

SAURASHTRA HIGH COURT

Labhshanker Keshavji

Vs

State, (Saurashtra)

Criminal Revisions Nos. 52 and 53 of 1953

(Shah, C.J. and Baxi, J.)

17.08.1954

JUDGMENT

Baxi, J.

1. The petitioners were convicted by the First Class Magistrate on a charge under Section 384, I.P.C. read with Section 34, I.P.C., and were sentenced to six months' rigorous imprisonment and a fine of Rs.700/- and three months' rigorous imprisonment in default of payment of fine. They preferred separate appeals to the Sessions Judge, Halar Division, we confirmed their conviction but reduced the sentence of Labhshanker to three months' rigorous imprisonment and set aside the sentence of fine. They have approached this Court in revision. As both the revisions arise out of a common judgment, they were heard together and are disposed of by this judgment.

2. The facts which give rise to these revisions are briefly as under. The complainant is the manager of the Digvijay Weaving and Spinning Mills Ltd. of Jamnagar. The petitioner Bhanushanker was at the material time the editor of the paper 'Insaf which was published from Rajkot and the petitioner Labhshanker was employed by him as a salaried reporter in Jamnagar. Four articles libelling the complainant were published in the Insaf between 29-3-50 and 9-1-50. Labhshanker approached the complainant on three or four occasions after 29-3-50 and asked him whether he preferred to settle with Bhanushanker by paying him a good sum or to allow the publication of the libels to be continued. The complainant replied that he would give a definite reply after considering the position. On 14-4-50 Shri Pravinsinhji Jethva, Inspector of the Police Special Branch at Rajkot, was in Jamnagar on some court business. The complainant met him and told him about the blackmail which was being attempted on him. Shri Jethva asked the complainant to call him if any further attempt was made. On 18-4-50 Labhshanker again saw the complainant at his bungalow at about 9 a.m. and informed him that Bhanushanker was in Jamnagar. The complainant asked him to bring Bhanushanker at about 4 p.m. and sent his car to Rajkot to bring Shri Jethva. At 4 p.m. Bhanushanker, Labhshanker and one Rasiklal, who has been acquitted by the Magistrate, saw the complainant at his bungalow at 4 p.m. and the complainant agreed to pay Rupees 1500/- as consideration for Bhanushanker stopping the publication of defamatory articles but asked them to call again at 9 p.m. for the money as he had no cash at the time. At about 5 p.m. Shri Jethva arrived from Rajkot in the complainant's car and

took down his complaint, Ex.6. As the offence under Section 384, I.P.C. is a non-cognizable offence, Shri Jethva applied to the First Class Magistrate for an order permitting him to investigate the offence and permission was endorsed by the Magistrate below the application. He then came back with three panchas Mulji, Manubhai and Chhabildas and they were all stationed in a lobby outside the complainant's drawing room within hearing distance. At about 9 p.m. Bhanushanker, Labhshanker and Rasiklal again came. Bhanushanker is alleged to have asked the complainant whether the money was ready. The complainant replied that he had the money and would pay him but Bhanushanker should leave him alone. To this request Bhanushanker is alleged to have replied that they were gentlemen and he, the complainant, should trust him not to publish any more libel. The complainant thereupon paid him Rs.1500/-in currency notes, which were previously initialled by the Panchas, and on his giving the agreed signal, Shri Jethva and others came and recovered the notes from Bhanushanker. Shri Jethva then instructed the Sub-Inspector, B Division, to register the offence in the crime register and a charge-sheet was duly submitted to the Magistrate against them. Bhanushanker admitted the receipt of the money but his case was that he was invited to the bungalow to settle certain outstanding bills and the money was paid to him in settlement of his bills and not as blackmail. Labhshanker's defence was that he had merely accompanied his employer Bhanushanker and denied having conveyed threats to the complainant as alleged by him. He alleged that he was involved in this prosecution by the complainant because he had attempted to expose certain scandals in the mill, in which the complainant was concerned, and the complainant had dismissed him on that account and bore illwill against him. The defence of both the petitioners was rejected by the Courts below, who accepted the prosecution story. We are satisfied that Bhanushanker has not made out his defense for reasons which have been fully recorded by the Courts below and which it is unnecessary to recapitulate. These revisions thus turn on concurrent findings of facts by the Courts below and normally they should be accepted in revision. But the case presents some peculiar features, the significance of which does not appear to have been appreciated by the Courts below, and in our opinion our interference is called for.

