

(1964) 07 BOM CK 0005
In the Bombay High Court
Case No : Criminal Appeal No. 198 of 1963

Atmaram and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-07-1964

Acts Referred:

Bombay Police Act, 1951 — Section 161(1)
Criminal Procedure Code, 1898 (CrPC) — Section 197, 197(1)

Citation : AIR 1965 Bom 131 : (1965) 67 BOMLR 25 : (1965) CriLJ 197 : (1965) ILR (Bom) 126 : (1965) MhLj 238

Hon'ble Judges : Paranjpe, J

Bench : Single Bench

Advocate : M.N. Phadke, M.W. Puranik and B.V. Kulkarni, for the Appellant; G.R. Mudholkar, Additional Government Pleader and P.G. Palsikar, Honorary Asstt. Government Pleader, for the Respondent

Judgement

(1) Three police officials, now under suspension, are challenging their convictions and sentences under sections 330, 342, 343 and 348 of the Indian Penal Code.

(2) The appellants Atamaram and Uttam are Head Constables and the appellant Bhikaji is a police constable. All three of them were attached to the Jalgaon Police Station in Buldana District in September 1962. On 1st of September 1962, one Akaram went to that police station to report that his brother Lahanu had disappeared. He expressed a suspicion that Lahanu might have been murdered. The Sub-Inspector in charge of the police station recorded that information and ordered the appellant Atmaram to enquire into that report of Akaram.

(3) The case for the prosecution was as follows :-

From the report of Akaram, the appellant Atmaram suspected that Lahanu was murdered, and Shewanti wife of Sonaji, Dwarki wife of Lahanu, Sheikh Jumma, Sakharam son of Kisan and Sakharam son of Sonaji were involved in that murder. In order to obtain information from these persons with respect to the murder of Lahanu and for knowing where the corpse was, Atamaram kept these

five persons in unauthorised custody from the 3rd of September 1962 till the 7th of September 1962 and also assaulted them. While she was in his custody, Atmaram also committed rape of Dwarki wife of Lahanu. The co-accused Uttam and Bhikaji also helped him in these illegal acts. Hence the prosecution under sections 330, 342, 343, 348 read with section 34 of the Indian Penal Code.

(4) All the three appellants abjured the guilt. According to them, false charges were levelled against them due to enmity.

(5) The Additional Sessions Judge, Khamgaon, found on facts that Atmaram had wrongfully confined Sheikh Jumma and had caused hurt to Sakharam son of Kisan, Sakharam son of Sonaji, Sheikh Jumma, Shewanti wife of Sonaji and Dwarki wife of Lahanu between the 3rd of September 1962 to the 7th of September 1962. He also found that Atmaram had confined the other four persons from the 3rd to the 7th of September 1962. According to him, the appellant No. 2 Uttam was guilty of causing hurt to Shewanti wife of Sonaji and Sheikh Jumma, and appellant No. 3 Bhikaji was guilty of causing hurt to Sakharam son of Kisan on the 7th of September 1962. He convicted the appellant No. 1 Atmaram under sections 330, 342, 343 and 348 of the Indian Penal Code and sentenced him to rigorous imprisonment for one year on each count, the sentences being concurrent. He convicted the appellant No. 2 Uttam and appellant No. 3 Bhikaji u/s 330 of the Indian Penal Code only and sentenced each of them to rigorous imprisonment for six months. Those convictions and sentences are being challenged now.

(6) Mr. M.N. Phadke, learned advocate for the three appellants pointed out that though the offences were committed between the 3rd and the 7th of September 1962 the charge sheet was not put up in the Court till the 15th of March, 1963, i.e., more than six months after the commission of the offences. According to him, section 161 of the Bombay Police Act precluded the Court from entertaining such a complaint or police report after the expiry of six months from the date of the offence and consequently the convictions and the sentences were bad in law. He also urged that the learned Additional Sessions Judge was in error in relying on the oral evidence which was interested and uncorroborated. I think it desirable to first consider the question of jurisdiction of the trial Court and then to proceed to discuss the evidence on merits if it were to be found that the trial was not vitiated by virtue of section 161 of the Bombay Police Act.

(7) In support of his main contention, Mr. Phadke submitted that the three appellants were charged with the duty of investigating the offences of the alleged murder of Lahanu and they were performing that official duty of investigation and of questioning the suspects. According to him, the alleged wrongful detention and assault were made "under colour" or "in excess of" the duty or authority of investigation and, therefore, they were all protected by section 161(1) of the Bombay Police Act. He was relying on the decision of the Supreme Court in Virupaxappa Veerappa Kadampur Vs. The State of Mysore, and also in Criminal Appeals Nos. 35 of 1963, dated 14-10-1963, and 153 of 1963, dated

11-11-1963, which I had decided on the authority of the aforesaid Supreme Court decision. Mr. Phadke also placed reliance on the order of the Division Bench in Criminal Appln. No. 6 of 1964, dated 31-3-1964, by which leave to appeal to the Supreme Court against the decision in Criminal Appeal No. 153 of 1963 was refused.

