
(1997) 04 GUJ CK 0021
In the Gujarat High Court

Divyang R. Parikh

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-04-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102, 155, 155(2), 155(4), 156
Penal Code, 1860 (IPC) — Section 109, 114
Telegraph Act, 1885 — Section 20, 20(1), 20(2), 20A, 21
Wireless Telegraphy Act, 1933 — Section 10, 11, 2, 3, 4

Citation : (1997) 3 GLR 2295

Hon'ble Judges : N.N. Mathur, J

Bench : Single Bench

Judgement

N.N. Mathur, J.—By way of this Special Criminal Application u/s 482 of Criminal Procedure Code, the petitioners seek direction to quash CR. No. 11/70/95 registered with Ranavav Police Station, Porbandar for offences under Sections 6(1) and (1-A) of the Indian Wireless Telegraphy Act, 1933 (hereinafter referred to as "the Act of 1933") and Section 20(1) of the Indian Telegraph Act, 1885 (hereinafter referred to as "the Act of 1885")

2. Twin contentions raised in this Special Criminal Application is firstly, whether in view of Section 20(2) of the Act of 1885, the offence being non-cognizable, investigation by the police and proceedings thereof are illegal and void and secondly, whether in view of Section 7 of the Act of 1933, which gives power of search only to officer specially empowered by the Central Government, vitiates the entire proceedings conducted at the hands of the local police?

3. The contention requires consideration in the backdrop of following Facts of the Case:

Petitioners are running a firm in the name of M/s. Veearsons. The said firm is engaged in electronic business and deal with various electronic items. The firm is also the distributors of Motorola Company which manufactures cellular phones as well as wireless sets and various other electronic items. Mr. V.D. Gohil, Police

Sub-Inspector, Ranavav Police Station visited the premises of Saurashtra Cement Ltd. on 20-9-1995 for verifying the enquiry papers in Enquiry Case No. 68 of 1995, wherein, near the control room, he noticed that one person named Ramlingam Paramguru was in possession of one walkie-talkie. He was also found using Motorola wireless set. The Police Sub-Inspector suspected that it was without licence, and therefore, he enquired from the said person as to whether he had any licence authorising him to possess the said wireless set, whereupon the said person replied in negative. The P.S.I. seized the said wireless set. On further investigation, five more walkie-talkie wireless sets of radius of GP 300 type worth Rs. 1,50,000/- and 16 old walkie-talkie sets of the type of C-5020 worth Rs. 80,000/- manufactured by Electronic Corporation of India Ltd., were produced by the Instrumentation Manager and Control Room Incharge of the Company. As no bill or documents in support of the said articles were produced, they were seized u/s 102 of the Cr.P.C. On further investigation, it revealed that the said six Motorola GP 300 walkie-talkie wireless sets were supplied to Saurashtra Cement Ltd., by M/s. Veearsons, Ahmedabad for which payment was made by cheque dated 27-7-1995 for an amount of Rs. 62,000/-. It also revealed that Saurashtra Cements do not have the requisite licence u/s 3 of the Indian Wireless Telegraphy Act, 1933 for possessing wireless sets. The suppliers of the said wireless sets, i.e., M/s. Veearsons was also not having the licence. It was also disclosed that M/s. Veearsons were getting wireless sets of Motorola from Adino Telecom Ltd. Bombay and Veearsons was working as Distributors of Adino Telecom Ltd. of Bombay. Adino Telecom Ltd., of Bombay had demonstration licence dated 20-12-1994 valid upto 30-9-1995 which had been extended till 30-9-1996 for possessing, dealing in and demonstrating Motorola Wireless sets of GP 300, i.e., handsets (eight sets) and Motorola Wireless sets of GP 300, i.e., base sets (eight sets). It was also disclosed that it was on the strength of licence of Adino Telecom, M/s. Veearsons was not only operating but also advising its customers of wireless sets to operate. Thus, according to the police, the various parties committed offence under the Acts of 1885 and of 1933 as follows :

(1) Saurashtra Cement Ltd. - committed offence under Sections 6(1) & 6(1-A) of Indian Wireless Telegraphy Act, 1933 by possessing transreceiver wireless sets of Motorola GP 300 and of ECIL without licence to possess the same u/s 3 of the Act and they also committed offence u/s 20(1) of the Indian Telegraph Act, 1885 by using the said wireless sets without licence required u/s 4 of the said Act.

