courtkutchehry.com

Company : CourtKutchehry
Website : www.courtkutchehry.com
Printed For :
Date : 13/09/2026

(2008) 07 DEL CK 0245

In the Delhi High Court

Case No : Criminal M.C. No. 1628 of 2007

Dr. Kamal Kishore Kalra — APPELLANT

Vs

State (NCT of Delhi) — RESPONDENT

Date of Decision : 02-07-2008

Acts Referred:
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 154, 155, 155(2), 155(4), 156
Delhi Police Act, 1978 — Section 103
Penal Code, 1860 (IPC) — Section 109, 171(4), 171E, 287, 308

Citation : (2008) 151 DLT 546 : (2008) 105 DRJ 226

Hon'ble Judges : Vipin Sanghi, J

Bench : Single Bench

Advocate : Avadh Kaushik and Vivek Rao, for the Appellant; Pawan Sharma, APP, for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.—This petition u/s 482 of the Code of Criminal Procedure (the Code) is filed to challenge the order dated 16.10.2006 and the notice framed on 28.11.2006 by the learned Metropolitan Magistrate, Delhi, in respect of a non-cognizable offence u/s 103 of the Delhi Police Act, 1978, and the order dated 17.02.2007 passed by the learned Additional Sessions Judge, Delhi, in Criminal Revision Petition No. 6/2007, whereby the aforesaid order dated 28.11.2006 has been confirmed, and for quashing the proceedings before the learned MM in the aforesaid case.

2. I have heard learned Counsel for the petitioner and the learned APP in the matter and also perused the trial Court record, which has been summoned for today.

3. The case of the prosecution is that on the receipt of some secret information that a person will come near Sarai Rohilla flyover on 27.04.2001 at about 03:00 p.m. with huge quantity of Govt. medicines which are stolen with intention to sell

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/dr-kamal-kishore-kalra-appellant-…

them, it laid a trap at about 02:45 p.m. beneath the flyover. At the appointed time one person came under the flyover holding one bag in his each hand. The informant identified him. On this the said person namely Ashok s/o Kesar Das was overpowered by the police and some medicines bearing the inscription ''MCD Supply Not For Sale'' were recovered from his possession. When he was asked to produce ownership proof, he was unable to do so and upon intensive interrogation, he told that all these medicines were stolen from MCD Dispensary and that he had come to sell them. The police registered the First Information Report No. 177/2001 against the accused Ashok u/s 411 IPC. The statement of the accused Ashok was recorded u/s 161 of the Code, who disclosed that more persons were involved in this business. At his instance further quantities of such like medicines were recovered from his house and on 29.04.2001 accused Anil Kumar was arrested on the identification of accused Ashok. Thereafter, upon further further investigation of both accused Ashok and Anil Kumar, their other companions including the petitioner herein, namely, Dr. Kamal Kishore Kalra were also traced out. The petitioner was arrested on 01.05.2001 on the identification of accused Ashok and Anil Kumar and at their instance a huge quantity of such like medicines were recovered from their possession.

4. It appears that the charge u/s 411, upon further inquiry, could not be sustained since the MCD hospitals and dispensaries which had been disclosed by the accused as being the ones from where the theft had taken place did not report any case of theft. Consequently, the police while filing the ''Charge Sheet'' dated 27.11.2001 before the learned Magistrate stated as follows: ''Since, huge quantity of Govt. medicines as per detail have been recovered from the accused persons in this case regarding which no accused has produced any ownership proof or evidence of their possession in respect of the recovered medicines and hence, it is prayed to this court that Section 411 IPC may please be cancelled and cognizance u/s 103 D.P. Act may please be taken. All five accused are on bail granted by the court.

5. On 07.01.2002, the learned magistrate took cognizance against all the accused persons in respect of the offence u/s 103 of the Delhi Police Act, which is a non-cognizable offence. The order taking cognizance records ''Fresh challan received. Seen. Be checked and registered. I take cognizance of the offence and (as) (sic) shown in the charge sheet u/s 190(1)(a) CrPC.'' Consequently, it appears that the learned Magistrate treated the charge sheet/challan as a complaint of facts which constitutes an offence.