(8) Mr. Palsikar, Honorary Assistant Government Pleader, contended that the impugned acts had no connection or nexus with the official duty which was assigned to the three accused, and, therefore, their act of wrongfully confining and assaulting the five persons cannot come within the ambit of section 161 of the Bombay Police Act. He was relying on the opinion of the Full Bench in *Narayan v. Yeshwant* 30 Bom LR 1018 : AIR 1928 Bom 352 in answer to the questions referred in First Appeal No. 346 of 1924 by Marten C.J. and Crump J. According to him, *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, was not applicable to the facts of the present case and the principles laid down in *The State of Andhra Pradesh Vs. N. Venugopal and Others*, would more appropriately apply to the facts of this case and would show that the impugned acts not being protected by any provision of law or authority would not give the protection of section 161 of the Bombay Police Act to the accused.

(9) Section 161(1) of the Bombay Police Act on which both parties are relying is in the following words:

"161(1) 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 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."

underlining (here intois mine).

(10) The relevant question to be decided would, therefore, be whether the offence does not or does not arise out of an act done under colour of office or in excess of such duty or authority or whether it does or does not appear to the Court that the act was of the character aforesaid.

(11) Analogous provision with respect to acts done in the discharge of official duties has also been made in section 99 of the Indian Penal Code and in section 197 of the Code of Criminal Procedure. Section 99, I.P.C. protects "acts of a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law". It would, therefore, be clear that S. 99, Penal Code would countenance an act of an official if done in good faith even if it is not strictly justifiable by law by which he is governed.

(12) The relevant provisions of section 197 of the Code of Criminal Procedure are

in the following words:

"197. (1) Whena Judge or any Magistrate or public servant..... 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, no Court shall take cognizance of such offence except with the previous sanction (of the prescribed authority)".

(13) A comparison of S. 197 of the Code of Criminal Procedure with S. 161 of the Bombay Police Act would show that there is a considerable difference between them. Section 197(1) of the Code of Criminal Procedure is limited to offences committed while acting or purporting to act in the discharge of the official duty. It does not cover acts committed under colour of or in excess of the authority. Section 161(1) of the Bombay Police Act, however, covers cases of acts done under colour of office and/or in excess of any such duty or authority. It further covers offences in which it appears to the Court that the wrong done was of the aforesaid character, viz., under colour of office or in excess of the duty. In view of this difference in the language of the two sections, there can be no doubt that the provisions of section 161 of the Bombay Police Act are much wider than those of section 197 of the Code of Criminal Procedure. There is another important distinction also. u/s 197 of the Code of Criminal Procedure, the Government acts in an executive capacity and it is in the discretion of the Government whether to grant or withhold sanction u/s 197 and the orders of the Government, either refusing or granting sanction u/s 197, need not be based on legal evidence; vide *In the Matter of Kalagava Bapiah*, ILR 27 Mad 54. Unlike these provisions of section 197 of the Criminal Procedure Code with the Government can use in an executive manner, the provisions of section 161(1) of the Bombay Police Act have to be interpreted by the Courts judicially on the basis of the evidence and materials on record. That would be another important distinction between these two provisions.

(14) Before proceeding to consider how section 161 of the Bombay Police Act should be interpreted, I would think it necessary to review how the law regarding sanction u/s 197, Criminal Procedure Code, had been applied. In the case of AIR 1939 43 (Federal Court) the accused, who was a Civil Surgeon in charge of a hospital, was convicted under sections 409 and 477A of the India Penal Code without sanction for his prosecution u/s 197 of the Code of Criminal Procedure having been obtained. The case against him was that he had dishonestly removed certain medicines from the hospital and had converted them to his own use. It was held that the test for determining whether sanction for prosecution was or was not necessary, was whether the official capacity of the accused had been utilised or involved in the act which was complained of; if his office is involved, section 197 of the Criminal Procedure Code applies and want of sanction is fatal; otherwise sanction is not necessary. On applying this test it was further held that the act of the removal of stocks of medicine did not involve any official capacity but the act of falsification of records was in its very nature such

that employment of the official capacity of the accused was necessarily involved in that act and, therefore, no sanction was required for the prosecution u/s 409, but a sanction would be required for the prosecution u/s 477A of the Indian Penal Code.