(2) M/s. Veearsons - committed offence under Sections 6(1) and 6(1-A) of the Indian Wireless Telegraphy Act, 1933 read with Sections 109 and 114 of I.P.C. by abetting the illegal possession of such wireless sets by Saurashtra Cement Ltd., and also by possessing themselves the said wireless sets in contravention of Section 3 of the Act.

(3) Adino Telecom of Bombay - committed an offence under Sections 109 & 114 of the Indian Penal Code read with Sections 6(1) & 6(1-A) of the Indian Wireless

Telegraphy Act, 1933 by supplying the said wireless sets to M/s. Veerasons who did a complaint was thus filed by the said P.S.I., for the said offences, on which a case was registered at Police Station Ranavav on 24-9-1995 as CR. No. 11/70/95.

Scheme of Act of 1885 and of 1933:

All wireless apparatus, receiving or transmitting, radio or television falls within the purview of Act of 1885; while it is the exclusive privilege of the Central Government to establish, maintain and work telegraphs in India, the Government may grant licence to any person to do so.

Thus, Section 4 provides for exclusive privilege of the Central Government in respect of telegraph and power to grant licence. It also empowers the Central Government to grant licence on such conditions and in consideration of such payments as it thinks fit. Part IV provides for penalties. Section 20 provides punishments for establishing, maintaining or working of unauthorised telegraph. Section 20 reads as follows :

20. Establishing, maintaining or working unauthorised telegraph : (1) If any person establishes, maintains or works a telegraph within (India) in contravention of the provisions of Section 4 or otherwise than as permitted by rules made under that section, he shall be punished, if the telegraph is a wireless telegraph, with imprisonment which may extend to three years, or with fine, or with both, and, in any other case, with a fine which may extend to five thousand rupees.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, offences under this section in respect of wireless telegraph shall for the purpose of the said Code, be bailable and non-cognizable.

(3) When any person is convicted of an offence punishable under this section, the Court before which he is convicted may direct that the telegraph in respect of which the offence has been committed, or any part of such telegraph, be forfeited to Government.

The punishment provided under Sub-section (1) of Section 20 is three years imprisonment or fine or with both. Thus, under the Code of Criminal Procedure, the offence is cognizable. However, non-obstante Sub-clause (2) makes the offence under Sub-section (1) of Section 20 as bailable and non-cognizable. Sections 20-A to 32-A, provides various offences and penalties but said non-obstante clause of Section 20(2) does not apply and rest of the offences are cognizable or non-cognizable as per the Schedule of Code of Criminal Procedure.

4. In the year 1933, the Indian Wireless Telegraph Act was enacted, under which a person possessing any wireless apparatus is required to take a "possession licence" unless he already had licence under the Indian Telegraph Act. The purpose of the Act is to make evasion of licence difficult. Telegraph authority is the licensing authority under the Indian Wireless Telegraphy Act. The purpose of licensing wireless transmitters is to control their use from the technical and

security angles. Wireless Telegraphy apparatus has been defined in Sub-clause (2) of Section 2 of the Act of 1933 which reads as follows :

(2) "Wireless Telegraphy apparatus" means any apparatus, appliance, instrument or material used or capable of use of wireless communication, and includes any article determined by rule made u/s 10 to be wireless telegraph apparatus, but does not include any such apparatus, appliance, instrument or material commonly used for other electrical purposes, unless it has been specially designed or adapted for wireless communication or forms part of some apparatus, appliance, instrument or material specially so designed or adapted, nor any article determined by rule made u/s 10 not to be wireless telegraphy apparatus.

Section 3 provides prohibition of wireless telegraph apparatus without licence. Section 6 provides offence and penalty. Section 6 reads as follows :

6. Offence and penalty : (1) Whoever possesses any wireless telegraphy apparatus, other than a wireless transmitter, in contravention of the provisions of Section 3 shall be punished, in the case of a second or subsequent offence, with fine which may extend to two hundred and fifty rupees.

(1-A) whoever possesses any wireless transmitter in contravention of the provisions of Section 3 shall be punished with imprisonment which may extend to three years or with fine which may extend to one thousand rupees, or with both.

(2) for the purposes of this section a Court may presume that a person possesses wireless telegraphy apparatus if such apparatus is under his ostensible charge, or is located in any premises or place over which he has effective control.

(3) If in the trial of an offence under this section the accused is convicted the Court shall decide whether any apparatus in respect of which an offence has been committed should be confiscated, and, if it so decides, may order confiscation accordingly.

