BOMBAY HIGH COURT

Atmaram Mahadeo Ghosale

Vs.

State (Bombay)

Criminal Appeal No. 441 of 1963

(Tarkunde and Palekar, JJ.)

21.02.1964

JUDGMENT

Tarkunde , J.

1. The question for the decision of which this appeal has been referred to the Division Bench is whether a prosecution launched on a Police report against some members of the police force for an offence alleged to have been committed by them by acting under colour or in excess of their authority is barred under section 161(I) of the Bombay Police Act if the prosecution were instituted more than six months after the date of the alleged offence. Sub-section (I) of section 161 of the Bombay Police Act, 1951, is in the following terms :-

> "In any case of alleged offence by the Revenue Commissioner, the Commissioner, a Magistrate. Police Officer or other person, or of a wrong alleged to have been done by such Revenue Commissioner, Commissioner, Magistrate, Police Officer or other person, by an act done under colour or in excess of any such duty or authority as aforesaid, or wherein, it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted, more than six months after the date of the act complained of. "

The duty or authority which has been referred to in this provision has been specified earlier in section 159 of the Act as, "any duty imposed or any authority conferred... by any provision of this Act or any other law for the time being in force or any rule, order or direction made or given therein."

2. The few facts in the context of which the above question arises in this case are these : one Vijaykumar was at the material time the District Superintendent of Police at Ratnagiri. In the beginning of June 1061, he went for the inspection of the Guhagar Police station which was in

charge of Sub Inspector Kamat. On 5th June 1961, in a fit of anger, Vijaykumar threw some heavy substance at the head of Sub-Inspector Kamat with the result that Kamat received a fatal injury and died. Accused No.1 in the present case was the orderly of Sub-Inspector Kamat. Accused No.2 was the Jamadar, and accused No.3 the Writer Police Head Constable, at the Guhagar Police station. Accused No.4 was the Office-peon of the District Superintendent of Police, Ratnagiri. According to the prosecution, accused Nos.1 to 4 carried the dead body of Sub-Inspector Kamat from the Police Station to the sea-shore and took steps to make it appear that Kamat had committed suicide by drowning. It was further the case of the prosecution that accused Nos.2 and 3 prepared a false inquest panchanama in an effort to show that Sub-Inspector Kamat had committed suicide by drowning, sent a false report to the Medical Officer, made false entries in the case diary, and made in incorrect entry in the Muddemal Register at the Guhagar Police Station. After the facts of this case came to light, the said Vijaykumar committed suicide. On the above facts, the four accused were tried in the Court of the Sessions Judge, Ratnagiri. The learned Sessions Judge found accused Nos. 1 to 4 guilty under Section 201 read with Section 34, I.P.C. for causing disappearance of the evidence of Vijaykumar's offence and knowingly giving false information in relation thereto. He also convicted accused No.2 and 3 under Section 218 read with Section 34, I.P.C. on the ground that these accused while being in charges of the preparation of the record of the case relating to the death of Sub-Inspector Kamat framed as incorrect report in order to save the said Vijaykumar from legal punishment by preparing a false inquest panchanama, a false report to the Medical Officer, a false case diary, and an incorrect entry in the Muddemal Register.

3. From the order of conviction and the sentence imposed upon them, the accused filed the present appeal which initially came for bearing before Mr. Justice Chitale. Mr. Kode, who appeared on behalf of the accused, argued before Mr. Justice Chitale that as far as the conviction of accused Nos.2 and 3 under Section 218 read with had by virtue of Section 161 of the Bombay Police Act, because the alleged offence consisted of acts done by accused Nos.2 and 3 under color of their duty or authority, and the prosecution was instituted more than six months after the acts complained of. On behalf of the State, the Additional Government Pleader did not dispute that the alleged acts, which constituted the offence of accused Nos. 2 and 3 under Section 218 read with Section 34, I.P.C., were done under color of their duty or authority and that the charge sheet on which the prosecution the alleged acts. The learned Additional Government Pleader, however, argued that Section 161 does not affect the State as it does not refer to the State either expressly or by necessary implication with the result that whereas a private case filed on a complaint against the officer mentioned in Section 161 might be barred under that section, a prosecution launched on a police report will not be affected in any way. Being of the view that the point raised by the learned Additional Government Pleader was of some importance, Mr. Justice Chitale, referred the appeal to the Division Bench.

