

(1983) 06 BOM CK 0006
In the Bombay High Court
Case No : Criminal Writ Petition No. 8 of 1982

Avinash Madhukar Mukhedkar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 27-06-1983

Acts Referred:

Constitution of India, 1950 — Article 21, 227

Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 155(4), 41(1), 460, 465

Penal Code, 1860 (IPC) — Section 411

Citation : (1983) 2 BomCR 791 : (1983) CriLJ 1833 : (1984) MhLj 88

Hon'ble Judges : Kurdukar, J

Bench : Single Bench

Judgement

1. This criminal writ petitioner under Article 227 of the Constitution is filed by the petitioner-accused (hereinafter referred to as "the petitioner") challenging the legality and correctness of the order dt. July 13, 1982 passed by the Additional Sessions Judge, Thane.

2. By this petition the petitioner seeks to challenge the maintainability of the criminal prosecution launched against him u/s 124, Bombay Police Act, 1951 (Bombay Act no XXII of 1951) - hereinafter referred to as "the Act". This petition raises a neat question of law and in order to appreciate the rival contentions, it would be necessary to set out the allegation of the prosecution case. It is common ground that the petitioner was charged-sheeted u/s 124 of the Act. It is further alleged in the charge-sheet that on 16-12-1980 at about 11-45 hrs. When house of the petitioner was searched several article of foreign make were found in his possession. These articles were not owned by the petitioner, but, however, he was found in possession of the same. Upon further enquiry it was transpired that some of the article of foreign make were sold by the petitioner to the witnesses and in regard to any of these articles the petitioner failed to account for such possession. It is further recited in the charge-sheet that there is reason to believe that these articles are stolen property or property fraudulently obtained and retained in possession by the petitioner. The charge-sheet therefore

recites that the petitioner has committed an offence punishable u/s 124 of the Act.

3. It is common ground that preceding the charge-sheet the police officer attached to Shahapur police station carried out the investigation and the petitioner was also arrested on 17-12-1980 and thereafter came to be released on 20-12-1980 under the orders of the Magistrate. The Investigating Officer submitted the charge-sheet on 30-1-1981 to the Judicial Magistrate, First Class, Shahapur. On 1-90-1981 the petitioner made an application Ext. 7 challenging the legality and maintainability of the said criminal prosecution for offence u/s 124 of the Act. The main contention raised in this application Exh. 7 by the petitioner is that the investigation having been made by the police in non-cognizable offence without the order of the Magistrate the entire investigation is vitiated and, therefore, the trial cannot be held on the basis of such illegal investigation. In support of this contention the petitioner strongly relied upon the provisions of Section 155(2) Cr.P.C. According to the petitioner in view of this mandatory provision contained in Section 155(2) Cr.P.C. no police officer could have investigated a non-cognizable offence without the order of the Magistrate having power to try such case or commit the case for trial. The petitioner therefore prayed that the trial is illegal and he be acquitted. It is common ground that no orders were obtained by the Investigating Officer from the competent Magistrate before the investigation was commenced in this case.

4. This application at Ex. 7 filed by the petitioner was opposed by the Additional Public Prosecutor at Ex. 9 contending, inter alia, that the contentions raised in the said application are devoid of any merits. The present offence is a cognizable offence u/s 41(1)(d), Cr.P.C. - hereinafter referred to as "the Code" and the petitioner was accordingly produced before the Magistrate on the same day. The petitioner was then remanded to the police custody till 20-12-1980 and, thereafter he came to be released under the orders passed by the Magistrate. A contention is also raised that in the case of this nature no prior permission for investigation or any orders from the Magistrate were necessary in view of the provisions of Section 155(4) Cr.P.C., the offence being cognizable one the police are not debarred from investigating the said offence. It is also contended that if two or more offences were alleged and even if one of such offences is a cognizable one no such permission from the Magistrate for investigation was necessary. The application is frivolous and the same be rejected.

5. After hearing both the sides the learned Judicial Magistrate, Shahapur by his order dated January 21, 1982 rejected the application Exh. 7 filed by the petitioner. The trial Magistrate took a view that provisions of Section 124 of the Act must be read along the provisions of Section 41(1)(d) of the Code and if both these provisions are properly construed the Investigating Officer was justified in investigating into the present offence without the order of the competent Magistrate. The learned trial Magistrate also on the question of nature of offence came to the conclusion that since the police have power to arrest without

warrant u/s 41(1)(d) of the Code the offence u/s 124 of the Act in cognizable one. The provisions of Section 155(2) of the Code are not applicable to the present case. Consistent with these findings, the learned trial Magistrate rejected the aforesaid application filed by the petitioner.

