BOMBAY HIGH COURT

State

Vs.

Gorakh Fulaji Mahale

Criminal Appeal No. 286 of 1964

(Chandrachud and Kantawala, JJ.)

28.07.1964

JUDGMENT

Chandrachud, J.

1. This appeal has been referred to the Division Bench by a learned Single Judge for decision of the question whether the special rule of limitation contained in Section 161(1) of the Bombay Police Act, applies to prosecutions under Section 161 of the Indian Penal Code and under section 5 of the Prevention of Corruption Act. Paranjpe, J. sitting on the Nagpur Bench has taken the view in another case that acceptance of bribe is an act done under color of office and therefore, the prosecution of a police officer for bribery is barred unless it is instituted within six months of the date of the act complained of. The correctness of this view is in question before us.

2. The facts are few and what is necessary to know for the decision of the point is the nature of the act complained of, the date on which the bribe was taken and the date on which the prosecution was instituted. This bribe is alleged to have been taken by the appellant in March 1963 and the prosecution was instituted on the 11th of November, that is, more than six months thereafter. The appellants, a railway police constable, has been convicted by the learned Special Judge, Ahmednager, under Section 161 of the Indian Penal Code and Section 5 (1)(d)read with Section 5(2) of the Prevention of Corruption Act, on the charge that he accented an illegal gratification of Rs. 50/- from the complainant as a motive for releasing the complainant's son, who was arrested by the appellant on the railway platform on suspicion that he was a pick-pocket. The appellant admitted that he received the amount, but, contended that it was paid to him not as illegal gratification but by way of loan.

3. One of the grounds on which the conviction is challenged before us is that, the prosecution is barred by limitation under Section 161(1) of the Bombay Police Act (Bombay Act No. XXII of 1951), not having been instituted within six months from the date on which the bribe is alleged to

have been taken by the appellant. This point was not taken in the trial Court; but since the decision of the point does not require a fresh investigation into facts and as the point is likely to affect a large number of cases, we have permitted the appellant to raise the point for the first time in this appeal.

4. Section 161(1) of the Bombay Police Act (hereinafter called "the Act") contains a provision which is intended for the protection of certain officers from state claims and accusations of a particular variety. In so far as criminal proceedings are concerned, it contains a special rule of limitation, generally unknown to criminal law, that prosecutions must in certain circumstances be instituted within the stated period. Sub-Section (1) of Section 161 of the Act reads thus :-

> "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 any net 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."

In order that this sub-section may apply, it is necessary, in so far as is material for this case, that the alleged offence must have been committed by doing an act "under colour or in excess of any such duty or authority as aforesaid." The words, "such duty or authority as aforesaid" are evidently referable to the description of duty or authority contained in Section 159 of the Act, which provides that a police officer, amongst others, shall not be liable to any penalty or to payment of damages on account of an act done in good faith, in pursuance or intended pursuance of "any duty imposed or any authority conferred on him 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". It is clear from this provision that the rule of limitation contained in Section 161(1) of the Act can apply only if the act complained of was done under color of duty or in excess of duty imposed or authority conferred on the officer concerned by any provision of the Act or by any other law or by any rule, order or direction made or given under the Act or under any other law.

5. The sole question which arises in the background of these provisions and on the few facts stated above is whether the appellant can be said to have received the illegal gratification by doing an act under color of duty or in excess of duty or authority imposed or conferred on him either by the Bombay Police Act or by any other law, rule, order or direction. The words "color of office", "color of duty" and similar other phrases having more or less the same connotation have been the subject matter of several decisions to which we will presently refer. Apart, however, from authority, it seems to us difficult to perceive how the act of receiving a bribe can be said to be an act done under color of duty imposed by law. In order that an act could be said to be done under colour of office or color of duty, it would at least be necessary that there should be some relationship between the act complained of and the duties appertaining to the office. The

existence of such a nexus is indispensable for proof that the act is done under colour of office though, in a conceivable class of cases, even such a nexus may not be adequate, in the light of other facts, for proving that the act was done under colour of office. In cases where there is a reasonable connection between the act complained of and the duties attaching to the office, the act can be said to have been done under colour of office or under colour of duty because the act has the external indicia of an official act, though, in fact, it may have been influenced by an oblique motive.

