MADHYA PRADESH HIGH COURT

Ashiq Miyan

Vs.

State of M. P

Criminal Revn. No. 131 of 1964, Decided on 4.9.1965. decided by Full Bench an Order of Reference made by Golvalker, J.
(P.V. Dixit, C. J., K.L. Pandey and N.M. Golvalker, JJ.)

03.08.1965 04.09.1965

JUDGMENT

Dixit, C. J.

1. This revision petition has come up before us on a reference by a Single Judge of this Court.

2. The petitioners in this case has been convicted by the Additional City Magistrate, Indore, under Section 9(a) of the Opium Act, 1878, and under Section 120-B and sentenced to rigorous imprisonment for a period of two years on each count. Their joint appeal against the convictions and sentences were dismissed in the First Additional Sessions Judge, Indore. Thereupon, they filed this revision petition against the decision of the additional Sessions Judge. When this petition first came up for hearing before one of us (Golvalker, J.) it was contended on behalf of the petitioners, on the authority of a Division Bench decision of this Court in *Sardar Khan v. State* [1] that the investigation of the offence in the present case did not fall within the purview of Chapter XIV of the Criminal Procedure Code and the report of the police officer, on the basis of which the case was instituted against the petitioners, was not a police report as contemplated by Section 251-A of the Code, and that therefore the trial of the petitioners held in accordance with the provisions contained in Section 251-A of the Code was vitiated. It was urged that the petitioners should have been tried according to the procedure laid down in Section 252 of the Code. In reply, it was submitted before the learned Single Judge on behalf of the State that the decision of this Court in Sardar Khan's Case AIR 1968 Madh. Pra 337 (supra) was no longer good law in view of the decisions of the Supreme Court in *Pravin Chandra v. State of Andhra Pradesh,*

[2] and *Amalshah v. State of Madh Pra,* [3] A reference was also made to a decision of Son, J. in *State v. Ganpatsingh.* [4] where the learned Judge held that the law laid down in Sardar Khan's case AIR 1963 Madh. Pra. 337 was no longer good law, 'especially in a case which is initiated on a report of a Police Officer'.

3. The learned Single Judge was inclined to think that the law laid down in Sardar Khan's case AIR 1968 Madh. Pra. 337 (supra) was still good, whether the case was one initiated on the report of an excise officer or a police officer. He, however, felt that as the decision of Sen, J. in Ganpatsingh's case Cri. Revn No. 275 of 1964, D/-8-3-1965 (Madh. Pra.) (Indore-Bench) (supra) and the decision in Sardar Khan's case AIR 1963 Madhya Pradesh 337 (supra) were conflicting this revision petition should be heard by a larger Bench rather than by him sitting single. Hence this reference.

4. The case against the petitioners was investigated in accordance with the provisions contained in the Opium Act and was initiated on a report made by a police officer. Section 251-A prescribes the procedure to be adopted in cases initiated by the police, and Sections 250 to 269 of the Code deal with the trial of the case instituted otherwise than on a police report. Section 20-G of the Opium Act as amended in this State runs as follows :

> "When an officer empowered under Section 20 to investigate offences or grant hail forwards in custody any person accused of an offence under this Act to the Magistrate, having jurisdiction to try the case, or admits any such person to bail to appear before such Magistrate, he shall submit a report setting forth the name of the accused person and the nature of the offence with which he was charged and the names of the persons who appear to be acquainted with the circumstances of the case, and shall sent to such Magistrate any article which it may be necessary to produce before him. Upon receipt of such report the Magistrate shall inquire into such offence and try the person accused thereof in like manner as if such report is a report in writing made by a police officer under clause (b) of Sub-Section (1) of Section 190 of the Code of Criminal Procedure, 1898." The short question that therefore arises for determination in this case is whether the report of a police officer initiating a case under the Opium Act, which is deemed to be a report under Section 190(1)(b) of the Code, is a 'police report' as contemplated by Section 251-A, so as to make the procedure prescribed by the Section applicable to a trial of the case.