6. Aggrieved by this order the petitioner preferred a revision application No. 20 of 1982 to the Sessions Court at Thane and the learned Additional Sessions Judge by his order dt. July 13, 1982 dismissed the revision application and confirmed the order passed by the trial Magistrate. The reasons given by the learned Addl. Sessions Judge are more or less on the same line as given by the learned trial Magistrate. It is against this order passed by the learned Additional Sessions Judge the petitioner has approached this Court under Article 227 of the Constitution.

7. Shri Chitnis, the learned advocate appearing in support of this petition firstly urged that the offence in the present case u/s 124 of the Act is a non-cognizable offence and the Courts below were in error in holding that the present offence is a cognizable one. In order to ascertain as to whether the present offence is cognizable or non-cognizable one will have to go to the provisions of the Cr.P.C. Before I consider the nature of the offence in the present case, a reference to Section 124 of the Act would be necessary. Section 214 of the Act reads as under :

"Whoever has in his possession or conveys in any manner, or offers for sale or pawn, anything which there is reason to believe is stolen property or property fraudulently obtained, shall, if he fails to account for such possession or to act to the satisfaction of the Magistrate, on conviction, be punished with imprisonment for a term which may extend to one year but shall not, except for reasons to be recorded in writing, be less than one month and shall also be liable to fine which may extend to five hundred rupees."

If the offence is proved u/s 124 of the Act, the Magistrate has to record a conviction and the punishment prescribed for the said offence is imprisonment for a term which may extend to one year but shall not except for reasons to be recorded in writing be less than one month, and shall also be liable to fine, which may extend to five hundred rupees. So the maximum punishment that could be awarded for an offence u/s 124 of the Act is one year imprisonment and fine up to Rs. 500/-.

8. The First Schedule to the Code gives the classification as to whether the offence is cognizable or non-cognizable, bailable or otherwise etc. The relevant entry is to be found in the classification titled as "II-Classification of offences against other laws" and therein the third entry is relevant for the purpose of the present case. The third entry reads as under : "If punishable with imprisonment for less than 3 years or with fine only" This Schedule again has to read in conjunction with definition contained in the Code which defines "cognizable offence" and "cognizable case" as also "non-cognizable offence". Section 2(c) of

the Code defines "cognizable offence" and the definition is as under :-
"Cognizable offence" means an offence for which, and "cognizable case means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant." Clause (1) of Section 2 of the Code defines "non-cognizable offence" and the definition reads as under :-

"Non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant."

Section 124 of the Act does not specifically prescribe as to whether the offence is cognizable or non-cognizable and, therefore, in the absence of any such specific reference therein in order to determine as to whether an offence u/s 124 of the Act is cognizable or non-cognizable one has to fall back upon the definition contained under the Code u/s 2(c) and 2(1) read with Part II of the First Sch. to the Code. If one reads these provisions together there can be no manner of doubt that the offence u/s 124 of the Act is non-cognizable and if it is so then obviously in a case of non-cognizable offence a police officer has no authority to arrest a suspect without warrant. In the present case the question that is posed before me by Shri Chitnis is if the offence u/s 124 of the Act is non-cognizable then which is the provisions in the Code which would govern the investigation in the present case.

9. Chapter XII of the Code deals with information to the police and their power to investigate. Section 154 relates to information in cognizable cases to which we are not presently concerned Section 155 of the Code deals with information as to non-cognizable cases and investigation of such cases. Section 155 reads as under :-

"155. (1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."

Sub-section (2) of Section 155 of the Code relates to the investigation by a police officer of a non-cognizable case without the order of the Magistrate having