(15) In AIR 1948 128 (Privy Council) the charge was u/s 161 of the Indian Penal Code. Their Lordships made the following observations for holding that the offence of receiving a bribe did not require sanction u/s 197, Criminal Procedure Code :

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

This view was reiterated by their Lordships of the Privy Council in AIR 1948 156 (Privy Council) . Their Lordships of the Supreme Court also followed these Privy Council decisions in Ronald Wood Mathams v. State of West Bengal AIR 1954 SC 455 for holding that no sanction was necessary u/s 197 of the Criminal Procedure Code for offences under sections 120B and 161 of the Indian Penal Code. It would be seen from the aforesaid decisions that as pointed out by Varadachariar J. in AIR 1939 PC 43 the questions regarding whether the tests prescribed in those rulings were satisfied or not, was treated as a question of fact to be determined with reference to the facts of each case.

(16) The matter again came up for discussion before the Supreme Court in In re Reference under s. 5 Court Fees Act, In Re: Reference under Section 5, Court-fees Act, . The question was whether sanction was necessary for prosecuting the accused u/s 409 of the Indian Penal Code and section 5(2) of the Prevention of Corruption Act. Their Lordships made the following observations:

"If section 197, Criminal Procedure Code, is construed too narrowly it can never be applied, for, of course, it is no part of an official's duty to commit an offence and never can be. But it is not the duty which the Courts have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The sanction (sic.) (section) has content and its language must be given meaning. the Courts have to concentrate on the word "offence" in the section. An offence seldom consists of a single act. It is usually composed of several elements and as a rule, a whole series of acts must be proved before it can be established. Where the elements alleged against the accused, a public servant in charge of Government stores, are first, that there was an "entrustment and/or "dominion", second, that the entrustment and/or dominion was "in his capacity as a public servant;; third, that there was a

"disposal" and fourth, that the disposal was "dishonest", it is evident that the entrustment and/or dominion here were in an official capacity, and it is equally evident 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. Therefore, the act complained of, namely the disposal, could not have been done in any other way. If it was innocent, it was an official act; if dishonest, it was the dishonest doing of an official act, but in either event the act was official because the accused could not dispose of the goods save by the doing of an official act, namely officially permitting their disposal. Therefore, whatever the intention or motive behind the act may have been, the physical part in the one case it was equally official in the other, and the only difference would lie in the intention with which it was done; in the one event, it would be done in the discharge of an official duty and in the other, in the purported discharge of it".

(17) The matter again came up before their Lordships of the Supreme Court in *Amrik Singh v. State of Pepsu*, (S) AIR 1956 SC 309. Relying on the earlier decisions of the Federal Court and the Privy Council, it was apparently urged that under no circumstances could it be said that misappropriation was within the scope of the duties of a public servant, and, therefore, no sanction was necessary. While repelling this suggestion, their Lordships made the following observations:

"We are of opinion that this is too broad a statement of the legal position, and that the two decisions cited lend no support to it. In our judgment, even when the charge is one of misappropriation by a public servant, whether sanction is required u/s 197(1) will depend upon the facts of each case. If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction u/s 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 would thus be seen that their Lordships liberalised the earlier view which appeared to be too rigid and stringent.

(18) Mr. Mudholkar, Additional Government Pleader, then contended that the Supreme Court had again taken a narrower view on this point in *K. Satwant Singh Vs. The State of Punjab*, by laying down the test that the act must bear such relation to the duty that the public servant could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty. I am afraid this would not be a correct interpretation of that decision. While dealing with the question of the necessity or otherwise of a sanction u/s 197 for an offence of cheating, their Lordships more or less summarised the views of that Court on this point. In paragraph 16 they made the following observations:

"We have no hesitation in saying that where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not

one while he is acting or purporting to act in the discharge of his official duty, as such offences have no necessary connection between them and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offences *Amrik Singh Vs. The State of Pepsu*, . The act of cheating or abetment thereof has no reasonable connection with the discharge of official duty. The act must bear such relation to the duty that the public servant could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty (vide *Matajog Dobey Vs. H.C. Bhari*,)"

It was clear that their Lordships had not narrowed down the scope of their observations in the earlier case of *Amrik Singh* on a part of which they were again relying, in the above quotation. It appears that their Lordships summarised the view taken in the two cases mentioned therein without amending or overriding their earlier decision in *Amrik Singh Vs. The State of Pepsu*, which lays down, as indicated above, that the question would depend upon the facts of each case. This decision in *K. Satwant Singh Vs. The State of Punjab*, cannot, therefore, amount to narrowing the view of the question as was suggested on behalf of the State.