4. The scope of Section 161(I) of the Bombay Police Act was recently considered by the Supreme Court in a case where the facts were essentially similar to the facts of the case before

us. In Virupaxappa v. State of Mysore the accused who was a head constable was convicted under Section 218, I.P.C. on the ground that he had prepared false panchanama and a false report in order to screen an offence under the Bombay Prohibition Act. The conviction of the accused was set aside by the Supreme Court on the ground that his prosecution was barred under Section 161(1) of the Bombay Police Act. Their Lordships held that the alleged offence was committed by the accused under colour of his duty as a head constable, and the prosecution was barred as it was launched more than six months after the alleged offence. The learned Additional Government Pleader argued before us that the above decision of the Supreme Court is not decisive of the question raised by him in the present appeal, because it was not argued before the Supreme Court that Section 161(1) had no application to a prosecution launched by the State. It does not appeal to us that the ratio decidendi of a case decided by the Supreme Court can be challenged before us on the ground that the decision might have been different if a particular argument had been advanced. However, it is not clear from the reported facts whether the prosecution in that case originated in a private complaint or a police report. That being so, it appears that the Supreme Court decision does not come in the way of the contention of the learned Additional Government pleader that Section 161(I) does not affect a prosecution launched on a police report.

5. Prior to the promulgation of the Constitution, it was well established in India Law that the Crown was not bound by legislation in which it was not named either expressly or by necessary implication. It would be enough for this purpose to refer to the decision of the *Privy Council in Province of Bombay v. Municipal Corporation of Bombay*[1], In that case the Privy Council held that the Crown was not bound by certain provisions of the City observed that the principle to be applied for the decision of the question whether or not the Crown was bound by a statute was not different in the case of Indian legislation from that which had long been applied in England. The principle as stated by Their Lordships was that the Crown was not bound by legislation in which it was not named expressly or by necessary implication.

6. The question whether this position has undergone a change after the promulgation of the Constitution and the establishment of a Repubican form of Government in India was considered by the Supreme Court in Director of Rationing and Distribution v. Corporation of Calcutta . In that case, the Government of West Bengal was sought to be prosecuted through one of its officer for storing rice in certain premises without obtaining licence for that purpose from the Corporation of Calcutta as required by a certain provision in the Calcutta Municipal Act, 1923. The Supreme Court held that the relevant penal provision in the Calcutta Municipal Act did not apply to the State of West-Bengal. In the majority judgment delivered by Sinha C.J., His Lordship pointed out that until the advent of the Constitution, the legal position was well established in India that the Sovereign was not bound by any statue where it was not mentioned specifically or by necessary implication. It was observed that although this rule of interpretation was initially derived from the King's prerogative, it has been adopted in our country on grounds of public policy. A reference was then made to Article 372 of the Constitution which has

provided that all the laws in force in this country immediately before the commencement of the Constitution shall continue in force until altered or repeated or amended by a competent Legislature or by other competent authority. His Lordship observed that the expression "laws in force" include, not only statutory law, but also custom or usage having the force of law,' and went on to say:

> "That being so, we are definitely of the opinion that the rule of interpretation of statutes that the State is not bound by a Statue, unless it is so provided in express terms or by necessary implication, is still good law."

7. Mr. Kode argued that the law declared by the Supreme Court in this case has been modified by its subsequent announcement. We have gone through the case cited by

[1]49 Bom LR 257 : (AIR 1947 PC 34)

Mr.Kode, and we are satisfied that his contention is not justified. Particular emphasis was laid by Mr.Kode on the judgment of the Supreme Court in State of Rajasthan v. Mst. Vidyawati . In that case, the Supreme Court confirmed a decision of the Rajasthan High Court which had held that the State of Rajasthan was vicariously liable for a tortious act committed by its employee, who was a driver of a jeep owned and maintained by the State for the Official use of the Collector of a District and who had driven it rashly and negligently so as to cause a fatal injury. The Supreme Court upheld the findings of the Courts below that the tortious act complained of was committed in circumstances wholly dissociated from the exercise of sovereign powers. The Supreme Court pointed out that the Government of India before the Constitution did not enjoy the same immunity from vicarious liability as was enjoyed by the Sovereign in Great Britain prior to the enactment of the Grown Proceedings Act of 1947. The Supreme Court then went on to say - and this is the passage on which Mr.Kode relied before us :

> "When the rule of immunity in favor of the Crown, based on Common law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the constitution. As the cause of action in this case arose after the coming into effect of the Constitution, in our opinion, it would be only recognizing the old established rule, going back to more than 100 years at least, if we uphold the vicarious liability of the State....."