5. Now, in the case of Sardar Khan AIR 1963 Madh. Pra. 337 (supra) a Division Bench of this Court, no doubt, following the reasoning given in *Premchand Khetry v. State,* [5] held that a complaint filed by an excise officer under the Opium Act could not be regarded as a case instituted on a police report so as to attract Section 251-A. In the Calcutta case, the learned Chief Justice explained the meaning of the term 'police report' thus :

> '.. .. .. the expression "police report," as used in the Code for reports of offence made by the Police, carries a special meaning. As used in the old Section 190(1)(b), the expression was interpreted by several High Courts as meaning reports made under section 173, that is to say, reports of cognizable offences with regard to which there had been a direction by a Magistrate to investigate, made after an investigation under Chapter XIV. The result of that interpretation was that cognizance of an offence could be taken under section 190(1)(b) only on police reports of that particular kind and not on other police reports. Other police reports were to be treated as complaints, coming under section 190(1)(a). Apparently the Legislature did not desire that the operation of Section 190(1)(b) should be so restricted and so in 1923 it amended the Section by replacing the expression "police report" by the more general words "report in writing of such facts (i.e. facts constituting an offence) made by any police officer" which would cover all police reports. At the same time, the Legislature left the expression, as occurring in Sections 170 and 173, untouched. It must therefore be presumed that the Legislature accepted the judicial construction of the expression, "police report" as used in the Code for reports of offences made by the police, and that where it left the expression used in a similar context untouched, it intended the expression to continue to bear the meaning which had been put upon it by the Courts. Not only did the Legislature not make any change in the expression "police report" when amending the Code in 1923, at any place other than Section 190(1)(h), but when it amended the Code again in 1955, it itself used the same expression in enacting the new Sections 207, 207-A, 251 and 251-A and in amending Sections 208 and 252. In those circumstances, it must equally be presumed that in the amendments made by it in 1955, the Legislature used the expression "police report" in the sense in which it had been construed to bear in the old Section 190(1)(b).'

6. The petitioners in the Calcutta case were also prosecuted under the Opium Act. The Opium Act, as amended by West Bengal, also contains a provision similar to Section 20-G reproduced earlier. On the effect of this provision, the learned Chief Justice of the Calcutta High Court, who delivered the judgment of the Court, said :

> "It is clear from Section 20-G that although an Excise Officer may not be a Police Officer in fact and in law, the report made by him is to be deemed to be a report by a Police Officer for the purposes of taking cognizance of the offence reported. From the point of view of the status of the person making the report, a report of an offence under the Opium Act made by an Excise Officer must therefore be held to be a "police report" within the meaning of Section 251-A of the Code.

This, however, does not dispose of the objection raised on behalf of the petitioner. The effect of Section 20-G of the Opium Act is no more than that a written report of facts constituting an opium offence made by an Excise Officer is "a report in writing of such facts made by Police Officer", as contemplated by Section 190(1)(b) of the Code. But the language of Section 190(1)(b) is very general and covers, as is now well settled not merely reports made under section 173 after an investigation under Chapter XIV, or earlier reports under section 157 but all reports of an offence made by the police. It follows that although Section 20-G of the Opium Act makes an Excise Officer's report of an opium offence a report made by a Police Officer, it does not make it a "police report" in the special and restricted sense of that term. For determining whether it is such a report, an examination of certain other provisions of law is necessary. It appears to me that a report of an opium offence made by an Excise Officer cannot be said to be a "police report" within the meaning of that term, as used in the Code with respect in reports of offences made by the police. A "police report", I have already pointed out, in a report made by the Police under section 157 of the Code when entering upon an investigation under Chapter XIV or a report under section 173 made after such investigation. An Excise Officer does not investigate an offence under the Opium Act under Chapter 14 of the Code indeed he does not investigate it under the Code at all, but does so under section 20 of the Opium Act itself." On this reasoning it was held in the Calcutta case 'that in order that the procedure prescribed by Section 251-A may be applicable to the trial of a warrant case, it must be a case "instituted on a police report" and the investigation resulting in its institution must be an investigation to which Section 173 may be applied.' The learned Judges, in Sardar

Khan's case AIR 1963 Madh. Pra. 337 saw no good reasons to differ from the aforesaid view expressed by the Calcutta High Court. The decision in Sardar Khan's case AIR 1968 Madh. Pra. 337 no doubt supports the contention of the petitioners before us, but, as will be shown presently, the Supreme Court in Pravinchandra's case AIR 1965 Supreme Court 1185 (supra) did not accept as correct the view expressed by the Calcutta High Court in Premchand's case AIR 1958 Calcutta 213 (supra) which was followed in Sardar Khan's case AIR 1963 Madh. Pra. 337.