(19) On applying the test laid down by the Supreme Court as indicated above, the question to be determined even for the purpose of section 197 of the Criminal Procedure Code would be whether the acts complained of are "so integrally connected with the duties attaching to the offence as to be inseparable from them". As I will show in greater detail in the sequel, the three accused were charged with the duty of proceeding with the investigation in connection with a suspected murder case and were questioning the suspects for that purpose. In order to enable them to carry out this duty, they wrongfully detained these persons and even assaulted them for the purpose of extorting statements or confessions in the course of that investigation. When that duty of investigation, which was entrusted to them, is viewed in its proper perspective, it would appear that this act of wrongful restraint and detention of the suspects and of causing hurt to them was integrally connected with the duty of questioning those persons for the purpose of investigation and it would not appear possible to separate it from their duty of investigation which they were carrying on at that time. Therefore, even according to the view of the Supreme Court with respect to sanction u/s 197 of the Criminal Procedure Code , the impugned acts would amount to offences performed while purporting to do the official duty and they would, therefore, necessarily fall u/s 197 of the Criminal procedure Code for which a sanction would be necessary.

(20) The three accused were not removable by the State or the Central Government, and, therefore, no sanction for their prosecution was necessary u/s 197 of the Code of Criminal Procedure. However, the District Superintendent of Police had accorded his sanction as per Exh. 77 which is on page 262, of the paper book. It was not dispute that this sanction was meant or intended to be u/

s 197 of the Code of Criminal Procedure. There was nothing in the record to support the contention of Mr. Palshikar that this sanction was given by the District Superintendent would not have proceeded to grant the sanction by way of abundant caution, if he had not considered it necessary. This sanction did not even mention the provision of law under which it was given or the grounds or reasons for which it was given. When there was so much lack of care in the matter of preparing that small sanction, it does not seem probable that it was given by way of abundant caution. This fact that the District Superintendent proceeded to accord a sanction apparently u/s 197, Code of Criminal Procedure, would necessarily mean that he considered that the impugned conduct of the accused was in purported discharge of their duties. This view of the immediate superior of the accused would discount the contention of Mr. Palshikar that the impugned acts were not in the purported discharge of their duty.

(21) There is one other important indication in the record to show that the three accused were acting or purporting to act in discharge of the duties which were assigned to them. After completing the investigation against the three accused, the police put up the charge sheet which contains the following recitals:

"The case for the prosecution is that on 1-9-1962 witness No. 1 (Akaram) gave a report to the police station Jalgaon about the sudden suspicious disappearance of his brother Lahanu. That is registered in the Station Diary at Serial No. 5, dated 1-9-1962, and witness No. 22 (P.S.I.Dhoke) entrusted the enquiry into that application to the accused No. 1 (Atmaram). Accordingly, accused No. 1 made an enquiry and, on his entertaining a strong suspicion as assault of the enquiry that the witnesses Nos. 2 to ... (Shevanti, Dwarki, Sheikh Jumma and Sakharam) were involved in the crime, he kept them under enquiry from the 3rd till the 4th of September 1962, in order to obtain real information about the murder of Lahanu and about the place of murder and whereabouts of the dead body and for getting information on these points he kept them under custody in the Baithak of the witness No. 15 (Police Patil Sheshrao) and after that assaulted them at the Gram Panchayat Sungaon. He obtained from them written confession under pressure of beating by the police; thereafter on 7-9-1962 while bringing back witnesses Nos. 2 to 5 to Sungaon assaulted them on the road." (Details of assault are mentioned).

(22) In view of these recitals in the charge sheet Mr. Palsikar did not dispute that the investigation officer treated these acts as having been done while performing the official duties assigned to the accused, but he contended that the opinion of the investigating officer should not bind this Court and the matter should be decided independently. Mr. Palsikar was not right in saying that the Sub-Inspector had given his opinion in the charge-sheet. u/s 173(1) of the Criminal Procedure Code, he has to write the substance of the information on facts which he had gathered in the course of investigation. The criticism of Mr. Palsikar on this point was not tenable.

(23) I have already indicated the difference in the language of section 197,

Criminal Procedure Code, and section 161 of the Bombay Police Act. Under the latter provision with which I am concerned in this appeal, it has to be found whether the impugned acts were committed under colour of office or in excess of the duty or whether it appears to the Court that they were committed under the character of colour of duty or authority. The word "colour" in its legal sense is defined in Webster's Dictionary as "an appearance or semblance of a right, authority, office or the like". In Wharton's Law Lexicon, 14th Edition, page 214, "colour of office" is defined as follows:

"When an act is unjustly done by the countenance of an office, being grounded upon corruption, to which the office is as a shadow and colour." In Stround's Judicial Dictionary, 3rd Edition, the word "colour" has been defined at page 521 as follows:

" "Colour of office" always taken in the worst part, and signifies an act evil done by the countenance of an office, and it bears a dissembling face 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. But "by reason of the office" and "by virtue of the office" are taken always in the best part."

