

(1959) 12 MAD CK 0036

In the Madras High Court

Case No : Criminal Revision Case No's. 431 and 432, etc. of 1959

Dandapani Nadar and Others

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 23-12-1959

Acts Referred:

Constitution of India, 1950 — Article 14, 20, 20(1)
Criminal Procedure Code, 1898 (CrPC) — Section 1(2), 173, 207, 207A, 251A
Madras Prohibition Act, 1937 — Section 32, 4(1), 48
Penal Code, 1860 (IPC) — Section 324, 409

Citation : (1961) ILR (Mad) 70

Hon'ble Judges : Ramaswami, J; Anantanarayanan, J

Bench : Division Bench

Advocate : G. Gopalaswami and V. Gopinathan, for the Appellant; P.S. Kailasam, Public Prosecutor, for the Respondent

Judgement

Ramaswami, J.—These revisions have been posted before this Criminal Bench under the directions of the learned Chief Justice on a reference made by Somasundaram J., before whom these revisions came in the first instance.

2. The facts are: the revision is against the conviction of the Petitioner for an offence u/s 4(1)(b) of the Madras Prohibition Act, that is, for manufacturing liquor or any intoxicating drug. The police officer on receipt of information that some persons are distilling illicit liquor at Vennar Padugai, went with two head constables and three constables for a raid. According to the prosecution case, accused 1 and 2 together were distilling arrack in a still. Accused 1 was said to have been kindling the fire in the oven and accused 2 changing water in the pot. The police officer arrested both accused 1 and 2. Then he put out the fire at the oven, dismantled the still, recovered the boiler pot, M.O. 1, which contained two gallons of boiling wash, the mud perforated pot, M.O. 2, stone rests, M.O. 3 series, the receiver chatti, M.O. 4, the mud condenser pot M.O. 5, and the burnt firewood pieces, M.O. 8 series. Then after taking a sample of the wash from M.O. 1 he, destroying the remaining wash under the powers conferred on him and

then after further investigation, charge-sheeted the Petitioner (accused 2).

3. The point taken before Somasundaram J., and ourselves is that inasmuch as the police investigating officer has exercised the powers conferred u/s 32 of the Madras Prohibition Act, he must be deemed to have investigated offence under chapter V of the Prohibition Act and not under chapter XIV of the Code of Criminal Procedure. This is rested on the decision of this Court in Pavadai In re. ILR [1957] Mad. 475, that a police officer investigating a prohibition offence can investigate either in accordance with the provisions of chapter XIV of the Code of Criminal Procedure or according to chapter V of the Prohibition Act; but not under both. In the event of his investigating under the provisions of the Prohibition Act, he must send only a report u/s 48 of the Prohibition Act and cannot file a charge-sheet. The Magistrate has thereupon to enquire into the matter under the provisions of Section 252 and not u/s 251A of the Code of Criminal Procedure. The procedure u/s 252 emanates on a report and the procedure u/s 251A emanates on a complaint. The report u/s 48 of the Prohibition Act and the police report (charge-sheet) u/s 173 of the Code of Criminal Procedure, are mutually exclusive. Therefore, when in regard to a report u/s 48 of the Prohibition Act the enquiry is conducted u/s 251A of the Code of Criminal Procedure, material prejudice is caused to the accused. The trial of an accused under a less advantageous procedure deprives him of a vested right and offends Article 20 of the Constitution.

4. We shall examine the four points involved in this contention:

(1) Is chapter V of the Prohibition Act a self-contained code for investigation and final action to be taken; or is it only complementary and supplementary to the Code of Criminal Procedure conferring additional power upon the police officer investigating into the special offences and for promoting the efficiency of investigation thereof such additional powers are conferred?

(2) Whether the report of the police officer or prohibition officer to give jurisdiction to a competent Magistrate is covered by the police report contemplated u/s 173 of the Code of Criminal Procedure? In this connection emphasis is placed upon the words in Section 48 of the Prohibition Act.