6. At the stage of framing of notice, the petitioner raised an objection before the learned Magistrate contending that the investigation carried out by the Investigating Officer was illegal and unwarranted since the alleged offence u/s 103 of the Delhi Police Act is a non-cognizable offence and the police could not have investigated into a non-cognizable offence without the prior permission of the concerned Magistrate, which permission was not obtained by the Investigating Officer (I.O.). Therefore, the whole exercise of investigation done

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/dr-kamal-kishore-kalra-appellant-…

by the IO is illegal, null and void and that the accused persons deserve to be discharged in the matter. This objection of the petitioner was considered and rejected by the learned Magistrate by his impugned order dated 16.10.2006. The learned Magistrate, thereafter, framed the notice vide order dated 28.11.2006, which is also impugned before me on the same ground i.e. that the investigation conducted by the police was illegal and void. The challenge to the order dated 28.11.2006, whereby the notice was framed in Criminal Revision No. 06/2007 before the learned Additional Sessions Judge, Delhi, has also proved unsuccessful and the same has also been impugned in this petition.

7. In support of his submissions, learned Counsel for the petitioner has relied on the following decisions:

1. Mrs. Rupan Deol Bajaj and another Vs. Kanwar Pal Singh Gill and another,

2. Siddanagouda Vs. State of Karnataka,

3. Mam Chand and Others Vs. State,

4. Ajit Singh Vs. State,

5. Surinder Kumar v. State 1997 JCC 45

6. Brahm Dutt and Ors. v. State and Ors. 1996 JCC 183

8. On the other hand, submission of Mr. Sharma, learned APP, is that Section 2(d) of the Code defines ''complaint'' to mean any allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence, but does not include police report. However, the Explanation to Section 2(d) states that ''A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant.'' The further submission of Mr. Sharma is that in this case the learned Magistrate has treated the challan/charge sheet filed by the police as a complaint and has taken cognizance of the same, which is also evident from his order dated 07.01.2002. Section 190(1)(a) states that any Magistrate of the First Class and any Magistrate of the Second Class specially empowered in this behalf may take cognizance of any offence upon receiving a complaint of facts which constitutes such offence. He also relies on the decision of this Court in Crl. Rev. P. 181/2007 ''Chaman Prakash v. State in support of his contention.

9. Having considered the rival submissions of the parties and perused the impugned orders passed by the learned Magistrate as well as by the learned Additional Sessions Judge in revision proceedings and upon a consideration of the contents of the FIR as well as the ''Charge Sheet'' filed before the learned Magistrate and the case law cited before me, I am of the view that there is no merit in this petition and the same deserves to be dismissed. A perusal of the FIR bearing No. 177/2001 shows that the allegations made therein do constitute

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/dr-kamal-kishore-kalra-appellant-…

a cognizable offence. The relevant extract from the said FIR reads as follows:

...I H.C. Together with Ct. Ravi Dutt No. 783/N and Ct. Mahabir Singh No. 1642/ N were on patrolling at about 2.20 P.M. in North District at Vaishno Mata Mandir. At this time some reliable informant came to Ct. Ravi Dutt No. 783/N and informed him that a person will come near Sarai Rohilla Flyover today at about 3.00 P.M. together with huge quantity of Govt. Medicines which are stolen/theft with the intention to sell them....

...This H.C. Constituted a raiding party with his accompanied staff together with the said informant and held a trap at about 2.45 P.M. beneath the flyover. At about 3.00 P.M. a middle aged man came on feet under the flyover and started waiting there for somebody. This man was holding one bag in his each hand. The said reliable informant identifying that man informed the raiding party by way of giving signs that this is the said person. On this I H.C. Over powered that person with the help of raiding party. After interrogation, it was revealed that the name of the said person is Ashok S/o Kesar Dass R/o RZ-25, Arya Mohalla, New Basti, Nangloi, Delhi. A while coloured bag was recovered from the right hand of Ashok in which four corrugated packets were found. It was found on the opening of these packets that each packet was containing 25 bottles of medicines Kufryl Syrup and MCD supply not for sale was written on each packet and same stamp was also inscribed on bottles. A green coloured bag was recovered from the left hand of the said person and three packets were found in the said bag and from each packet, when opened, 40 bottles of TONOFERON DROPS were recovered. On these bottles and packets stamp of ''M.C.D. supply not for sale'' wee inscribed. Ashok was asked to produce ownership proof of the said recovered Govt. medicines but he could not produce any proof and on intensive interrogation, he told that all these medicines are stolen from MCD Dispensary and I had come today to sell them.