We do not think that this observation of the Supreme Court affects in any manner their previous decision in . What the Supreme Court have observed in the later case is that the law in India with regard to the vicarious liability of the State was materially different from the English Law even prior to the promulgation of the India Constitution, and that it was not necessary to review the position after the promulgation of the Constitution when the rule of immunity in favour of the Crown has disappeared even in the land of its birth.

8. Mr. Mode then argued that Section 161(I) of the Bombay Police Act, was a procedural section

providing a period of limitation to certain types of prosecutions and suits, and that the rule that the state is not bound by legislation in which it is not named expressly or by necessary implication does not apply to procedural provisions. We do not think that this contention is correct. The proper ambit of the above rule appears to us to have been stated in Maxwell on the Interpretation of Statutes. After observing that the rule is commonly stated unless it is directly or by necessary implication referred to, the learned author goes on to say (Eleventh Edition, Page 129) "It has been said that the law is prima facie presumed to be made for subjects only, but this is now-a-days perhaps to be regarded as rather an overstatement of the position of the Crown. At all events, the Crown is not reached except by express words or by necessary implication in any case where it would be ousted of an existing prerogative or interest".

A little later, the learned author says at page 135 :

> "But it is probably more accurate to say that the Crown is not excluded from the operation of a statute where neither its prerogative, rights nor property are in question".

The proper ambit of the rule, therefore, seems to be that a statue would not be so construed as to adversely affect an existing right of the State unless the state is referred to in the statute either expressly or by necessary implication. Now, a statute providing a period of limitation to suits or prosecutions would adversely affected the rights of the State, and it must, therefore, follow that unless the State is referred to in such a Statute either expressly or by necessary implication, the statute would not bind the State.

9. There are many reported decisions in which the State was held bound by procedural statutes. But in all those cases, whenever the above rule of interpretation was relied upon, it was held that the State was referred to in the statute either specifically or by necessary implication. For instance, in *Appaya v. The collector of Vizagapatam*[2], it was held by following the above rule that the Government were bound by the provisions of the India Limitation Act, 1877, relating to applications. recently, the Supreme Court considered in the State of Bihar v. Rani Sonabati Kumari , whether action against a State Government can be taken under Order 39, Rule 2 sub-rule (3) of Civil Procedure code if Government committed a breach of a temporary injunction issued by the Court. It was contended before the supreme Court that Order 39, Rule 2(3) does not refer to the State either expressly or by necessary implication, and that no action against the State could therefore be taken under that provision. The Supreme Court rejected the contents, not because the rule does not apply to procedural provisions but because on an examination of the provisions of the Civil Procedure Code, in general and of Order 39, Rule 2(3) in particular, the Supreme Court came to the conclusion that the State was bound by necessary implication by the provisions of the code, and particularly those contained in Order 39, Rule 2(3).

10. We must, therefore, proceed on the basis that Section 161(1) of the Bombay Policy Act. cannot adversely affect the right of the State unless the State is mentioned in the statute either

expressly or by necessary implication. The argument of the learned Additional Government Pleader that a prosecution initiated by a police report to not affected by Section 161(1) is based on the assumption that a prosecution initiated by a private report is, and a prosecution initiated by a private complaint is not launched by the State. Now, it is arguable that a prosecution initiated on a police report is also not a prosecution launched by the State, for a police Officer who sends a report to an offence to a Magistrate does so in performance of his statutory duty under Section 173 of the Code of Criminal Procedure, and not in his capacity as a servant or agent of the State. This position however, was not argued before us, nor did we find it necessary to invite arguments thereon, because it appeared to us obvious that all prosecutions, however, initiated, are always to be deemed as prosecutions by the State. In Halsbury's Laws of England, Third Edition, Volume 10, it has been observed (at Page 272) :

> "Legal punishment is punishment awarded in a process which is instituted at the suit of the Grown 'standing forward as prosecutor on behalf of the subject on public grounds ....."