Upon receipt of such report the Magistrate shall inquire into such offence and try the person accused thereof in like manner as if complaint has been made before him as prescribed in the Code of Criminal Procedure, 1898.

(3) Is the procedure u/s 252 more advantageous to the accused than the procedure u/s 251A of the Code of Criminal Procedure?

(4) Has the accused any vested right in any particular procedure?

We shall deal with these points seriatim.

5. On a careful consideration of the relevant sections of the Code of Criminal Procedure and the Prohibition Act, we have no doubt in our minds that chapter V

of the Prohibition Act is only complementary and supplementary to the provisions of the Code of Criminal Procedure in chapter XIV. Chapter V of the Prohibition Act has been enacted because the investigating agency can consist of two distinct agencies, viz., the police agency or the revenue and excise agency. It is only recently that the separate prohibition agency has been abolished and investigation has been entrusted in the police. The prohibition agency cannot be made into a police agency under the provisions of the Code of Criminal Procedure. The Code of Criminal Procedure contemplates only investigating police officers and station-house officers. So, a non-police prohibition officer can investigate only under the Prohibition Act. But the converse is not true. When a police officer investigates, he investigates only under the provisions of the Code of Criminal Procedure. But inasmuch as these special offences pose special problems, additional powers are conferred under the Prohibition Act. Two instances are sufficient. One is where the police officer under the provisions of the Prohibition Act can compel the accused to go to a doctor and if he refused to undergo medical examination, a pen is prescribed for the same. There is no similar provision in the Code of Criminal Procedure. Secondly, under the Section 32 of the Prohibition Act, as amended, where toddy or wash or sonti soru is seized, it is enough if a sample alone is sent to the Magistrate and the Police Officer may destroy or cause to be destroyed on the spot the wash, toddy or sonti soru seized by him. There is no corresponding provision in the Code of Criminal Procedure, because the Code of Criminal Procedure covers all crimes and is not intended to meet special problems arising under the Prohibition Act. This position is provided for by Section 1(2) of the Code of Criminal Procedure which states:

... in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force ...

6. Therefore, a police officer investigating into a prohibition offence does so under the provisions of the Code of Criminal Procedure, supplemented by the special provisions of the Prohibition Act.

7. Point 2.-The word "complaint" in Section 48 of the Madras Prohibition Act is wider than the word "complaint" as defined in Section 4(h) of the Code of Criminal Procedure. Section 48 of the Prohibition Act refers to both the police and prohibition officers. It is only a police officer who can file a report u/s 173 of the Code of Criminal Procedure. A prohibition officer is not empowered to investigate under chapter XIV of the Code of Criminal Procedure and as such he cannot file a report u/s 173. Hence, the word "complaint" is intended to cover both the police report and the report of the prohibition officer. The word "complaint" in Section 4(h) of the Code of Criminal Procedure means the allegations made by any person to any Magistrate with a view to his taking action under the Code. The definition specifically excludes the report of a police officer. This specific exclusion

supports the view that normally the word "complaint" includes the allegations made by all persons to a Magistrate with a view to his taking action. The word "complaint" in Section 48 of the Prohibition Act is wider and should be construed in a general sense and the restricted definition given in the Code of Criminal Procedure should not be made applicable. On this construction the word "complaint" in Section 48 of the Prohibition Act will include a report by a police officer also.

8. Point 3.-Inasmuch as the amendments to the Code of Criminal Procedure have been made only in 1955, we must guard ourselves against ex cathedra pronouncements, whether the procedure u/s 252 is more advantageous to the accused than the procedure u/s 251A of the Code of Criminal Procedure. On this point we have two reported decisions, viz., *Macherla Hanumantha Rao and Others Vs. The State of Andhra Pradesh*, and *Veeraraghavulu v. The State* ILR [1958] A.P. 143. In the former case their Lordships of the Supreme Court considered the constitutionality of the provisions of Sections 207 and 207A of the Code of Criminal Procedure and made the following observations at page 121:

