has also been taken for offences under Section 147 (Vexatious injury, search, arrest etc. by police officer) and Section 148 (Vexatious delay in forwarding a person arrested) of the Bombay Police Act, 1951. Cognizable and non-bailable offences were registered against the appellants. They were liable to be arrested and detained. The gravamen of the charge is the failure on the part of the accused persons to produce them before a Magistrate within 24 hours of arrest. The complainants were in the custody of the police officers and at the police station. It cannot be denied that the custody which was legal to begin with became illegal on account of non-production of the complainants before the Magistrate by the police officers officially detaining the appellants at a place meant for detaining the persons suspected of having committed an offence under investigation. The act constituting an offence alleged to have been committed by the accused-respondents was certainly done by them in their official capacity though at a given point of time it had ceased to be legal in spite of being legal to begin with. On the totality of the facts and circumstances of the case in our opinion the learned Magistrate and the High Court have not erred in holding the accused-respondents entitled to the benefit of protection under Section 197 (2) of the Cr.P.C. We have felt it unnecessary to deal with the allegation made in the complaint relating to beating of the appellants whilst in police custody because no cognizance has been taken for an offence in that regard and no cognizance can now be taken because of the bar of limitation enacted by Section 468 of Cr.P.C.

22. For the foregoing reasons the appeal is dismissed.

[1]*1981 (22) GLR 956*
[2]*1984 RLW 545*
[3]*1985 Kerala Law Journal 403*
[4]*AIR 1971 SC 2480*
[5]*AIR 1979 SC 1841*
[6]*AIR 1966 SC 220*
[7]*1939 FCR 159*
[8]*AIR 1948 PC 128*