...Thus, accused Ashok S/o Kesar Dass R/o RZ-25, Arya Mohalla, New Basti, Nangloi, Delhi has committed an offence u/s 411 IPC by keeping stolen Govt. Medicines in his possession. Hence, this complaint is being sent through Ct. Ravi Dutt to the police station. Kindly register the case and inform me.

10. Section 411 IPC states that ''Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both''. Therefore, it cannot be said that the allegations contained in the FIR do not constitute the offence u/s 411 IPC, since the allegation is that the accused Ashok was possessed of substantial quantities of medicines with the stamp ''MCD Supply Not For Sale'', and that Ashok was asked to produce ownership proof of the recovered medicines but he could not produce the same, and upon interrogation he is alleged to have stated that all these medicines are stolen from MCD Dispensary and that he had come to sell the same. The offence u/s 411 IPC, which carries a sentence up to three years imprisonment, is a cognizable offence. Consequently,

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/dr-kamal-kishore-kalra-appellant-…

the police was empowered to investigate the same u/s 154 read with Section 156 of the Code. In the so called ''Charge Sheet'' filed by the police before the learned Magistrate, it was stated that ''during investigation, SI prepared a site plan of the spot after visiting there and accused Ashok (Col. No. 4) was interrogated and statements u/s 161 Cr.P.C. was recorded. Accused Ashok confessed in his statement that some more persons are also involved in this business and he can help the police by getting these people apprehended and medicines recovered. Hence, SI obtained police custody of the accused Ashok from the court and on his instance 55 corrugated packets each containing 50 coscopin cough zinctius and 10 corrugated packets each containing 108 bottles Fur Oxon Syp were recovered from his house and on 29.04.2001 accused Anil Kumar Col. No. 4 Sr. No. 2 was arrested on the identification of accused Ashok Col. No. 4 Sr. No. 1 on whose instance a huge quantity of Govt. medicines as per list of different names were recovered and after obtaining police custody remand of both the accused from the court till 02.05.2001, their other companions were traced out. In this case accused Kamal Kishore Kalra Col. No. 4 Sr. No. 4, Om Prakash Col. No. 4 Sr. No. 3 and Mukesh Mutreza Col. No. 4 Sr. No. 5 were arrested on 01.05.2001 on the identification of accused Ashok and Anil and on their instance a huge quantity of Govt. medicines as per list were recovered from their possession and after making inquiry their statements were recorded and statements of witnesses u/s 161 Cr.P.C. were recorded and enquiry was conducted from the persons named by the accused. Since, the huge quantity of Govt. medicines as per detail have been recovered from the accused persons in this case regarding which no accused has produced any ownership proof or evidence of their possession in respect of recovered medicines and hence, it is prayed to this court that Section 411 IPC may please be cancelled and cognizance u/s 103 D.P. Act may please be taken. All five accused are on bail granted by the Court''.

11. The said ''Charge Sheet'' further discloses that upon further investigation in the form of letters written to the officers of Dr. Bhim Rao Ambedkar Hospital, Rohini, Maternity Centre Haiderpur and Polyclinic Kishan Ganj and report from Tihar Jail, regarding theft from where the medicines were stated to be stolen, and reports after physical verification of stock were collected, on verification it had been found that no case of theft had been registered at any place. Pertinently even this information with regard to no theft of medicines being reported from the aforesaid hospitals and dispensaries came to light as a result of the very investigation, which is now questioned by the petitioner. Therefore, in my view, the trial Court as well as the learned Additional Sessions judge rightly rejected the contention of the petitioner founded upon Section 155(2) of the Code, which states that no police officer shall investigate a non-cognizable case when the order of a magistrate having power to try such case or commit the case for trial.