6. If, for example, an officer, has the power to make a panchnama or to record a statement and he introduces a false detail in it, it may be possible to say that the act is done under color of office or under color of duty imposed by law. In such cases, the officer is under a duty to make a correct record, but what he does under the cloak of discharging that duty is to introduce into the record a false recital. He is then said to act under color of office for, the duty imposed upon him by his office is utilized by him as a cover or shield for doing a wrongful act. If again, a police officer has the right to disperse an unlawful assembly by the use of reasonable force, and if he uses unreasonable force, it may be possible to say that he acted under color of authority for, the right of dispersal of an unlawful assembly by the use of reasonable force is utilized by him as a cloak for committing an unjustifiable assault. Many more instances can be cited for demonstrating in what circumstances an act can be said to have been done under color of office, but as is often said, in matters of this nature, hypothetical cases are perhaps best avoided. Multiplying instances will also not assist either in the formulation of a principle or in the deduction of a rule of a common application because, as observed by the Federal Court in *Hori Ram Singh v. Emperor*[1], at p. 56, a question of this nature is substantially one of fact, to be determined with reference to the act complained of and the attendant circumstances. The only importance, 'perhaps of, these hypothetical cases is that they present at least two common features : (1) there is in these cases a reasonable relationship between the act complained of and the duties of office and (2) the officer, if challenged in the doing of the act, can apparently justify it by referring to the nature of duties which his office imposes on him or the rights which it confers on him. That briefly is the reason why such acts are described as having been done under color of office or under colour of duty.

7. Acceptance of bribe cannot, in our opinion, be described as an act done under colour of office or under color of duty because it is wholly unconnected with the rights and duties attaching to the office. It is an act which is entirely extraneous to the nature of duties which the office imposes on the incumbents. The only connection if at all, between the office and the acceptance of bribe by the officer, is that the office affords an opportunity to the officer to demand and accept the bribe. That, however, is not a relevant consideration because what law requires is not that the act must be done by virtue of office, but that it must be done under color of office. As stated in Wharton's Law Lexicon, 14th Edition, p. 214, an act is said to be done under colour of office when it

> "is unjustly done by the countenance of an office, being grounded upon corruption, to which the office is as a shadow and colour" or as stated in Stroud's Judicial Dictionary, 3rd Edn., p. 521.

> "Colour of office : .... signifies an act, evil done by the countenance of an office and it bears a dissembling fact of the right of the office, whereas the office, is but a veil to the falsehood, and the thing is grounded upon vice, and the office is as a shadow to it."

A public servant who accepts an illegal gratification cannot, either in justification or in explanation point to the rights and duties of his office if he is challenged in the act of taking the bribe, that is to say, he cannot ever use the office "as a veil to his falsehood", though, of course, he exploits his office to extort the bribe.