(24) Their Lordships of the Supreme Court have observed in this connection, in AIR 1963 SC have observed in this connection, in Virupaxappa Veerappa Kadampur Vs. The State of Mysore, in paragraph 10 as follows:

"It appears to us that the words "under colour of duty" have been used in section 161(1) to include acts done under the cloak of duty, even though not by virtue of the duty. When he (the police officer) prepares a false Panchanama or a false report he is clearly using the existence of his legal duty as a cloak for his corrupt action or to use the words in Stroud's Dictionary as a veil to his falsehood". The acts thus done in dereliction of his only must be held to have been done "under colour of the duty" ".

(25) Mr. Phadke submitted that on applying these tests it would be clear that the acts of wrongful detention and assault were committed by the three accused persons in the course of their official duty of investigation and, though these impugned acts were not by virtue of their duty, they were obviously under the cloak of duty even though they amounted to dereliction of their duty and, therefore, they will have to be treated as being within the meaning of section 161 of the Bombay Police Act. Mr. Palsikar contended on the other hand that there was no integral connection of these impugned acts with the duty of investigation, and wrongfully detaining persons or assaulting them was not their duty and consequently they would not come under the cloak of duty within the meaning of section 161 of the Bombay Police Act.

(26) In making this submission Mr. Palsikar was treating the clause "under the cloak of duty" as synonymous with "by virtue of the duty". He did not show any authority to support that view. On the contrary, the observations from paragraph 10 in Virupaxappa Veerappa Kadampur Vs. The State of Mysore, quoted above,

would show that the expression "under cloak of duty" is not equivalent to but is different from the expression "by virtue of duty". Wrongfully detaining these persons and assaulting them was certainly not the duty assigned to these accused, but they committed these acts for the purpose of carrying out their duty of collecting information and confessions, if possible, from these persons. Consequently, it will have to be held that these impugned acts, though they were not by virtue of their duty and though were in dereliction of their duty, were clearly under the cloak of duty within the meaning of section 161 of the Bombay Police Act.

(27) Mr. Palshikar then submitted that the view of the Supreme Court in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, was modified and superseded by their later decision in *The State of Andhra Pradesh Vs. N. Venugopal and Others*, . According to him, the impugned acts cannot be permitted by section 161 of the Bombay Police Act because an action therefore cannot be lawfully brought for anything done or intended to be done under the provisions of any law for the time being in force conferring powers on the police. He further submitted that the Supreme Court decision in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, was not in point and the matter was really covered by the opinion of the Full Bench in AIR 1928 Bom 352 on the second question referred by the Chief Justice in the First Appeal No. 346 of 1924.

(28) Mr. Phadke, advocate for the appellants, met these contentions of Mr. Palshikar on the grounds that follow. The expression "any act done under colour of any such duty or authority" as appearing in section 161 was explained by the Supreme Court in the case of *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, and that decision was exactly in point so far as the present case was concerned. The view of the Supreme Court in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, was not modified or superseded in the later decision in *The State of Andhra Pradesh Vs. N. Venugopal and Others*, but was specifically affirmed therein. In this later decision section 53 of the Madras District Police Act, which was materially different from section 161 of the Bombay Police Act was explained by their Lordships and the criticism of Mr. Palshikar based on the wordings of that section 53 of the Madras District Police Act was not applicable to the facts of the present case. The other expression "in excess of any such duty or authority" as appearing in section 161 of the Bombay Police Act was not considered by their Lordships of the Supreme Court in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, as it was not necessary for the decision of the facts therein. The opinion which the Full Bench gave on the question referred in the First Appeal No. 346 of 1924 was not applicable as claimed by Mr. Palshikar because the facts which gave rise to the reference on the point were materially distinguishable.

(29) The contention of Mr. Palshikar that the Supreme Court decision in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, was modified and superseded by their later decision in *The State of Andhra Pradesh Vs. N.*

Venugopal and Others, was based on the assumption that the Supreme Court had interpreted section 161 of the Bombay Police Act differently in the later case but that assumption was unwarranted. A perusal of the later decision would show that their Lordships were interpreting would show that their Lordships were interpreting section 53 of the Madras District Police Act and not section 161 of the Bombay Police Act. That section 53 of the Madras District Police Act, as quoted in the aforesaid decision, is in the following terms:

"All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done under the provisions of this Act or under the provisions of any other law for the time being in force conferring powers on the police shall be commenced within three months after the act complained of shall have been committed and not otherwise."

A comparison of this provision with section 161(1) of the Bombay Police Act would show that the two are widely different. Since the two provisions are not in pari materia it would not be permissible to apply the interpretation of that section while interpreting section 161 of the Bombay Police Act.