As indicated above, there is no doubt that there are material differences in the two procedures relating to commitment according as the case has been investigated by a competent police officer who has submitted a charge-sheet and a report u/s 173 of the Code, or, a competent magistrate has taken cognizance of an offence on a complaint. In the latter case, the procedure before the committing magistrate is more elaborate. But is it always to the advantage of an accused person that there should be an elaborate procedure before such a magistrate and not a summary one? It is the avowed policy of the Legislature and there can be no doubt that it is in the general interest of administration of justice, that crimes should be investigated and criminals brought to justice as expeditiously as circumstances of the case would permit. That must also be in the interest of an accused person himself if he claims not to be guilty of any offence. Generally speaking, therefore, only a real offender would be interested in prolonging the inquiry or trial so as to postpone the day of judgment. If a person has been falsely or wrongly accused of an offence, it is in his interest that he should get himself declared innocent by a competent court as early as possible. In view of these considerations, there cannot be the least doubt that the Legislature has been well-advised to amend the procedure relating to commitment proceedings in cases which have been investigated by a competent police officer. The Legislature has rightly retained the old elaborate procedure only in those cases which have not been investigated by such a public officer, or, after investigation, have been declared not to be fit to be proceeded with in public interest.

9. In the latter case which was decided by a Bench of the Andhra Pradesh High Court (Subba Rao C.J., and Basi Reddy J.) the facts were: In Criminal Miscellaneous Petition Nos. 898 and 900 of 1956, the Petitioners sought the quashing of the charges framed by the Magistrate for offences u/s 409, Indian

Penal Code. In Criminal Miscellaneous Petition No. 891 of 1956, the Petitioners prayed that the charges framed against them u/s 4(1)(6) of the Madras Prohibition Act, be quashed. In Criminal Miscellaneous Petition No. 911 of 1956, in which a police charge-sheet had been filed for an offence u/s 324, Indian Penal Code, the Petitioner asked for a direction to the lower Court not to follow the procedure u/s 251A but to follow the procedure prescribed by Sections 252 to 258, Code of Criminal Procedure. It was contended for the Petitioners that the provisions of Section 251A are violative of the fundamental right enshrined in Article 14 of the Constitution of India in that they discriminate between accused persons proceeded against on police reports and those proceeded against on complaints; and it was said that the new procedure as compared with the old, was disadvantageous and prejudicial to the accused and, therefore, discriminatory. Sections 251 and 251A were inserted in the Code of Criminal Procedure by the Amendment Act XXVI of 1955. Prior to that, there was a uniform procedure in respect of the trial of all warrant cases by Magistrates, whether such cases were instituted on police reports or on complaints. Section 251A, however, introduced a change up to the point of framing of the charge with regard to the trial of warrant-cases instituted on police reports. It may be noted that, after the framing of the charge, there is virtually no difference between the two kinds of procedure.

10. The argument advanced by the learned Advocates before the Andhra Pradesh High Court was that the new procedure worked to the detriment of an accused proceeded against on a police charge-sheet, as his right to get a discharge is nullified by the non-examination of witnesses and by the Magistrate acting solely on the documents furnished by the police. There was a right to cross-examine witnesses before the charge which was now taken away, as no witnesses are examined at that stage. It was further contended that under the old procedure a Magistrate could discharge an accused on two grounds, namely, u/s 253(1), if he found that no case against the accused had been made out which, if unrebutted, would warrant his conviction, and under Sub-section 2 of Section 253 where at any previous stage of the case the Magistrate considered the charge to be groundless, whereas under the new procedure u/s 251A(2), an accused shall discharge only if the Magistrate considers the charge to be groundless. Another prejudicial feature of the new procedure urged was that under it the Magistrate is empowered to treat statements falling within the mischief of Section 162, as evidence and act upon them for the purpose of framing a charge against the accused. Lastly, it was contended that police reports are placed on a higher pedestal and are accorded greater sanctity than complaints filed by public officials acting under the powers conferred on them by the various Central and State enactments. The Bench held that there was no foundation for holding that the procedure u/s 251A works to the disadvantage of the accused.