power to try such case or commit the case for trial. This is a mandatory provision and, in my opinion, having regard to this mandatory provision the investigating officer could not have investigated in the present offence without the order of the Magistrate having power to try or commit such case for trial. The learned Judges of the Courts below however drew support to their reasoning that investigation as well as arrest could be made by the police officer in the present offence by taking aid of provisions of Section 41(1)(d) of the Code. I have therefore to examine as Code. I have thereafter to examine as to whether the Investigating Officer could rely upon the provisions of Section 41(1)(d) of the Code in respect of a non-cognizable offence and proceed to investigate and arrest the suspect for an offence u/s 124 of the Act Chap. V of the Code deals with the powers of the police officer to make arrest of persons. If the scheme of Chap. V is carefully scrutinized it appears to me clear that this chapter deals with the general powers of the police officers to effect the arrest of persons. Section 41 of the Code is therefore a depository of the general powers of the police officers to effect arrest of persons but it does not mean that the police officer under this Chapter or more precisely u/s 41 of the Code has got powers to arrest a person in a case of non-cognizable offence. This power is undoubtedly subject to various other provisions contained in the Code and it cannot be read in isolation and as an absolute rule of arrest. Clause (d) of sub-section (1) of Section 41 of the Code undoubtedly authorises a police officer to arrest a person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing. In the present case the charge-sheet is filed u/s 124 of the Act and the phraseology used in Section 124 of the Act which is referred to hereinabove is more or less similar to the extent that any person has in his possession or conveys in any manner, or offers for sale or pawn anything which there is reason to believe is stolen property or property fraudulently obtained shall, if he fails to account for such possession or to act to the satisfaction of the Magistrate. A person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing may be said to have committed an offence not only under the Penal Code but also under some of the special statutes like the present Act. Therefore, in a given case where an offence of theft punishable u/s 379 or an offence punishable u/s 411 of the Penal Code for dishonestly receiving the stolen property, may be covered by the provisions of Section 41(1)(d) of the Code and the Police Officer would be justified in arresting a suspect without warrant, or the investigation without order of the Magistrate of a competent jurisdiction, but the said analogy would not be correct where an offence is covered by the provisions of Section 124 of the Act. The offences u/s 411 as well as Section 379, I.P. Code, are cognizable offences and, therefore, a police officer can investigate into such offences and even effect the arrest of a suspect without the order of the Magistrate or without the warrant and these powers are specifically given to the police officer u/s 156 of the Code. Therefore general provisions contained in Chap. IV and especially Section 41(1)

(d) of the Code will have to be read in conjunction with the provisions contained in Sections 155 and 156 of the Code. The learned Judges of the Courts below proceeded on the assumption that the powers conferred on a police officer u/s 41(1)(d) of the Code are wide powers and which could be exercised in a case where a person in possession of anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing. In the present case the petitioner was found in possession of certain articles of foreign make and according to the prosecution the petitioner could not satisfactorily account for the same. The charge-sheet is specially under Sec. 124 of the Act and if it is so then the offence is non-cognizable and if the offence is non-cognizable then although a police officer is empowered to effect an arrest of a person u/s 41(1)(d) of the Code, but in order to exercise such a power he must exercise the said power in accordance with the provisions of Sections 155 and 156 of the Code. If sub-section (2) of Section 155 prohibits a police officer from investigating a non-cognizable case without the order of Magistrate having power to try a case or commit a case for such offence a police officer cannot exercise the powers contained u/s 41(1)(d) of the Code. These powers are although general powers of the police officers in connection with the arrest of a person but they cannot be read in isolation and must be read in conjunction with the provisions of Sections 155 and 156 of the Code with reference to the nature of offence. In this connection it would be relevant to refer to the Explanatory Note attached to the First Schedule of the Code. The second explanatory note to the said Schedule is as under :

"(2) In this Sch. (i) the expression "Magistrate of the first class" and "Any Magistrate" include Metropolitan Magistrate but not Executive Magistrate; (ii) the word "cognizable" stands for "a police officer may arrest without warrant"; and (iii) the word "non-cognizable" stands for "a police officer shall not arrest without warrant".

In a defining section of "cognizable offence" and "cognizable case", u/s 2(c) of the Code a specific reference is made therein to the powers to be exercised by the Police Officers in accordance with the First Sch. or under any other law for the time being in force to effect arrest without warrant. Therefore a Police Officer cannot effect an arrest without warrant de hors to the powers conferred on him in the first Schedule or under any law for the time being in force for effecting arrest without warrant. If this is the legal position then the offence u/s 124 of the Act must necessarily fall under the 3rd entry to Part II of the First Sch. referred to hereinabove. The effect of it is that the offence which is punishable with imprisonment for less than three years or with fine only would be non-cognizable and since the punishment provided under S. 124 of the Act is less than three years it will have to be held that the offence u/s 124 of the Act is non-cognizable offence and if it is so then the police officer will have no power u/s 155(2) of the Code to investigate into the offence u/s 124 of the Act without the order of the competent Magistrate having jurisdiction to try the same or commit the same for

trial. The entire reasoning of the Courts below is based on a wrong assumption namely that Section 41 confers a power on the Police Officer to arrest a person without an order from the Magistrate and without a warrant and S. 41(1)(d) is referable to the offence in the present case. Therefore, the offence under S. 124 of the Act is a cognizable offence. This reasoning in my opinion, is wholly incorrect because S. 41 as stated earlier is a depository of general powers of the police officer to arrest but this power is again subject to certain other provisions contained in the Code itself as well as in the special statute to which the Code is made applicable. The learned Sessions Judge while discussing this aspect in para 10 of his judgment has concluded as under :-

"... It is true that Sch. I of Cr.P.C. provides the nature of the offence whether cognizable or otherwise. But Section 41(1)(d) has got to be treated as an exception to Sch. I of the Cr.P.C. when the offence is committed under any other law. Therefore I am not inclined to uphold the contention of Mr. Ovalekar. I further hold that the Offence which is punishable under S. 124 Bombay Police Act, is a cognizable offence.