7. In the case before the Supreme Court Pravin Chandra Mody was being prosecuted under Section 420 Indian Penal Code and under Section 7 of the Essential Commodities Act, 1955. During the course of his trial he raised the preliminary objection that as the police had filed a report under Section 11 of the Essential Commodities Act the trial of the offence under Section 7 could not be under Section 251-A but under Section 252 of the Code. He prayed that the charge framed against him should be quashed. In support of this objection, the argument that was advanced before the Supreme Court on behalf of Mody was on these lines. The words 'police report' in Section 251-A of the Code meant the report mentioned in Section 17th which the police officer makes to a Magistrate in respect of offences investigated by him under Chapter XIV; the investigation was in respect of cognizable offences, because non-cognizable offences could only be investigated by police officers after being authorized in that behalf by a competent Magistrate; the three-fold distinction made in Section 190 indicated that by 'police report' in Section 190(1)(b) was meant a charge-sheet of the police officer under Section 173 of the Code, and since the report in writing which the police officer made under Section 11 of the Essential Commodities Act, 1955, was not a charge-sheet under Section 173 of the Code, it must be equated to a complaint of facts under Section 190(1)(a). On this argument it was urged on behalf of Mody that the offence under Section 7 of the Essential Commodities Act was triable under the procedure laid down in Section 252, and that the charges against him in respect of Section 420 Indian Penal Code and Section 7 of the Essential Commodities Act should either be split up or the two offences should be tried under the procedure laid down by Section 252.
The Supreme Court did not accept as correct the meaning which was sought to be given to a "police report" and said :

"In Section 190, a distinction is made between the classes of persons who can

start a criminal prosecution. Under the three clauses of Section 190(1), to which we have already referred, criminal prosecution can be initiated (i) by a police officer by a report in writing, (ii) upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion, and (iii) upon receiving a complaint of facts, if the report in this case falls within (i) above, then the procedure under section 251-A. Criminal Procedure Code, must be followed. If it falls in (ii) or (ill) then the procedure under section 252, Criminal Procedure Code, must be followed."

The above observations make it very clear that if a case has been instituted upon a report falling under Section 190(1)(b), i.e. on it report in writing "of such facts made by any police officer", then the procedure prescribed by Section 261-A must be followed. It follows, therefore, that if under Section 20-G of the Opium Act as amended in this State the report of an officer of the excise or the police department is deemed to be a report in writing of a police officer under Section 190(1)(b) of the Code, then the trial of the case instituted on such a report would be governed by Section 251-A. The fact that the investigation of the offence under the Opium Act is under Section 20 of that Act and not under Chapter XIV of the Code does not in any way affect the position. Under Section 5(2) of the Code the trial of offences under the Opium Act is, no doubt, subject to the provisions contained in that Act regulating the manner a place of investigating, inquiring into, trying or otherwise dealing with offences there under. But when the Opium Act itself contains it special provision deeming the report of an excise officer or a police officer as a report under Section 190(1)(b) of the Code, that provision has to be given effect to. This matter has been further clarified by the Supreme Court in the penultimate paragraph in Pravin Chandra's case AIR 1965 Supreme Court 1185 (supra). The observations made by the Supreme Court in that paragraph fully apply here and must be reproduced in extenso.
The Supreme Court said :

"It was contended, before us on the authority of AIR 1958 Calcutta 218 that a prosecution under section 251-A. Criminal Procedure Code can only commence on a report under section 173 of the Code of Criminal Procedure. It is submitted that the report of the police officer cannot be regarded as a charge-sheet for purposes of Section 173, Criminal Procedure Code. In that case the learned judges of the Calcutta High Court went elaborately into the meaning of the expression "police report" in Section 190(1)(b) and held that those words were