11. Basi Reddy J., in this connection made the following,- apposite observations which are worth repeating (at page 147):

That there are certain differences in the two kinds of procedure cannot be gainsaid, but it is a moot point whether the new procedure works to the disadvantage of an accused person.... it is noteworthy that, after the framing of the charge, there is practically no difference between the new and the old procedures. From that stage, all the rights and privileges which an accused enjoyed are left intact. His right to cross-examine and to further cross-examine witnesses is left unaffected; his right to adduce defence evidence is left untouched.

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The police are the guardians of the peace. Prevention and detection of crime and the maintenance of law and order are their primary duties. They are specially trained for that purpose. They have the necessary machinery for it. They are expected to investigate into offences impartially with the sole aim of bringing offenders to justice. They would not be interested in putting up false or frivolous cases. Not so, a private complainant; oblique motives and private vendetta may induce him to set the criminal law in motion.

Similarly complaints filed by public officials under various special laws are not on a par with police reports since such complaints are not based on thorough investigation as is contemplated by chapter XIV of the Code of Criminal Procedure, nor are the powers and duties of such public officials identical with those of police officers.

In the one category of cases there is a preliminary investigation by a responsible police officer and the material furnished by him would provide a prima facie sound basis for the framing of a charge. In the other class of cases there is no such previous investigation. The Magistrate does not have before him the statements of witnesses or the documents on which the prosecution may rely. Therefore, the Legislature has thought it desirable that, in cases instituted on complaints, the evidence of prosecution witnesses should be recorded before the charge could be framed. In cases instituted on police reports, however, for the limited purpose of framing the charge, the Legislature has thought fit to authorise the Magistrate to act on the documents furnished by the investigating police, and the examination of witnesses at that stage is done away with. The interests of the accused are safeguarded by the insistence on the supply of these documents free of cost. In practice, no hardship would be caused to an accused person. In the trial of a warrant-case, the proceedings up to the framing of a charge are in the nature of a preliminary bout and the real fight starts only with the framing of a charge. Even under the old procedure, witnesses were seldom cross-examined before charge, and even if they were, cross-examination at that stage was cursory. The alleged prejudice would, therefore, appear to be more imaginary than real.

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... Far-reaching changes were introduced by the Amendment Act (XXVI of 1955)

with the avowed object of eliminating delays in the disposal of criminal cases without interfering with the right of the accused to a fair and impartial trial. This has, been done in the larger interests of justice, and the interests of justice require as much that the guilty should be punished as that the innocent should be absolved.

Delay in the disposal of criminal cases tends to defeat justice. From the point of view of the prosecution, lapse of time is likely to dim the memory of witnesses and, under the stress of cross-examination, they are liable to make serious mistakes while giving evidence. It is a matter of common knowledge that, in the vast majority of criminal cases, persons who figure as witnesses are ignorant and uneducated village folk. Further, delay would give unscrupulous persons scope for tampering with witnesses. From the point of view of the accused, delay would give opportunities for private persons interested in the prosecution to coach up and tutor witnesses with a view to blacken the case against the accused. An innocent person would not be interested in prolonging a case which would entail unnecessary trouble and expenses. He would like to get rid of the case as quickly as possible. From the standpoint of an innocent accused, an acquittal is a much more satisfactory way of vindicating his innocence than a discharge. Only a guilty man would like to prolong a case in the hope of putting off the evil day, and to gain time for gaining over witnesses, if possible.

The Constitution is intended to be a shield for the innocent and the wronged; it is not a protecting screen for the criminal and the wrong-door.

Wigmore: Hiding place of crime:

The underlying purpose of the impugned section is to ensure speedy disposal of warrant-cases instituted on police reports without in any way prejudicing the accused.... In fact a speedy trial in a criminal case is a procedural safeguard for the protection of the accused contained in the Sixth Amendment of the American Constitution-See: discussion in Douglas J. (Supreme Court, U.S.A.). From Marshall to Mukherjee (Tagore Law Lectures) at pages 294 to 295.