[1] AIR 1939 FC 43

8. In coming to the conclusion that the act of receiving an illegal gratification is an Act done under colour of office, Paranjape, J. has relied on a judgment of the Supreme Court in *Virupaxappa v. State of Mysore*[2], The learned Judge observed in his judgment that Counsel for the State was inclined to urge that the act of receiving a bribe could not be said to be done under colour of office but the submission was not pursued as it was "effectively answered in paras 9 to 11 in the Supreme Court decision referred to above," With respect, we are unable to agree that the decision of the Supreme Court is an authority for the proposition that acceptance of bribe is an act done under colour of office. In the case before the Supreme Court, a head constable had attached 15 packets of Ganja from a person who was suspected to be engaged in smuggling the packets. The head constable drew a panchnama showing that only 9 packets were seized and on the next day, he prepared another panchnama stating that an unknown person had thrown the 9 packets and had run away. On the basis of the second panchnama, the head constable prepared a report of the matter and forwarded it to his superior officer. In these facts, he was charged for an offence under Section 218 of the Indian Penal Code, the allegation being that he, a public servant, who was charged with the duty of preparing a correct report, framed an incorrect report with the intention of saving the real offender from legal punishment. It was held by the Supreme Court that if a police officer, who was authorised under the Bombay Prohibition Act, to seize prohibited articles, prepares a false panchnama and forwards an untrue report regarding the seizure of the articles, he is clearly using the existence of his legal duty as a cloak for his corrupt action or as a veil to his falsehood. In para 7 of the judgment, their Lordships have observed that it was the duty of the head constable to prepare a correct panchnama and to forward a true report of the incident to his superior officer. That is why the preparation of the false report was held to be an act done under colour of duty. It is thus clear that the Supreme Court was dealing with a set of facts distinguishable from the facts of the case like the one before us in which the act complained of is the acceptance of a bribe. The charge against the accused in this case is that he received an illegal gratification as a motive or reward for showing official favor. In the first place, the act of receiving illegal gratification is not connected, reasonably or remotely, with the duties of office, and one cannot indeed conceive of a stronger case in which the two are so completely disassociated. Secondly, the bribe taker, if challenged, cannot possibly justify the act by a reference to the nature of his duties. In our opinion, therefore, the decision of the Supreme Court does not lend support to the proposition that acceptance of illegal gratification is an act done

under colour of office.

9. Rather than lend such support, it is significant that their Lordships have referred approvingly to a decision of this Court in *Parbat Gopal Walekar v. Dinkar S. Shinde*[3], in which it was held that the act of a constable driver in driving a police jeep rashly and negligently, when he was carving a Sub-Inspector of police, who was proceeding for investigation, was not done under colour or in excess of duty imposed upon him as a constable driver. In discussing this decision, the Supreme Court has observed that on the facts of that particular case, the decision "may well be justified on the ground that injuring a person by a rash and negligent driving had no relation to the duty of the constable to drive the motor vehicle." A part of the decision was not approved by the Supreme Court but that has a different bearing and it does not affect the real question

[2] AIR 1963 SC 849

[3]63 Bom LR 189

which arises on this appeal. Incidentally, the decision in 63 Bom LR 189, is
important in that it was not only the duty of the accused therein to drive the police jeep, but at the time of the accident the accused was driving the jeep in the discharge of his duties as he was carrying a sub-inspector of police who was proceeding for investigation and yet it was held that the act of driving rashly and negligently was not done under color of duty.

10. As we have stated at the outset of our judgment, the words "colour of office", "colour of duty ' and the other cognate phrases have been construed in a large number of decisions. We shall notice some of the decisions to which our attention has bees drawn by Mr. V.S. Kotval, who appears on behalf of the appellant, and by the learned Government Pleader, who appears on behalf of the State. In AIR 1939 FC 43, a Sub-Assistant Surgeon was prosecuted under Sections 493 and 477-A of the Indian Penal Code, on the allegation that when he was in charge of a Hospital, he had removed a certain quantity of medicines to his own quarters and had omitted to enter the particular stock of medicines in the appropriate register. It was contended before the Federal Court that the prosecution was liable to fail as the consent of the Governor of the Province was not taken as required by Section 270(1) of the Government of India Act, 1935, which provided that no proceedings could be instituted against a person "in respect of any act done or purporting to be done in the execution of his duty", except with the consent of the authority mentioned therein. The question whether the want of consent vitiated the prosecution, depended on whether the breach of trust and the falsification of accounts committed by the accused were acts which he had done or which he had purported to do in the execution of his duty. In dealing with this question, Sulaiman, J. observed that Section 270(1) was not intended to apply to acts done purely in a private capacity by public servants and that it was necessary that the acts must have been ostensibly done by the public servant in his official capacity in execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office nor even necessarily because he was engaged in his official business at the particular time. Sulaiman, J. has taken a hypothetical illustration of an officer taking a bribe and has observed at p. 52 of the report as follows : -

> "For instance, if a public servant accepts as a reward a bribe in his office while actually engaged in some official work, he is not accepting it even in his official capacity, much less in the execution of any official duty, although it is quite certain that he could never have been able to take the bribe unless he were the official in charge of some official work. He does not even pretend to the person who offers the bribe that he is acting in the discharge of his official duty, but merely uses his official position to obtain the illegal gratification."