The police officers had right to arrest the persons under S. 41(1)(d), Cr.P.C. They had further right to investigate into the offence and file the charge-sheet on completion of the investigation. Therefore the trial is not deemed to be vitiated"

10. So far as the provisions of the present Act are concerned there are certain provisions for instance. Sections 72, 73 and 143B wherein a police officer has power to arrest and investigate without the previous permission of the competent Magistrate. From these provisions it is, therefore, clear that wherever the Legislature wanted to give powers to the police officers to effect an arrest of a person or to investigate into an offence falling under any of the provisions of the Act they have accordingly so provided but so far as S. 124 of the Act is concerned, there is no such reference to the powers of arrest without warrant of such a person as well as of an investigation without prior permission of the competent Magistrate.

11. Shri Chitnis, learned Advocate in support of his submissions strongly relied upon the judgment of the Calcutta High Court in State of West Bengal Vs. Jogindar Mallick, A somewhat similar question arose for consideration before the Calcutta High Court. There the charge-sheet u/s 33A of the Calcutta Suburban Police Act (2 of 1866) was filed. Section 33A of the Act is pari materia as S. 124 of the Bombay Police Act. The facts of the Calcutta case show that initially the investigation commenced for an offence punishable u/s 411, Penal Code, but after completing the investigation, the Investigating Officer thought that the offence may not fall under S. 411 of the I.P. Code but may appropriately fall under S. 33A, Calcutta Suburban Police Act, and, therefore, accordingly a charge-sheet was filed under S. 33A of the said Act. A contention was raised before the learned trial Magistrate that the entire trial was vitiated inasmuch as no prior permission of a competent Magistrate in connection with the investigation u/s

33A of the Act was taken and since the offence u/s 33A of the said Act was a non-cognizable offence not only the investigation but the trial is also vitiated. The Calcutta High Court undoubtedly after considering rival arguments held that the investigation was not bad because initially the investigation commenced under S. 411 of the I.P. Code and the Police Officer was competent to investigate into the said offence and merely because a charge-sheet was filed under S. 33A of the said Act, that does not vitiate the investigation as well as the trial and accordingly trial was ordered to proceed in accordance with law. In this context the Calcutta High Court has observed as follows :-

"4. Section 33A of the Act, so far as it is relevant for our present purpose, provides that whoever is found in possession of anything which there is reason to believe to have been stolen or fraudulently obtained shall, if he fails to account for such possession to the satisfaction of the Magistrate, be liable to fine which may extend, to one hundred rupees, or to imprisonment, with or without hard labour, for a term which may extend to three months. Section 43(1) of the Act empowers any police officer to arrest without warrant any person committing in his presence in any street or public place any offence punishable under any section of the Act. From the order of the learned Magistrate, it appears, that inspiration was drawn by the petitioner from this provision to contend that the offence u/s 33A of the Act was a "cognizable offence" within the meaning of S. 2(c) of the Code, which defines cognizable offence to mean an offence for which a police officer may, in accordance with the First Sch. of the Code or under any other law for the time being in force, arrest without warrant. Apparently though it may seem that by virtue of Section 43(1) of the Act the offence u/s 33A becomes a cognizable offence, a closer look would show otherwise,

5. The offence u/s 33A is possession of anything which is reasonably believed to be stolen or fraudulently obtained and a failure on the part of the person to give account for such possession to the satisfaction of the Magistrate would make him liable to punishment. When such an offence is committed in presence of a police officer in any street or public place, then only a police officer can arrest him without a warrant in exercise of the powers conferred by Section 43(1) of the Act. It would thus appear that the power of the police officer to arrest for an offence u/s 33A is not plenary, but qualified, and can be exercised only when the conditions of Section 43(1) are satisfied, namely, that the offence is committed in his presence, in any street or public place. An offence under S. 33A can also be committed by a person by keeping anything in his house or godown and when the offence is committed in such manner, the police would not have any power to arrest the person concerned without warrant. Possession, as mentioned in Section 33A, by itself is an offence but when such offence is committed under certain circumstances as mentioned in Section 43(1), the police officer has the power to arrest without warrant. But if the offence is committed under different circumstances, the police officer will have no power to arrest without warrant.