12. What is relevant and material to examine is, whether, at the time of registration of FIR, the allegations made therein disclosed the commission of a

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/dr-kamal-kishore-kalra-appellant-…

cognizable offence, which empowers the police to carry out its investigation. If during the course of investigation, and as a result thereof, it transpires that the commission of a cognizable offence cannot be sustained and, instead, the commission of a non-cognizable office is disclosed it is only proper that the ''report made by the police officer in a case which discloses after investigation, the commission of a non-cognizable offence'' is treated as a complaint made by the police officer by whom such report is made. This is what is provided for by Explanation to Section 2(d) of the Code, which defines the expression ''complaint''. From the said Explanation it is evident that the Legislature was conscious of the fact that there may be instances where, though the allegations contained in the FIR may disclose the commission of a cognizable offence, after investigation, the report made by the police officer discloses the commission of only a non-cognizable offence and, Therefore, in such situations such police report is deemed to be a complaint by the concerned police officer. It is also evident from the order passed by the learned Magistrate that he too was conscious of the fact that the report filed by the police, namely, the so-called ''Charge Sheet'' was a deemed complaint and, Therefore, he took the cognizance of the offence u/s 103 of the Delhi Police Act ''upon receiving a complaint of facts which constitute such offence''. Since the complaint was by a public servant acting or purporting to act on the discharge of his official duties, the Magistrate while taking cognizance has dispensed with the examination of the complainant and the witnesses u/s 200 of the Code.

13. The decisions cited by the petitioner also do not support the proposition canvassed by him in this case. Rupan Deol Bajaj (Mrs.) (supra) has been merely relied upon to refer to the principles set out by the Supreme Court in State of Haryana v. Bhajan Lal 1992 SCC (Cri) 426 for the exercise of powers under Article 226 of the Constitution of India or the inherent powers u/s 482 of the Code by the High Court to prevent abuse of process of Court, or otherwise to secure the ends of justice. Specific reference is made two situations discussed in Bhajan Lal (supra) i.e. categories 2 and 4, which reads as follows:

(2) Where the allegations in the first information report and other materials, if any , accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers u/s 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer within an oder of a Magistrate as contemplated u/s 155(2) of the Code.

14. Both these categories of cases require that the FIR and other materials accompanying the FIR do not disclose or constitute the commission of a cognizable offence. However, that is not the position in the facts of this case. As I have already indicated hereinabove, the allegations in the FIR at the time of its registration did disclose the commission of a cognizable offence u/s 411 IPC. It was only subsequently, during the course of and as a result of further

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/dr-kamal-kishore-kalra-appellant-…

investigation, that it was learnt that the offence u/s 411 could not be sustained and only a non-cognizable offence u/s 103 of the Delhi Police Act could be sustained. Section 103 of Delhi Police Act reads as under:

103. Possession of property of which no satisfactory account can be given - 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 act to the satisfaction of the Metropolitan Magistrate, on conviction, be punished with imprisonment for a term which may extend to three months or with fine which may extend to one hundred rupees, or with both.

15. The decision of the Karnataka High Court in Siddanagouda (supra) is also of no avail since the said decision does not disclose factual matrix similar to the one in hand. It appears that the FIR in that particular case being Crime No. 191/94 was registered u/s 171E read with Section 109 IPC, which is a non-cognizable offence. I may notice that the law report misprints the Section as 171(4). In fact there is no such provision in the IPC. From a perusal of the judgment it is clear that the offence alleged against the accused was one u/s 171E IPC, which is non-cognizable. As noticed hereinabove, in the present case, the FIR that had been registered was in respect of a cognizable offence and the allegations contained in the FIR did disclose the commission of a cognizable offence. The decision of this Court in Mam Chand (supra) is also distinguishable on facts. In that case the Court came to the conclusion that ''Once, on the circumstances prevalent at the time of registration of the case, it is evident that a cognizable offence is not made out, permitting the police to first register a cognizable case, carry out investigations and ultimately if it is found that a cognizable offence was not made out, would be giving a long rope to the police''. Therefore, in Mam Chand (Supra) the present case, the Court was of the opinion that even at the time of registration of the FIR, the facts did not disclose the commission of a cognizable offence, which is not the case in hand. The observation of this Court: ''The nature of the offence is to be gathered from the facts available at the relevant time and if there is a doubt as to whether a cognizable offence is made out or not, the police can report it to the Magistrate concerned and obtain appropriate orders. On the one hand, no prejudice will be caused to the prosecution by adopting a safer course and on the other it will eliminate the possibility of misuse of power by the police. This approach will also be in consonance with the spirit and intention of Section 155 of the Code'', does not come to the aid of the petitioner, since the allegations in the FIR in the present case left no manner of doubt that the commission of an offence u/s 411 IPC was disclosed. Moreover, this decision does not take into account the Explanation to Section 2(d) of the Code, as aforesaid. In Ajit Singh (supra) though the challan was filed filed u/s 338, which is a cognizable offence, the Magistrate converted it into a non-congnizable offence u/s 287 and took cognizance. This Court quashed the proceedings u/s 482 Cr.P.C. It was held that simply because the case was registered u/s 338 IPC, which is a cognizable offence, the police could not