Varadachariar, J. who delivered a separate but concurring judgment, classified the several decisions of the High Courts in India, on the question and stated that the correct view was "that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it" in order that it could be said that the act was done by the public servant in the purported execution of his duty. The Federal Court took the view that consent of the Governor was not necessary for the offence of breach of trust under Section 409 because the official capacity of the accused was material only in connection with the entrustment and did not necessarily enter into the later act of misappropriation or conversion. It was, however, held that consent of the Governor to the prosecution under Section 477-A was necessary as the official capacity of the accused was involved in the very act complained of, the gravamen of the charge being that the accused had acted fraudulently in the discharge of his official duty. The decision of the Federal Court is important from two points of view : one, that it emphasises that the question of the present nature is substantially one of fact to be determined with reference to the nature of the act complained of and the attendant circumstance, and two, that it lays down a workable test which has been subsequently approved of by the Privy Council and the Supreme Court. The test applied by the Federal Court was whether there was something in the nature of the act complained of that attaches it to the official character of the person doing the act.

11. In *Hector Thomas Huntley v. Emperor*[4], station master was tried for an offence under Section 161 of the Indian Penal Code, on the charge that he had accepted an illegal gratification of Rs. 20 in order to provide wagons be the complainant. In repelling the contention that the prosecution was bad because the consent of the Governor of the Province was not obtained as required by Section 270 (1) of the Government of India Act, 1935, the Federal Court followed its earlier decision in Hori Ram Singh's case AIR 1939 FC 43 and held that the act of the accused in taking the illegal gratification could not be said to have been done by him in the execution or purported execution of his duty. Zafrulla Khan, J. who delivered the judgment of the Court has referred expressly to a passage from the judgment of Sulaiman, J. in Hori Ram Singh's case, AIR 1939 FC 43, in which the hypothetical illustration with regard to the acceptance of an illegal gratification was cited by the learned Judge and had adopted the reasoning of Sulaiman, J. It was held by the Federal Court in this case that the act of receiving illegal gratification could not "surely..,...be an act done or purporting to be done in the execution of......duty".

12. The question of sanction under Section 197 of the Criminal Procedure Code, arose before the

Privy Council in *H.H.B. Gill v. The King*[5], in which the accused was prosecuted under Section 161 of the Indian Penal Code. Section 197 provides, in so far as is material, that no Court shall take cognizance of an offence alleged to have been committed by a public servant "while acting or purporting to act in the discharge of his official duty", unless the consent of certain authorities was obtained. It was urged before the Privy Council that the prosecution was vitiated as consent of the Governor to the prosecution of the accused was not obtained. The Privy Council approved of the two decisions of the Federal Court in Hori Ram Singh's case AIR 1939 FC 43 and Hector's case AIR 1944 FC 66 and observed that it was impossible to distinguish between the language of Section 270(1) of the Government of India Act and Section 197 of the Criminal Procedure Code at least in relation to an offence of bribery and that the words in Section 270 "in respect of any act done or purporting to be done in execution of his duty as a servant of the Crown" had precisely the same connotation as the words in Section 197 (1) : "an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". In a passage which is frequently cited as containing a pithy exposition of law, the Privy Council says that :

> "a public servant can only be said to act or to purport to act in the discharge of his

[4] AIR 1944 FC 68

[5] 50 Bom LR 487 : (AIR 1948 PC 128)

> official duty, if his act is such as to lie within the scope of his official duty. Thus a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act; nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. 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. Applying such a test to the present case, it seems clear that Gill could not justify the acts in respect of which he was charged as acts done by him by virtue of the office that he held. Without further examination of the authorities, their Lordships, finding themselves in general agreement with the opinion of the Federal Court in the case cited Hori Ram Singh's case AIR 1939 FC 43, think it sufficient to say that in their opinion no sanction under Section 197 of the Code of Criminal Procedure was needed."