A reading of Section 6 shows that under Sub-section (1) for possession of wireless telegraphy apparatus, for the first offence the punishment provided is Rs. 100/- and in case the second or subsequent offence, it may be extended upto Rs. 250/-. However, for possession of wireless transmitter without licence, the higher punishment which may extend upto three years imprisonment/ extending upto 3 years or with fine or both. Thus, offence u/s 6(1-A) is cognizable. Section 7 deals with power of search. Such power has also been given to officer specially empowered by the Central Government. Section 7 reads as under :

7. Power of search: Any officer specially empowered by the Central Government in this behalf may search any building, vessel or place in which he has reason to believe that any wireless telegraphy apparatus, in respect of which an offence punishable u/s 6 has been committed, is kept or concealed, and take possession thereof.

Section 11 is saving clause under the Act of 1885, which reads as under:

11. Saving of Indian Telegraph Act, 1885: Nothing in this Act contained shall authorise the doing of anything prohibited under the Indian Telegraph Act, 1885 (XIII of 1885) and no licence issued under this Act shall authorise any person to do anything for the doing of which a licence or permission under the Indian Telegraph Act, 1885, is necessary.

Contention No. 1 :

It is contended by Mr. Vivek M. Barot, learned Counsel for the petitioner that the offence punishable u/s 20(1) of the Act of 1885 is non-cognizable in view of the provision of Section 20(2). He further submits that this provision shall also apply to offence under Indian Wireless Telegraphy Act, 1933, in view of Section 11 of the Act. It is contended that the prohibition contained in the Indian Telegraph Act, 1885 shall remain prohibited under the Indian Wireless Telegraphy Act, 1933 as the same is saved by Section 11. I have carefully read Section 11. The provision can be divided in two parts. The first part simply says that nothing in this Act contained shall authorise the doing of anything prohibited under the Indian Telegraph Act, 1885. The second part says that no licence issued under the Act, shall authorise any person to do anything for doing of which licence or permission of the Indian Telegraph Act is necessary. The learned Counsel has confined his argument to the first part only. A reading of the provision makes it clear that both the Acts are independent, it simply says that whatever is prohibited under the Act of 1885 shall remain prohibited and anything contained in the Act of 1933 will not be understood as lifting of prohibition. The saving clause can only save the right of a party, which it had acquired previously. There is no question of acquiring of any right in the present context. Further, if legislature intended to make the offences under the Act of 1933 non-cognizable, it could have said so, as done in the case of Section 20. On the contrary, the legislature has made its intention very clear by using the expression "offence under this section" u/s 20(2). Thus, it is only the offence u/s 20(1) is declared non-cognizable irrespective of the fact that the said offence is cognizable as per the Code of Criminal Procedure. The contention is built up on an erroneous foundation that by virtue of Section 20(2) all the offences under the Act of 1885 are non-cognizable. Beyond Section 20, there are various offences punishable under Sections 23, 24, 25, 26, 27 and 27-A which are cognizable, for which there is no declaration to treat them as non-cognizable. Mr. Vivek Barot, learned Counsel, further, in order to show that offence under the Act of 1885 and Act of 1933 are non-cognizable, has referred to Chapter VIII of the Wireless Licensing Manual, issued by the Indian Post and Telegraph Department, which provides for Directions, Enquiries and Prosecution. He has referred to Paras 14, 20, 35, 38, 39 and 41. The main emphasis is on Para 35, wherein it is said that all offences under the Act of 1885 and Act of 1933 or the statutory rule thereunder are non-cognizable. Para 35 reads as follows :

35. The penalties u/s 20 of the Indian Telegraph Act and Section 6 of the Indian

Wireless Telegraphy Act in respect of wireless transmitters include imprisonment and the complaints under these sections will be treated as warrant cases attracting Chapter XXI of the Code of Criminal Procedure. Complaints under any of the other relevant sections of rules will be treated as summons cases attracting Chapter XX of the Code of Criminal Procedure. All offences under the Indian Telegraph Act and the Indian Wireless Telegraphy Act or the statutory rules made thereunder are, however, non-cognizable, that is to say, action will not be taken by the police on any report made to them without orders from a Magistrate in that regard. The investigation into the cases as well as the prosecution is to be conducted by the Posts and Telegraphs Department.