6. In my considered view, to bring an offence within the definition of "cognizable

offence" u/s 2(c) of the Code, the offence by itself should be such for which the offender can be arrested without a warrant of arrest. If for commission of such offence under certain circumstances the police is given the power to arrest without warrant that would not make the offence cognizable. In that view of the matter and in view of the punishment provided for the offence u/s 33A of the Act it is not a "cognizable offence" under the First Sch. of the Code nor has the offence been made a cognizable one under the Act. The only power that has been given under the Act is that when it is committed under certain circumstances, the police has a right to arrest without warrant. The purpose for which such a power has been given to a police officer is also patent. When a person is found in possession of anything within the meaning of Section 33A of the Act on street or public place, by a police officer it will be ridiculous to suggest that the police officer will have to rush to a Magistrate to obtain a warrant for apprehending him. It must, therefore, be held that notwithstanding the power of the police officer to arrest without warrant, a person committing an offence u/s 33A of the Act, in exercise of the powers conferred by Section 43(1), the offence is not a cognizable one."

With respect I am completely in agreement with the view taken by the Calcutta High Court. The judgment of the Calcutta High Court in all fours is applicable to the facts of the present case.

12. Shri Chitnis, learned advocate then strongly relied upon another judgment of the Calcutta High Court in Subodh Singh Modak Vs. The State, In that case it was held by the Calcutta High Court that in a case of non-cognizable offence if the provisions of Section 155(2) are not followed then non-conformance with the procedure established by law and the investigation u/s 155(2) of the Code is vitiated. The Calcutta High Court further held that this is an illegality and cannot be cured u/s 537, Cr.P.C. 1898. The Calcutta High Court drew support to its decision from various authorities and after considering theses authorities the Calcutta High Court has observed as follows :

"..... It is a short and simple case where a non-cognizable offence was being investigated by the police without taking the previous order of the learned Magistrate concerned. The question is one of illegality and the question also is of not conforming to the procedure established by law. Article 21 of the Constitution has laid down in clear and unambiguous terms that no person shall be deprived of his life or personal liberty except according to the procedure established by law and this is quite distinct from the concept of due process of law in the American Constitution. Some meaning and effect must be given thereto. Even before the passing of the Constitution in our country the well-known principle laid down by Jessel M.R. in the case of Taylor v. Taylor (1876) 1 Ch D 426 was approved of by Lord Roche in the case of AIR 1936 253 (Privy Council) namely, that "where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden." I respectfully agree with the said observations and I hold

that a non-conformance to the mandatory provisions laid down in Section 155(2), Cr.P.C. is a non-conformance to the procedure established by law and the impact thereof has been missed by the learned Sessions Judge, vitiating the ultimate order that he passed in setting aside the order for quashing the proceedings and sending back the case on remand. Justice demands that the said order should be set aside and due regard should be given to the order passed by the learned Judicial Magistrate. The contentions of Mr. Banerjee accordingly succeed."

This judgment of the Calcutta High Court supports the petitioner's contention that non-conformance of mandatory provisions of Section 155(2) of the Code vitiates the entire investigation as well as the trial.

13. Shri Barday the learned Public Prosecutor appearing on behalf of the State urged that investigation although done by the police officer without any order from the Magistrate yet the investigation does not become illegal ipso facto and assuming there is some illegality or irregularity the same can be cured under Sections 460 and 465 Cr.P.C. I do not think that the irregularity or the illegality of the present nature can be cured u/s 460 as well as Section 465 Cr.P.C.

14. In the result, the petition succeeds. The order dt. 21-1-1982 passed by the Judicial Magistrate, First Class, Shahapur in Criminal Case No. 67 of 1981 and on revision confirmed by the Additional Sessions Judge, Thane by his order dt. July 13, 1982 in Criminal Revision Application No. 20 of 1982 is quashed and set aside and the criminal prosecution initiated pursuant to the charge-sheet filed by the Investigating Officer is quashed and set aside. It is, however, made clear that the Investigation Officer is at liberty to take such steps as he deems fit in accordance with law. The goods seized by the Police Officer during the investigation shall remain in their custody till July 30, 1983. If no such steps are taken by the police officer in regard to the offence alleged, to have been committed by the petitioner, the articles shall be returned to the petitioner on or after 1-8-1983. The bail-bond of the petitioner to stand cancelled. Rule is accordingly made absolute.

15. Petition allowed.