13. The decision in Gill's case 50 Bom LR 48 : (AIR 1948 PC 128) was re-considered and reiterated by the Privy Council in *Phanindra Chandra Neogy v. The King*[6], The question which arose in Phanindra Neogv's case 51 Bom LR 440 : (AIR 1949 PC 117) was identical with the one which arose in Gill's case, 50 Bom LR 487 : (AIR 1948 PC 128) but it was argued before the Privy Council that the observations made in Gill's case 50 Bora LR 487 : (AIR 1948 PC 128) were obiter and that it was necessary to reconsider the question. The argument that the observations contained in Gill's case, 50 Bom LR 487 : (AIR 1948 PC 128) were obiter was rejected by the Privy Council and the view taken in Gill's case, 50 Bom LR 487 : (AIR 1948 PC 128) was confirmed. While upholding the conviction of the accused under Section 161 of the Indian Penal Code, it was observed by the Privy Council that a public servant could be said to act

or to purport to act in the discharge of his official duty only if his act was such as to lie within the scope of his official duty and, therefore, sanction for the prosecution was not necessary under Section 197 of the Criminal Procedure Code.

14. The Supreme Court has had occasion to consider this question in few cases to which we will now refer. In *R.W. Matharns v. State of West Bengal*[7], it was argued before the Supreme Court that the conviction of the accused, a public servant, under Section 161 was bad because sanction under Section 197 of the Code of Criminal Procedure, was not obtained before instituting the prosecution. Venkatarama Ayyar, J. who spoke for the court, rejected this contention by observing that :-

> "The question whether sanction under Section 197 was necessary for instituting proceedings against the appellant on charges of conspiracy and or bribery is now concluded by the decisions of the Judicial Committee in 50 Bom LR 487 : (AIR 1948 PC 128) and 51 Bom LR 440 : (AIR 1949 PC 117) and must be answered in the negative."

A somewhat similar question arose before the Supreme Court in a subsequent case in *Shreekantiah Ramayya Munipalli v. State of Bombay*[8], The question was whether sanction under Section 197 of the Code of Criminal Procedure was necessary for the prosecution of a public servant under Section 409 of the Indian Penal Code. The Supreme Court

[6] 51 Bom LR 440 : (AIR 1949 FC 117)
[8] AIR 1955 SC 287
[7] AIR 1954 SC 455

approved of the view expressed by Varadachariar, J. in Hori Ram's case, AIR 1939 FC 4S that the question involved was substantially one of fact to be determined with reference to the nature of the act complained of and the attendant circumstances, and held that the offence of breach of trust under Section 409 can in conceivable cases be said to have been committed while the public servant was acting or purporting to act in the discharge of his official duty. It was held on the facts of that case that the entrustment was made to the accused in his official capacity and that

> "..... there could in this case be no disposal, lawful or otherwise, save by an act done or purporting to be done in an official capacity."

In view of the finding that both the entrustment and the disposal were done in an official capacity, it was held by the Supreme Court that sanction was necessary under Section 197 of the Criminal Procedure Code, for the prosecution of the accused under Section 409 of the Indian Penal Code. Yet, another case on similar facts came up before the Supreme Court in *Amrik Singh v. State of Pepsu*[9], The accused was charged under Section 409 of the Indian Penal Code and the argument was that the prosecution was vitiated for want of sanction under Section 197 of the Criminal Procedure Code. Venkatarama Ayyar, J. observes in the judgment of the Court, that though there was considerable divergence of judicial opinion on the scope of Section 197(1), the position could be taken to be fairly well-settled. After referring to the decision of the Federal Court in Hori Ram Singh's case, AIR W39 FC 43 the two decisions of the Privy Council in Gill's

case, 50 Bom LR 487 : (AIR 1948 PC 128) and Phanindra Chandra Neogy's case, 51 Bom LR 440 : (AIR 1949 PC 117) and to the two earlier decisions of the Supreme Court in AIR 1954 Supreme Court 455 and AIR 1955 Supreme Court 287, Venkatarama Ayyar, J. has summed up the position thus :-