3. The publication of the defamatory articles is proved and within a few days thereafter Bhanushanker admittedly received the money from the complainant and he has not given a satisfactory explanation of why such a large sum should have been given to him. His defence has completely failed. But it is not for him to give any explanation. The prosecution alleges that the money was extorted by him by threats and the prosecution has to prove beyond doubt that it was extorted under those threats. The circumstances enumerated above are therefore not alone sufficient to bring the offence home to him though they may create deep suspicion against him. He can only be convicted if the alleged conversation between him and the complainant at the time of the delivery of the money is proved. Similarly Labhshanker cannot be convicted, unless it is held proved that he had previously given threats to the complainant and demanded money on Bhanushanker's behalf. These facts are sought to be proved by the oral testimony of the complainant, Shri Jethva and the two panchas Mulji and Chhabildas and the conviction depends entirely upon the credibility attaching to them.

The complainant is unquestionably on bad terms with the petitioners and Shri Jethva on his own admission is a friend of the complainant. Shri Jethva was at this time posted in Rajkot. He was specially called by the complainant and it appears from his deposition (Ex.12 para 82) that he came down from Rajkot, although his superior officer was not in the station. He admits that the offence could be dealt with by the ordinary police machinery in Jamnagar and it is curious that he should have undertaken to investigate it himself. His explanation is that the Special Police

Branch also deals with the offences of blackmail. But he had to admit that the offence could be investigated by the Sub-Inspector in charge of the local Special Branch Office in Jamnagar. We do not doubt that Shri Jethva's department deals with cases of blackmail, but what leaves us wondering is what were the special features of this case which called for his personal intervention and induced him to leave Rajkot in the absence of his superior officer. We doubt very much whether he would have taken the same trouble and left his station for any ordinary citizen and we are led to believe that the special circumstance, which weighed with Shri Jethva, was his friendship with the complainant, and the special interest which he has shown in the complaint puts him in the position of a partisan witness. The panch Chhabildas is admittedly connected with the mill and is its agent. The learned Sessions Judge however considered the second panch witness Mulji to be an independent witness and special emphasis was laid on his evidence on behalf of the prosecution during the arguments before us. Bhanushanker has not been able to show that Mulji had any previous connection with the complainant or the mill, but Mulji admits that after he served as a panch at the complainant's bungalow he and the panch Manubhai developed friendly relations with the complainant and on the date, when he was deposing in Court, he was indisputably thick with the complainant. He cannot therefore be regarded as an independent witness. The learned Magistrate thought that Mulji was supported by the Panchnama of the search, Ex.8, made after the delivery of the money, which records this conversation, but this record of the conversation was deleted from the panchnama by his predecessor, who had examined Mulji. The learned Magistrate was therefore not entitled to rely on that record. Neither Shri Jethva nor the complainant apparently trusted the normal police machinery to bring the petitioners to book and the one witness Mulji, who could have claimed to be an independent witness, was allowed to be friendly with the complainant with the result that the entire evidence against the petitioners consists of the complainant and his friends and in the peculiar circumstances of this case we consider that it is risky to accept their testimony and convict the petitioners.

4. But apart from this consideration the trial is vitiated by an illegality and the petitioners' conviction cannot be sustained. An offence under Section 384, I.P.C. is a non-cognizable offence and before investigation could be undertaken by Shri Jethva it was necessary for him to obtain an order of the Magistrate under Section 155, Criminal Procedure Code This he did by the application Ex. 13. But when that application was made and order given to him to investigate, the offence had not been committed because money was not yet paid. In - *Shyamlal Sharma v. Emperor*', Seth J. delivering the judgment of the Court expressed the view that before ordering an investigation the Magistrate has to be satisfied that reasonable grounds exist for believing that an offence has been committed'; otherwise he would be acting arbitrarily in ordering the investigation and an anticipatory order to investigate is not a valid order. The learned Magistrate's order, on which Shri Jethva started his investigation, was thus not a valid order and the entire investigation was unauthorized. The learned Assistant Government Pleader argued that the offence of extortion was committed as soon as the complainant was "induced" by threats to deliver money and this had already been accomplished at 4 p.m. at the first meeting between the petitioners and the complainant. Our short answer to this argument is that the complainant was at the time "induced" to pay up in the sense in which the learned Assistant Government Pleader means. He never wanted to pay Bhanushanker anything and all that he did was to pretend that he was paying. The offence was therefore not committed at all if by the words "induced to pay", the learned Assistant Government Pleader means that the complainant had decided to pay Bhanushanker any money. But we base our decision on the broad ground that the essence of the

offence of extortion is in the actual delivery of possession of the property by the person put in fear and the offence is not complete before such delivery. The investigation by Shri Jethva was thus unauthorized as there was no valid order from the Magistrate permitting him to investigate the offence.