These observations repel the self-same arguments advanced before us for showing that the procedure u/s 251A is more advantageous to the accused. On the other hand, we are, as at present advised, definitely of the view that the procedure u/s 251A confers two inestimable advantages on him, viz., his being put in possession of all documents giving him a complete picture of the case against him before he embarks upon the task of meeting it or as the Law Commission, Fourteenth Report, page 751 puts it:

so that the accused might know at the outset-the nature and volume of the evidence against him.

and secondly, his having to be acquitted if the prosecution is unable to prove the case against him and which once again means that unlike a discharge it cannot be comparatively easily interfered with, because an appeal against an acquittal is

only to the High Court and the long line of case-law has laid down that it is only for substantial and compelling reasons that an acquittal can be interfered with.

12. Point 4.-It is well-settled in England, United States of America and India, that the accused has no vested right in any course of procedure.

13. Maxwell on the Interpretation of Statutes, tenth edition, page 225:

No person has a vested right in any course of procedure. Mellish L.J., *Republic of Costa Rica v. Erlanger* (1876) 3 Ch. D. 62, 69. He has only the right of prosecution or defence in the manner prescribed for the time being, by or for the court in which he sues, and, if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode.

[See judgments of Wilde B., *Wright v. Hale* (1860) 30 L.J. Ex. 40, 43 and of Lord Wensleydale, *The Attorney-General v. Sillem and Ors.* (1864) 10 H.L.C. 704 and James L.J., in *Warner v. Murdoch* (1877) 4 Ch. D. 750, 752.]

14. Craies on Statute Law, fifth edition, at page 370:

... there is no vested right in procedure ...

15. Beals Cardinal Rules of Legal Interpretation, third edition, page 477, contains similar observations.

16. McCaffrey's Statutory Construction, page 143:

It is competent for the legislature at any time to change the remedy or mode of procedure for enforcing or protecting rights ...

17. Basu's Commentaries on the Constitution of India, second edition at page 144 dealing with the scope of Clause (1) of Article 20, states:

Secondly, it would seem that the above prohibition would not prevent the legislature from altering matters of procedure, which do not make an act which was not an offence to be an offence. Similarly, a change in the rules of evidence made after the commission of an offence would not offend against this prohibition, for such a change would not create a new evidence.

18. A.S. Chaudri's Constitutional Rights and Limitations, volume I, at page 705:

A trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time, cannot be held to be unconstitutional under Article 20(1). An act which merely relates to procedure and evidence would not come within the inhibition of Article 20(1).

[See: *Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh*, , holding that a person accused of an offence has no fundamental right to trial by a particular Court or by a particular procedure, except in so far as any constitutional objection by way of discrimination or the violation of any other

fundamental right may be involved, and also Public Prosecutor Vs. K.C. Ayyappan Pillai and Others, (C.F. Cooley on Constitutional Limitations, seventh edition, page 381.) The test is whether the changes deprive the Defendants of any of those substantial protections with which the existing law surrounds the person accused of crime; Thompson v. Missouri (1898) 171 U.S. 380; Thompson v. Utah (1898) 170 U.S. 343.

19. There are similar observations in the exhaustive AIR commentaries on the Constitution of India, volume I, at page 484.

20. Sri N.R. Raghavachariar sums up the whole position in his Constitution of India, at page 92 as follows:

While a statute merely regulating procedure and leaving untouched all the substantial protection with which existing law surrounds a person accused of crime is not within the constitutional inhibition of ex post facto laws, a statute is void, and ineffective as relating to previous offences, if it takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates, even though in a general sense it may be said to regulate procedure.

[See Winstan v. State 118 A.L.R. 719.] See also discussion at page 459 and following of Aggarwalla Fundamental Rights and Constitutional Remedies. Therefore, neither Article 14 nor Article 20 of the Constitution can be invoked.

21. We answer the point raised by Somasundaram J., as follows: The report of a police officer investigating a prohibition offence will fall not u/s 48 of the Madras Prohibition Act but u/s 173, Code of Criminal Procedure.

22. We acknowledge our indebtedness to Messrs. Gopalswami and the learned Public Prosecutor for their able expositions which materially assisted us.