(30) Moreover, Mr. Palshikar was also not right in suggesting that the earlier decision in Virupaxappa Veerappa Kadampur Vs. The State of Mysore, was overruled or modified by their Lordships of the Supreme Court in their later decision. Paragraph 15 in the later decision was in these terms:-

"This aspect of the matter was emphasized by this Court recently in Virupaxappa Veerappa Kadampur Vs. The State of Mysore, when examining the language of a similar provision in the Bombay District Police Act."

The similarity referred to in the two provisions in section 53 of the Madras District Police Act and in section 161 of the Bombay Police Act was only with respect to the words "under the provision of law". I have already pointed out that the point to be considered in the present case was whether the impugned acts were or were not under colour of duty or authority of the accused and it would not be possible to agree with Mr. Palshikar that the impugned acts cannot be treated as under colour or in excess of the duty because they did not fall under the wordings of section 53 of the Madras District Police Act or under the provision of any other law for the time being in force.

(31) Mr. Palshikar was not right in his submission that the decision in Virupaxappa Veerappa Kadampur Vs. The State of Mysore, which had interpreted the provisions of section 161 of the Bombay Police Act was not in point. Their Lordships of the Supreme Court while considering the wordings of section 161 of the Bombay Police Act have held as follows:

"The expression "under colour of something" or "under colour of duty", or "under colour of office" is not infrequently used in law as well as in common parlance. Thus in common parlance when a person is entrusted with the duty of collecting funds for, say, some charity and he uses that opportunity to get money

for himself, we say of him that he is collecting money for himself under colour of making collections for a charity. Whether or not when the act bears the true colour of the office or duty or right, the act may be said to be done under colour of that right, office or duty, it is clear that when the colour is assumed as a cover or a cloak for something which cannot properly be done in performance of the duty or in exercise of the right or office, the act is said to be done under colour of the office or duty or right. It is reasonable to think that the legislature used the words "under colour" in section 161(1) to include this sense. It is helpful to remember in this connection that the words "colour of office" have been stated in many law lexicons to have the meaning just indicated above."

In the face of that direct pronouncement, there was no substance in the contention that the section had not been interpreted by the Supreme Court or that that decision of the supreme Court was not applicable to the facts of the present case.

(32) Mr. Phadke was right in pointing out that their Lordships of the supreme Court had not explained the expression "in excess of any such duty or authority" as appearing in section 161 in their decision in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, as that was not necessary for the decision of the facts therein. The provisions of section 161 of the Bombay Police Act, 1951 are analogous to the provisions of section 80 of the Bombay District Police Act, 1890. The question whether the acts of an investigating officer in deliberately taking down the statement of a witness incorrectly come within the expression "done under colour or in excess of a duty imposed or any authority conferred" within the meaning of section 80 of the Bombay District Police Act, 1890, had arisen in a criminal case. Upon a reference, the Full Bench gave its opinion on that question in AIR 1928 Bom 352 . The Full Bench did not explain the expression "in excess of duty or authority", but delivered the following opinion on that question:-

"Where an investigation police officer reduces a statement of a witness to writing his act is one done under colour or in excess of a duty imposed or an authority conferred on him by S. 51(1)(b), whether he acts bona fide or otherwise and even if he acts mala fide and in deliberate disregard of his proper duty or authority and deliberately takes down the statement of such witnesses incorrectly." Relying on this opinion, Mr. Phadke contended that the impugned acts would be in excess of the duty or authority of the three accused. There is considerable force in this contention. The accused were entrusted with the duty of investigating the alleged offence of the murder of Lahanu. In furtherance of that duty, they called the witnesses for questioning them. They were not authorized to wrongfully detain those persons or to assault them for the purpose of carrying out their duty of investigation and yet they did wrongfully confine and assault those persons for the purpose of obtaining their statements in the course of investigation. These impugned acts would, therefore, clearly appear to be in excess of their duty or authority of questioning the witnesses for the purpose of

investigation. Consequently, their acts would also be covered by the clause "in excess of the duty imposed or authority conferred on them" and, for that reason also, the acts would come within the ambit of section 161 of the Bombay District Police Act.