5. The next question is whether the trial is vitiated thereby. Section 155, Criminal Procedure Code., prohibits a police officer from investigating a non-cognizable offence, unless authorised by an order of a competent Magistrate, and if the police investigates such offence without a valid order, they act without jurisdiction and a report submitted on such investigation is, in our opinion not a report upon which the Magistrate can validly take cognizance of the offence under Section 190, Criminal Procedure Code, find the entire trial is vitiated as without jurisdiction. The learned Assistant Government Pleader argued that the irregularity, if any, was cured by Section 537, Criminal Procedure Code He could not refer to any authority bearing directly on the point but based his argument on the analogy of S.3 of the Prevention of Corruption Act. That section makes offences under Section 161 and Section 165, I.P.C., cognizable offences though, under the Criminal Procedure Code, they are non-cognizable offences. The proviso to that section says that no Police Officer below the rank of the Deputy Superintendent of Police shall investigate any such offence without an order of a First Class Magistrate. It was argued that the Allahabad High Court had decided that investigation by Police Officer not authorised by the Section to investigate did not vitiate the trial. But there is a conflict of decisions between the Allahabad High Court on the one hand and Calcutta and Punjab High Courts on the other on this point and the question is not quite free from doubt. The Allahabad High Court held in - '*Promod Chandra Shekhar v. Rex*'², that the trial was not vitiated on the ground that adequacy of investigation will be reflected by the evidence given by the prosecution and it is by that evidence that the case against the accused will be measured and the irregularity was therefore cured by Section 156(2), Criminal Procedure Code This case was followed in - '*Keshava Nand v. The State*'³, But a contrary view was expressed by the Calcutta High Court in - '*Sudhir Kumar v. The State*'⁴, in which it was held that the failure to comply with the provisions of proviso to Section 3, Prevention of Corruption Act, was an illegality, the effect of which was that the entire proceedings, based on the charge-sheet reported by the Officer, who was not competent to investigate, failed. A similar view was expressed in a case under Section 5(2), Prevention of Corruption Act, by Falshaw J., in - '*The State v. Madan Lal*'⁵, In - '*Shivbhat Manjunathbhat v. Emperor*'⁶, the offence was one under Section 84 of the Indian Railways Act but it was held that the trial was not vitiated on the ground that the report was sent to the Magistrate by the Police, although they were debarred under the rules from investigating the offence as the District Magistrate himself had started an inquiry. These decisions however are not of any assistance because the offences were primarily cognizable offences and the only objection was that the particular officer, who investigated them, was not authorised to do so and the Court was called upon to decide whether by virtue of Section 156(2), Criminal Procedure Code the irregularity was cured. But no police officer of whatever rank has jurisdiction to investigate a non-cognizable offence without an order of a Magistrate and he cannot be permitted to send up a report to the Magistrate on an investigation conducted without an order of the Magistrate. If the Legislature had intended to treat unauthorised police investigation of such offences as a mere irregularity, it would have added a proviso to Section 155, Criminal Procedure Code similar to Section 158(2), but as this is not done it is not open to the Court to apply by analogy the provisions of Section 156(2), Criminal Procedure Code and cut down the scope of Section 155, Criminal Procedure Code To do so would be to permit the police to investigate non-cognizable

offences and take shelter under the plea that the want of authority to investigate was merely an irregularity. The Calcutta and the Punjab High Courts set their faces against unauthorised investigations by the Police into the offences under Sections 161 and 165, I.P.C. though they have been made cognizable by the Prevention of Corruption Act. They refused to apply the provisions of Section 156(2), Criminal Procedure Code and uphold the trial, but insisted upon a strict compliance with the provisions of that enactment. In the case of non-cognizable offences this instance is all the more necessary. We therefore hold that the report submitted to the Magistrate on Shri. Jethva's investigation was not a report upon which he could validly take cognizance of the offence and all his proceedings must be quashed as without jurisdiction.

6. In the result, we allow the revision and set aside the convictions and sentences of the petitioners. Fine, if paid, is ordered to be refunded. The currency notes recovered from the petitioner Bhanushanker, which are lying in the Court, should be returned to him.

Shah, C.J.

7. I agree.

Revision allowed.

Cases Referred.

¹ AIR 1949 All 483 (FB)

² AIR 1951 All 546

³ AIR 1952 All 122

⁴ AIR 1953 Cal 226

⁵ AIR 1954 Pun 42

⁶ AIR 1928 Bom 162