> "It is not every offence committed by a public servant that requires sanction for prosecution under Section 197(1), Criminal Procedure Code; nor even every act done by him while lie is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence, on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution."

It was further observed that :

> "If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under Section 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required."

It was held on the facts of that case that sanction to the prosecution was necessary under

[9] AIR 1955 SC 309

Section 197 and since the sanction was not obtained, the conviction was bad.

15. It is urged by Mr. V.S. Kotwal, who appears on behalf of the appellant, that these decisions can afford no assistance in the matter before us because the wording of Section 161 of the Bombay Police Act, is in material respects different from the wording both of Section 197(1) of the Criminal Procedure Code and Section 270(1) of the Government of India Act, 1935. We are unable to appreciate that there is material difference in the language of these statutes. Section 197(1) of the Criminal Procedure Code says, in so far as is material, that previous sanction must be obtained to the prosecution of a public servant if he is accused of any offence alleged to have been committed by him "while acting or purporting to act in the discharge of his official duty". The language used by Section 270(1) of the Government of India Act, is that no proceeding shall be instituted without the previous sanction against a public servant in respect of any act "done or purporting to be done in the execution of his duty". That mere is no difference in principle between the language of these two provisions, at least in so far as the offence of bribery is concerned, is clear from the decision of the Privy Council in 50 Bom LR 487 : (AIR 1948 PC 128). Now in so far as the wording of Section 161 of the Bombay Police Act is concerned, it is

true that it uses a slightly different expression, namely, "that the act must be done under colour of duty or in excess of duty"; but "acting under colour of duty" has the same connotation as "purporting to act in the discharge of official duty". In either case, the duties attaching to the office are used as a cloak or shield to do a wrongful act. The gist is that official duty acts as a mere pretence to the doing of the act complained of. In our opinion, therefore, there is no substance in the distinction which Mr. Kotval seeks to make.

16. The decisions cited above have uniformly taken the view that an act cannot be said to be done under colour of office, or under colour of duty or in the purported execution of official duties unless there is a reasonable connection between the act and the office. A view has also been taken in these decisions that one of the tests for determining whether an act has been done in the purported discharges of official duties is whether the public servant can defend his act by reference to the nature of the duties of his office if he is challenged while doing the act. Some of the decisions which we have discussed are indeed directly in point because the question which arose therein as for example, in the case of Hector before the Federal Court. (AIR 1939 FC 43) or in the case of Gill and Phanindra Chandra Neogy before the Privy Council, 50 Bom LR 487 : (AIR 1948 PC 128) and 51 Bom LR 440 : (AIR 1949 PC 117V. was whether the act of the accepting illegal gratification could be said to be done in the purported execution of official duties. The Federal Court and the Privy Council have, taken the view which is approved by the Supreme Court in the subsequent cases that it is difficult to discover any connection between the acceptance of illegal gratification and the official duties of a public servant.

17. As the Act of the appellant in accepting illegal gratification does not lie within the scope of his official duties, as there is no reasonable relationship between the acceptance of the illegal gratification and the duties attaching to his office, and lastly as the appellant, if challenged, could not have reasonably claimed, that what he was doing was being done in virtue of his office, it must be held that the act was not done by him under colour of duty. The provisions of Section 161(1) of the Bombay Police Act cannot, therefore, be attracted.

18. In the result, the contention that the prosecution is barred by limitation under Section 161(1) of the Bombay Police Act must fail and the appeal must be heard on merits.
Order accordingly.