(33) I would next consider Mr. Palshikar's contention that the instant case was covered by the opinion of the Full Bench on the second question in the civil reference in AIR 1928 Bom 352 . Two references were made to that Full Bench, one arising from the Criminal Revision No. 20/27 and the other arising from the First Appeal No. 346/24. I have already pointed out in the preceding paragraph what the reference in the criminal case was and what answer was given to it by the Full Bench. The facts which gave rise to the reference in the First Appeal No. 346/24 were the following: A Police Sub-Inspector and his assistant were engaged in investigating into certain charges of criminal offences committed by two members of the criminal tribe. It had been alleged that the plaintiff was harbouring these two persons and some offenders connected with them. One morning, the plaintiff happened to be passing by the office of the Sub-Inspector and he was called into the office. The Sub-Inspector, with the help of his assistant, then proceeded to question him as regards the two members of the criminal tribe, who were then in the office and put to him certain questions. The plaintiff denied any knowledge of the two persons in question, whereupon the Sub-Inspector accused him of telling lies. Afterwards, getting angry, the Sub-Inspector seized him by the moustache and pulled him into an upright position. Then the defendant No. 2 at the instigation of the defendant No. 1 beat him. The plaintiff then left the office and was again called back and was further threatened by the Sub-Inspector. On these facts two questions were referred to the Full Bench. Mr. Palshikar was relying only on the second question and the answer thereto. That question was in the following words:-

"Can the alleged assault or battery be said to have been committed under colour or in excess of such duty or authority."

The answer of the Full Bench was that the alleged assault or battery cannot be said to have been committed under colour or in excess of such duty or authority. Mr. Palshikar was contending that this opinion on the second question and the ratio thereof should be treated as guides for deciding the instant case. In making that submission, he was not remembering that the facts leading to that reference and the ratio for the opinion of the Full Bench were materially distinguishable from the facts of the present case. As would be seen from the recitals of the facts therein, the acts of the Sub-Inspector from the summoning of the plaintiff upto questioning him were held by the Full Bench to be fully under colour of his duty or authority but the subsequent act of assault and battery were not in any manner connected with the discharge of his duties. It was not the case that he assaulted the plaintiff for the purpose of obtaining a statement from him. The matter of obtaining the statement had come to an end with the plaintiff's denial of any knowledge about the two members of the criminal tribe. Consequent on

the answers given by the plaintiff the Sub-Inspector accused him of telling lies and afterwards getting angry committed the acts of assault and battery. These acts were, therefore, entirely unconnected with the duty or authority which was imposed on him. The Full Bench had given following reason for their opinion in the middle of the second column on page 361:

"In the second case, however, while the acts of the Sub -Inspector from the summoning of the plaintiff and questioning him also fell under colour of his duty or authority, by no process of reasoning can the alleged acts of battery and assault be said to fall under such colour or in excess of such duty or authority."

Since the acts were in no way connected with the duty or committed for the purpose of carrying out the duty, but were committed after the duty was over, no other answer could have been given. In view of that distinguishing feature that opinion cannot be applicable to the facts of the present case, in which the impugned acts were not unconnected with the duty but were committed for the purpose of discharging the duty. Mr. Palshikar's contention in this behalf must, therefore, fail.

(34) In support of his contention, Mr. Palshikar was contending that the Full Bench had not given their opinion with reference to the particular facts and even if they had given the opinion with reference to the facts of the case, the opinion of the Full Bench must be treated in the abstract without considering the facts on which it was based. Mr. Palshikar was obviously not right in saying that the opinion was not given on the facts of that particular case. In the order of reference, the facts were quoted and they were also considered by the Full Bench while delivering their opinion. The second question, which I have quoted above had referred to the "alleged assault and battery". That would necessarily mean that the question was only with reference to the facts of that case and was not meant or intended to be a general question without reference to facts . When an opinion was given on the particular facts placed before the Full Bench, it would not be permissible to say that the opinion, merely because it came from the Full Bench, should be considered in abstract without considering the facts giving rise to the reference or the facts of the case to be decided. This opinion was not meant or intended to lay down any general propositions but was with reference to the facts of that case and, therefore, it will be impossible to accept the contention that it should be applied to the present case without considering the facts either of the reference or of this case.

(35) Mr. Palshikar was then contending that only this opinion on the second question in the civil reference would apply to the present case and the opinion of the same Full Bench in the Criminal reference should not be applied. It was indeed difficult to accept or appreciate that submission. The opinion on the reference in the criminal case clearly showed that the acts of a police officer in making a false record of the statement of witnesses clearly amounted to an act done under colour of duty or in excess of duty and, therefore, section 80(3) of the Bombay District Police Act came into operation. There was no warrant for the

contention of Mr. Palshikar that this opinion in the criminal reference which was in point for the decision of the present case, should be left out of account and of which were materially distinguishable should be followed. That submission also must stand rejected.