5. In my view, the Manual which contains administrative instructions at the first instance cannot speak in disregard to the statutory provisions. Secondly, it proceeds on wrong assumption that all the offences under the Act of 1885 and the Act of 1933 are non-cognizable, except Section 20 of the Act of 1885, the said Act or the Act of 1933 does not specifically declare any particular offence to be cognizable or non-cognizable. For deciding the same reference will have to be made to Part II of the First Schedule of the Cr. P.C., wherein it is explicitly mentioned that an offence punishable for 3 years and upwards is cognizable and non-bailable. As per the said Schedule, offences under the different sections are cognizable, and non-cognizable as follows:

Cognizable	Non-cognizable	Act of 1885	Section 23	20
		[in view of Section 20(2)]		
Section 24	20-A	"25	21	"26
22	27	25-A	27-A	27-B
29	30	Act of 1933		
Section 6(1-A)	6(1)			

6. Thus, there is obvious error in Para 35 when it says that all offences under the two Acts are non-cognizable. It appears that there is an error in using the word "all" in Para 35. However, if it refers to only non-cognizable offence, the further instructions that "action will not be taken by police on any report made to them without orders from a Magistrate", is in line with Section 155(2) of the Code of Criminal Procedure. Section 155 of the Code of Criminal Procedure prohibits investigation by police of non-cognizable offence except by the order of the Magistrate. As the non-cognizable offences are to be enquired and prosecuted by officials of the department, such instructions can be issued. But department cannot issue administrative instructions with respect to investigation of cognizable offence except where special statute so permits. Though the department is not before me and if the stand is that word "all" has been consciously used, then in my view the instructions are illegal and void, being in disregard to the statutory provisions contained under the Code of Criminal Procedure, as Section 156 of the Code casts duty on the police to investigate cognizable case without the order of the Magistrate. Even where case relates to two or more offences of which one is cognizable, Section 155(4) of the Cr. P.C. says that notwithstanding the other offence is non-cognizable, the case shall be deemed to be a cognizable offence. In the instant case, by virtue of Sub-section (2) of Section 20, the offence u/s 20(1) is non-cognizable, but offence u/s 6(-A)

of the Act of 1933 is cognizable. Hence, the case shall be deemed to be cognizable. In view of this, there is no illegality in the investigation. The first contention is therefore, rejected.

Contention No. 2:

7. It is contended that in view of Section 7 of the Act of 1933, the power of search only vests in officer specially empowered by the Central Government, and hence search made by the police is illegal. In this regard so far as the factual position is concerned, Mr. Satish Verma, District Superintendent of Police, Porbandar, in his affidavit has stated that no search was made by the police during the investigation but instruments were seized u/s 102 of the Cr. P.C. It is also stated by Mr. Satish Verma in his affidavit that the investigation has revealed that it is extremely serious matter of unauthorised possession and unrestricted sale of the most sophisticated Motorola wireless sets by the petitioners without the required licence to possess the wireless equipments and without even ensuring the person to whom such wireless sets were sold to persons who were not possessing a licence. It is submitted that such a serious matter has resulted into possession of such sophisticated wireless sets by many unauthorised persons in the sensitive border State which has grave consequences for National Security. It is emphasised that when such sophisticated wireless sets (hand-held sets as well as base sets) have been sold to anybody and everybody by the accused-petitioners without having the least regard for the legal requirement of licence, the possibility of such wireless sets which, are capable of transmitting as well as receiving wireless messages as such are called trans-receivers because they work both as transmitter and as receiver, passing into the hands of smugglers and anti-national elements cannot be ruled out.

8. On facts seizure has been made u/s 102 of the Cr. P.C. The word "any offence" employed in Section 102 of the Cr. P.C. shows that even in case of non-cognizable offence, police may seize property found under suspicious circumstances.

8.1. Apart from the factual position, Section 7 is only enabling provision. It empowers the Central Government to authorise any officer for the purpose of the Act of 1933 so far as the search of the unauthorised wireless sets are concerned. It does not prohibit the statutory power of the police u/s 156 of the Cr. P.C. of investigation of a cognizable offence and the power under the other provisions of the Cr. P.C. in the matter of seizure. In view of this, there is no merit in the second contention as well.

9. In view of the aforesaid, I find no justified ground to quash the impugned investigation in CR. No. 11/70/95. This Special Criminal Application being devoid of force, is accordingly rejected.

Rule discharged. The interim relief stands vacated.