A footnote further says :

[2] ILR 4 MAD 155

> "Any private person, in the absence of statutory provision to the contrary, can commence a criminal prosecution, but the prosecution is always at the suit of the Crown. Hence it is that criminal proceedings were called pleas of the Crown".

As the learned Additional Government pleader fairly pointed out, this principal has been accepted and acted upon in many decided Indian cases and is also implicit in several provisions of the Criminal Procedure Code.

11. In *Queen-Empress v. Murarji Gokuldas*[3], the facts were that the pleaders for the prosecution and the defense agreed that if the principal witness would give his evidence on a special oath, they would accept his evidence as Act. The witness took the agreed special oath and gave his evidence, which however, was not accepted by the Magistrate who heard the case. It was argued before the High Court in revision that the Magistrate was wrong in not accepting the evidence of the witness as conclusive. The question whether the evidence was conclusive depends on whether the expression in S. 8 of the Oaths Act "Party to any judicial proceeding" included the complaint whose pleader had agreed with the pleader of the defense to be bound by the special oath. Dealing with this question, the High Court observed :

> "It must be remembered that all offences affect the public as well as the individual injured and that in all prosecutions the Crown is the prosecutor. The term 'party' in its technical sense finds no place in the Criminal Procedure Code.... The proceeding is always treated as a proceedings either proceeds itself, or lends the sanction of its name. The offence is dealt with as an invasion of the public peace, and not a mere contention between the

complaint and the accused".

Again in *Queen-Empress v. Nageshappa Pai*[4]. this Court rejected the argument advanced before it that the period of six months which was provided for prosecutions by Section ii of the General Salt Act XII of 1882, could be extended by virtue of Sections 18 of the Limitations Act of 1877. In rejection the argument, Ranade, J. observed :

" The principles on which rules of limitation are framed have no natural application to prosecutions which are, in theory at least, instituted by the Crown. The general law of limitation and its schedules are chiefly intended for civil matters." Before the Calcutta High Court, an argument was advanced in *Mahadev Lal v. Dhonraj Maisri*[5], that a certain conviction for attempting to cheat should be set aside, because the person who was attempted to be cheated as not the complaint but was somebody else. In rejecting the argument, the Court observed that "the prosecutor in all criminal cases is the Crown:.

12. There are several provisions in the Criminal procedure Code which show that even where a prosecution is launched on a private complaint, the prosecutor is not the complainant but the State Section 217, provides that in every trail before ducted by a Public Prosecutor. What is more Section 492 empowers the State Government to appoint a Public Prosecutor, generally, or in any case or for any specified class of cases. Under S. 493, where the Public Prosecutor appears appointed by a private person to prosecute the

[3] ILR 13 Bom 389 [5]12 Cal WN 750

[4] ILR 20 Bom 543

case has to act under the directions of the Public Prosecutor, and it is the Public Prosecutor who has to conduct the prosecution. Under Section 494, any public prosecutor may, with the consent of the Court..... withdrawn from the prosecution of any person, and upon such withdrawal, the accused is discharged or acquitted if the withdrawal is made after charge. These provisions show that, even in a case initiated on a private complaint, a public prosecutor may be appointed by the State Government and the Public Prosecutor may with the consent of the Court withdraw from the case, with the result that the accused is either discharged or acquitted. Moreover, section 422 provides for notice to be issued after an appeal is admitted by the appellate Court, and the provisions of that section show that, even where an accused is convicted in a trial initiated on a private complaint, the notice of the appeal is to be given not to the complainant, but to such officer as the State Government may appoint in that behalf.

13. Since all prosecutions are really prosecutions on behalf of the State, it is not possible to accept by the legislature to be covered by Section 161 of the Bombay Police Act, are prosecutions initiated on private complaints and not prosecutions initiated on police reports. The use of the word "prosecution" in Section 161(1) necessarily implies that the State is referred to in that provision, and it must, therefore, follow that every prosecution for an offence specified in S. 161(1) will come under the mischief of that provision irrespective of whether it is initiated on a private complaint or a police report.

14. Having dealt with the question for the decision of which this appeal was referred to a Division Bench, we direct that the appeal will now be placed for disposal before a single judge.

Reference answered.