> confined to a charge-sheet under section 173 of the Code, We have pointed out above that in all those cases where the law requires a report in writing by a public servant the requirements of the law are satisfied when a report is filed by a public servant who is also a police officer. We have also pointed out that even in a case where the police officer cannot investigate a non-cognizable offence without the permission of a Magistrate he is not prevented by anything in the Code from investigating a non-cognizable offence along with a cognizable offence when the two arise from the same facts. In the case of AIR 1958 Calcutta 21" (supra) to which we have case referred, there was a provision (Section 20-G) in the Opium Act, as amended in Bengal, which provided that a report in writing in an officer of the Excise. Police or the Customs Department shall be enquired into and tried as if such report was a report in writing made by a police officer under clause (b) of Section 190(1) of the Code of Criminal Procedure. 1898. The Divisional Bench in the Calcutta High Court held that the Section created a fiction by which the report of an Excise or Customs Officer was to be regarded as the report of a police officer but only for the purpose of Section 190(1)(b), that it did not make the report a charge-sheet under section 173 of the Code, and that Section 251-A, Criminal Procedure Code, was not applicable because it contemplated a report under Section 173 of the Code. We invited counsel to tell us that if the effect of the fiction did not make it a report under section 173, Criminal Procedure Code, what other purpose could the Legislature have had in mind in saying that it was a police officer's report ? He could suggest none and we cannot also set what other purpose was intended. In our opinion, the position is clear that such reports, if they are regarded as made under section 190(1)(b), must attract the provisions of section 251-A at the Code, because if the fiction is given full effect, they cannot be regarded as falling within "complaints" under section 190(1)(a) or within Section 190(1)(c).

8. The above observations of the Supreme Court leave no manner of doubt that the report of an excise officer or police officer, on the basis of which a case under the Opium Act has been instituted, having been deemed to be under Section 20-G of the Act a report in writing made by a police officer under Section 190(1)(b) of the Code, the trial of a case instituted on the basis of that report is governed by Section 251-A of the Code.

9. The contention of the petitioners that their trial was vitiated must be rejected by

reason also of the decision of the Supreme Court in Cri. Appeal No. 201 of 1963 dated 11-12-1964 (SC) (supra). Amalshah was prosecuted in the Court of the Sub-Divisional Magistrate. Bhupal for offences under Section 9(a) and (b) of the Opium Act on a report made by a police officer. He was acquitted by the trial Magistrate, but convicted in appeal by this Court. Amalshah then preferred in appeal before the Supreme Court, contending inter alia that his trial was vitiated by the fact that the procedure prescribed by Section 251-A of the Code had been adopted and in law that did not apply. Relying on the decisions in AIR 1958 Calcutta 213 (supra) and AIR 1963 Madh. Pre. 337 (supra), it was argued on his behalf before the Supreme Court that the case against him had been started at the instance of the excise officers and so Section 251-A could not be invoked as the report made by the excise officer could not be said to be a police report within the meaning of the said section; and further that though the report made by the excise officer was treated as if it were a report made by a police officer under Section 190(a)(b) of the Code it could not be held to be a police report within the meaning of Section 251-A. The Supreme Court did not think it necessary to express am opinion on the argument raised by Amalshah as the proceedings against him had boon commenced on the report of it police officer and not on the report, of an excise officer. It was observed by the Supreme Court :

> "On the record as it stands, there is no justification for assuming that the report on which the Magistrate acted was sent to him by the Excise Officer; on the contrary, the evidence shows that the said report was made In a police officer, and so. Section 251-A in terms would apply."

