

(2006) 06 J&K CK 0019
In the Jammu And Kashmir High Court
Case No : Criminal P.C. No. 56 of 2005

Dr. Ghulam Mohammad Sheikh and Others

APPELLANT

Vs

State of J. and K.

RESPONDENT

Date of Decision : 07-06-2006

Acts Referred:

Jammu and Kashmir Criminal Procedure Code, 1989 — Section 19, 197, 197(1), 561A
Ranbir Penal Code, 1989 — Section 269, 279, 336

Citation : (2006) CriLJ 3546 : (2006) 4 RCR(Criminal) 776

Hon'ble Judges : Mansoor Ahmad Mir, J

Bench : Single Bench

Advocate : Sami Yaqoob, for the Appellant; M.A. Rathore, AAG, for the Respondent

Judgement

Mansoor Ahmad Mir, J.—By the medium of this petition, petitioners have invoked the jurisdiction of this Court in terms of Section 561-A

Criminal Procedure Code, for quashing of the proceedings drawn by the Court of Judicial Magistrate 1st Class, Second Subordinate Judge,

Srinagar, in the case titled as State v. Dr. Ghulam Mohammad Sheikh, File No. 72/B of 2004, FIR No. 56 of 2004 P/S Karan Nagar, Srinagar,

under Sections 269, 336 of RPC, on the grounds taken in the petition.

2. It appears that on 30th August, 2004, Mst. Shaheena was brought for post-surgery check-up. She developed acute pain and was shifted to

Private Nursing Home where she was again operated upon and during the operation surgical gauze was found in the body of the patient which was removed.

3. P.W. 1, Ghulam Rasool lodged report in Police Station Karan Nagar which set the police in motion and police conducted investigation and

presented challan under Sections 279 and 336 of RPC with the allegations that accused operated upon P.W. 3 negligently.

4. It appears that a plea was raised before the trial Court that no prosecution could have been lodged against the accused without obtaining

sanction in terms of Section 197, Criminal Procedure Code because they were performing their official duties and acting in the discharge of their

official duties at the relevant point of time. Thus, the cognizance drawn, process issued and charge framed vide order dated 26-7-2005 are abuse

of the process of law.

5. It is profitable to reproduce Section 197 of Criminal Procedure Code, herein, which reads as under:

197. Prosecution of Judges and public servants.- (1) When any person who is Judge within the meaning of Section 19 of the Ranbir Penal Code or

when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the State Government or the

Government of India, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his

official duties, no Court shall take cognizance of such offence except with the previous sanction.

(a) in the case of persons employed in connection with the affairs of the Union, of the Government of India; and

(b) in the case of persons employed in connection with the affairs of the State, of the Government;

(2) The Government of India or the State Government, as the case may be, may determine the person by whom, the manner in which, the offence

or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the

trial is to be held.

6. This provision of law mandates that if it is alleged that public servant while performing official duty has committed any offence prosecution

cannot be launched against him without sanction.

7. Apex Court in case titled as Abdul Wahab Ansari Vs. State of Bihar Another, , has observed as under:

6. Previous sanction of the competent authority being a pre-condition for the Court in taking cognizance of the offence if the offence alleged to

have been committed by the accused can be said to be an act in discharge of his official duty, the question touches the jurisdiction of the Magistrate

in the matter of taking cognizance and, therefore, there is no requirement that an accused should wait for taking such plea till the charges are

framed....

7. It is not necessary for us to multiply authorities on this point and hearing in mind the ratio of the aforesaid cases and applying the same to the

facts of the present case as indicated in the complaint itself, we have no hesitation to come to the conclusion that the appellant had been directed

by the Sub-Divisional Magistrate to be present with police force and remove the encroachment in question and in course of discharge of his duty to

control, the mob, when he had directed for opening of fire, it must be held that the order of opening of fire was in exercise of the power conferred

upon him and the duty imposed upon him under the orders of the Magistrate and in that view of the matter the provisions of Section 197(1) applies

to the facts of the present case. Admittedly, there being no sanction, the cognizance taken by the Magistrate is bad in law and unless the same is

quashed qua the appellant, it will be an abuse of the process of Court.

8. Apex Court in case titled as State of Orissa through Kumar Raghvendra Singh and Others Vs. Ganesh Chandra Jew, , has observed as under:

11. Such being the nature of the provision the question is how should the expression, ""any offence alleged to have been committed by him while

acting or purporting to act in the discharge of his official duty"", be understood ? What does it mean ? ""Official"" according to dictionary means

pertaining to an office, and official act or official duty means an act or duty done by an officer in his official capacity. In B. Saha and Others Vs.

M.S. Kochar, , it was held : (SCC pp. 184-85 para 17 (Para 18 of Cri LJ)):

The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in

Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will

be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will

take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed

or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every

offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1),

an Act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution and the said provision.

Use of the expression, "official duty implies that the act or commission must have been done by the public in the course of his service and that it

should have been in discharge of his duty. The section does not extend its protective cover to every act or omission done by a public servant in

service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

9. This Court in case titled as Superintendent of Police v. Chandan Kumar reported in 1999 KLJ 87, has observed as under:

12. Before cognizance could be taken of the complaint it was required on the part of the learned Magistrate to address himself whether the

provisions of Section 197, Cr. P.C. are attracted or not and the facts of the case are such where they are operative. The legal requirement of prior

sanction to prosecute the petitioner is lacking and as such the cognizance of the complaint is per se illegal.

10. Applying the test to the instant case, the allegations against the accused, as discussed above, are that they have committed negligence while

performing the official duties. Thus, prosecution cannot be launched without sanction.

11. In the given circumstances, drawing of cognizance, issuance of process and framing of charge against the accused are hereby quashed.

However, respondent State is at liberty to file charge-sheet after obtaining sanction.

12. Accordingly, this petition is disposed.

13. Registry is directed to send down the record along with a copy of this order.