(36) The question whether the act of making a false report by a police officer in the course of investigation was covered by section 161 of the Bombay Police Act had recently come before this Court in another case. Certain police officers who were convicted and sentenced under S. 218 read with section 34, Indian Penal Code for making false reports in the course of investigation had challenged their convictions and sentences. It was urged in the course of arguments before Mr. Justice Chitale that the impugned acts were done under colour of duty or authority and the prosecution was launched more than six months after the date of offence and, therefore, the prosecution was liable to be dismissed u/s 161 of the Bombay Police Act. The learned Additional Government Pleader who appeared for the State did not dispute that the alleged acts which constituted the offence of the accused Nos. 2 and 3 u/s 218 read with section 34, Indian Penal Code, were done under colour of their duty or authority and the charge-sheet was filed more than six months after the alleged act. The learned Additional Government Pleader, however, argued that section 161, Bombay Police Act did not affect the State as it does not refer to the State either expressly or by necessary implication, with the result that the police prosecution filed after six months would not be barred u/s 161. Since the point was of considerable importance, Mr. Justice Chitale referred it to the Division Bench. The decision of the Division Bench is reported in *Atmaram Mahadeo Ghosale and Others Vs. State*, . The Supreme Court decision in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, was referred. The learned Additional Government Pleader was challenged the ration decidendi of the Supreme Court decision on the ground that the decision might have been different if arguments were addressed on the point raised by him. The Division Bench pointed out that the ration decidendi of the case decided by the Supreme Court could not be challenged on that ground. The Division Bench after considering the law on the question held that the word "prosecution" in section 161(1) necessarily implied that the State is referred to in that provision, and that every prosecution for an offence, whether initiated on the complaint or a police report will come under the mischief of that provision. That Division Bench decision will also repel the contention raised before me in this behalf.

(37) Mr. Phadke then drew my attention to the Criminal Application No. 6 of 1964, for leave to appeal to the Supreme Court, which was decided on 31-3-1964 by a Division Bench to which I was a party. That application was for leave to appeal against my judgment whereby I had dismissed a prosecution in accordance with the provisions of sub-s. (1) of S. 161 of the Bombay Police Act with respect to an alleged offence under S. 161 of the Indian Penal Code read with S.5(1) (d) and 5(2) of the Prevention of Corruption Act as it was instituted more than six months after the offence was committed by the police officer

under colour of his duty. The learned Additional Government Pleader had also urged therein that the later decision in *The State of Andhra Pradesh Vs. N. Venugopal and Others*, , should be followed in preference to the earlier decision in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, . It was pointed out in that decision delivered by Mr. Justice Wagle that their Lordships of the Supreme Court were considering a different provision of law in the later case, namely, S. 53 of the Madras District Police Act, and that the Supreme Court had not purported to override or dissent from the earlier decision. The case which had given rise to that application for special leave concerned a police officer, who was demanding a bribe for dropping or weakening the prosecution case which he himself was investigating. The following observations were made by Mr. Justice Wagle in that decision:-

"The result that was to be achieved in the Supreme Court case was also to lessen the gravity of the offence and the object of the police officer in the instant case was also a similar one, giving either complete relief to the accused or at least a partial relief. The facts of this case, therefore, would certainly bring it within the ratio of the decision of the Supreme Court in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, ."

(38) It is, therefore, clear that the impugned acts of the three accused were committed under colour of office while discharging their duty and in excess of the authority vested in them. The prosecution was admittedly launched more than six months after the date of offence. Consequently, S. 161(1) of the Bombay Police Act would be a bar to entertaining the case, and the prosecution ought to have been dismissed.

(39) In the course of arguments, it had also been suggested that by giving special protection to police officers, S. 161 of the Bombay Police Act had made an invidious distinction between police officers and persons other than police officers who commit such offences. I do not think that it would be correct to say that any such invidious distinction had been made in favour of police officers by enacting S. 161. That enactment was based on a reasonable classification by giving protection to police officers so that they may not be harassed by such prosecutions, if they are made after a long lapse of time. It was also contended that interpreting S. 161 of the Bombay Police Act by giving protection to police officers would result in allowing several police officers to escape the clutches of law if only they can succeed in covering their offences for a period of six months or in managing to get the investigation delayed for more than six months. The idea of that provision is not to allow delinquent police officers to escape punishment for offences but to ensure that such police officers are not required to face prosecutions after a long lapse of time and are promptly brought to book. It was contended that the prosecution frequently find it difficult to complete the investigation within a period of six months and to put up a charge-sheet against police officers within that period. The difficulty in the way of the prosecution putting up a charge sheet within six months need not deflect the Court from

arriving at a correct conclusion on the basis of the wordings of the statute. If the difficulties are genuinely felt, it would be for the legislature to step in and amend the law as was remarked by his Lordship Mr. Justice Bhagwati in paragraph 17 of the Supreme Court decision in Behram Khurshed Pesikaka Vs. The State of Bombay, .

(40) In the result, the appeal is allowed, the convictions and sentences of the three appellants are quashed and set aside and the prosecution of these three accused under the several sections of the Indian Penal Code is dismissed in accordance with the provisions of S. 161(1) of the Bombay Police Act. The bail bonds of the appellants shall stand cancelled.

(41) Appeal allowed.