10. The decision in Amalshah's case Criminal Appeal No. 201 of 1963, dated 11-12-1964 (SC) is directly in point here. Shri Bhargava, learned counsel appearing for the petitioner, however, suggested that as in Amalshah's case, Criminal Appeal No. 201 of 1903, D/-11-12-1964 (SC) (supra) no reference was made to the earlier decision of the Supreme Court in Pravin Chandra's case AIR 1965 Supreme Court 1185 (supra) and the Supreme Court declined to express any opinion on the argument raised by Amalshah on the authority of the decisions in Sardar Khan AIR 1963 Madhya Pradesh 337 and Prem Chand. (AIR 1958 Calcutta 213) (supra) it should be taken that the law laid down by this Court and the Calcutta High Court in the two cases was still good law. We are unable to accede to this contention. It is no doubt true that the Supreme Court did not express any opinion on the argument canvassed on behalf of Amalshah and did not refer to its earlier decision in Pravin Chandra's case, AIR 1965 Supreme

Court 1185 (supra); but the necessary implication of the conclusion of the Supreme Court in Amalshah's case Criminal Appeal No. 201 of 1963, D/-11-12-1964 (SC) that Section 251-A did not apply to the trial of a case initiated under the Opium Act on a report made by a police officer is that though the report of a police officer in respect of an offence under the Opium Act investigated under Section 20 of that Act is not a report falling under Section 173 of the Code which the police officer makes to a Magistrate in respect of an offence investigated by him under Chapter XIV is deemed to be a report falling under Section 190(1)(b) of the Code, still that report is a police report so as to attract Section 251-A. The decisions in Premchand AIR 1958 Calcutta 213 and Sardar Khan AIR 1913 Madhya Pradesh 337 (supra) do run counter to the reasoning underlying the conclusion of the Supreme Court in Amalshah's case Cri. Appeal No. 201 of 1963, D/-11-12-1964 (SC). Merely because the Supreme Court thought it unnecessary to express any opinion on the argument advanced on behalf of Amalshah on the strength of the decisions of this Court and the Calcutta High Court with regard to the applicability of Section 251-A and because there was no reference to Pravin Chandra's case. AIR 1965 Supreme Court 1185 (supra) it does not follow that in Amalshah's case Cri Appeal No. 201 of 1963, D/-11-12-1964 (SC) the Supreme Court was not inclined to differ from the reasoning given in the cases of Sardar Khan AIR 1963 Madh. Pra. 387 and Prem Chand AIR 1958 Calcutta 213 (supra) or that it was inclined to modify the observations made by it in Pravin Chandra's case. AIR 1905 Supreme Court 1185. It is obvious from the decision of the Supreme Court in Amalshah's case, Cri. Appeal No. 201 of 1963, D/-11-12-1964 (SC) that it did not desire to express any opinion on the correctness of the decisions in Sardar Khan. AIR 1963 Madh. Pra. 337 and Prem Chand, AIR 1958 Calcutta 213 (supra) as in those cases the prosecutions were launched on reports made by excise officers and in Amalshah's case, Cri. Appeal No. 201 of 1963, D/-11-12-1964 (SC) the case against him was started on a report made by a police officer. But it must be noted that both the excise officer and police officer investigate into offences under the Opium Act under Section 20 of that Act and not under Chapter XIV, and the reports of both these officers are under Section 20-G of the Act deemed to be reports of police officers under Section 190(1)(b) of the Code. If, therefore, as held by the Supreme Court in Amalshah's case Cri. Appeal No. 201 of 1963, D/-11-12-1964 (SC) (supra), Section 251-A is attracted to a case instituted under the Opium Act on a report made by a police officer, then it logically follows that the trial of a case under the Opium Act instituted on a report made by an excise officer would also be governed by Section 251-A.

11. For all these reasons, our conclusion is that the contention of the petitioners that their trial was vitiated by the fact that the procedure prescribed by Section 251-A of the Code had been adopted must be rejected. As regards the merits of the petition, though the whole case has been referred to us we think it would be proper and desirable that the petition should be heard and decided on merits by the referring Judge and not by us. Let the case be laid before the referring Judge for final disposal.

Order accordingly.

Cases Referred.

1. AIR 1963 Mad Pra 337
2. AIR 1965 SC 1185
3. Criminal Appeal No. 201 of 1963, dated 11-12-1964 (SC)
4. Cr. Revn. No. 275 of 1964, D/-8-3-1965 (Madh Pra)
5. AIR 1958 Calcutta 213