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/dr-kamal-kishore-kalra-appellant-…

investigate the offence which actually fell u/s 287 IPC. The decision of this Court in Ajit Singh (supra) is also, in my view, of no assistance to the petitioner for the reason that it fails to take notice of the Explanation to Section 2(d) of the Code, which deems the police report to be a complaint in a case where, after investigation the commission of a non-cognizable offence is disclosed.

16. No doubt the police cannot assume the power to investigate into an offence when it has none, by merely registering a First Information Report in respect of a cognizable offence. Therefore, what would be relevant to examine is not merely the Section under which the FIR is registered but the contents of the FIR itself.

17. In Surinder Kumar (supra), FIR was registered against the accused u/s 308 and 323 IPC. The offence u/s 323 was non-cognizable. The Court, rely ion upon the undisputed facts of the case, particularly the MLC of the injured which showed that the injuries were simple, and also the fact that there was a cross-complaint u/s 324 IPC against the complainant, which showed that there was a scuffle between the two parties without any intentions to either side to cause such injuries which may result the death of the victim, concluded that the material before the Additional Sessions Judge was not such which could give rise to grave suspicion against the petitioner of his having the intention or knowledge to cause such an injury that, had death been caused, the petitioner would have been guilty of culpable homicide. Therefore, the Court examined the presence/ absence of the ingredients necessary to constitute the offence u/s 308 IPC and concluded that the said offence was not made out and, Therefore, the petitioner could not have been charged for the offence punishable u/s 308/34 IPC. In paragraph 9 of the judgment this Court held as follows:

9. Coming to the second question as to whether the petitioners could be tried for an offence punishable u/s 323/34 IPC, I find that the offence u/s 323 is a non-cognizable offence and investigation by the Police into the case involving non-cognizable offence is not permissible without permission of the Magistrate. Admittedly, no permission has been taken by the Police to investigate into the offence punishable u/s 323 IPC. It is contended by Mr. Behl that as the FIR related to an offence not only u/s 323 IPC but also u/s 308, there was no bar in the police investigating the case. In my opinion, the argument has no basis. When the case is actually registered against an accused in respect of both cognizable and non- cognizable offences and ultimately it is found that the cognizable offence is not made out, it may mean giving long hand to the police in first registering cases for cognizable offences which ultimately may not fall within the definition of such a case. I am, Therefore, of the view that the police having not taken permission of the Magistrate u/s 155(2) of the Code of Criminal Procedure, the proceedings against the petitioners u/s 323 cannot be continued.

18. Firstly, I may notice that the Court came to the conclusion that even on the basis of the material on record, the offence u/s 308 IPC could not be made out. That being the position the registration of the case u/s 308 IPC itself was bad and had been resorted to merely to enable the police to undertake investigation

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/dr-kamal-kishore-kalra-appellant-…

without the permission from the Magistrate. That is not the case in hand. Secondly with due respect, the said decision also does not take notice of the Explanation to Section 2(d) of the Code. I, Therefore, do not consider myself to be bound by the view expressed by the Court in that decision. The decision of this Court in Brahm Dutt and Ors. (supra) is also on the same lines, as the decision in Mam Chand (supra). Once again this decision does not take notice of the Explanation to Section 2(d) of the Code and, Therefore, I do not consider myself bound to follow the same, particularly in the facts of this case.

19. On the other hand, I find support support in the view that I take from the decision of this Court in Chaman Prakash (supra). The petitioner had been accused of committing the offences u/s 323/341/354/506 IPC arising out of an incident where the complainant alleged that the petitioner had slapped her and sought to intimidate her. The case of the petitioner/accused was that the allegations in the FIR taken as a whole, did not disclose the commission of any cognizable offence and the inclusion of Section 323/354/506 IPC was merely to confer jurisdiction on the police to investigate into the matter as otherwise, the so-called injuries were simple in nature. The trial Court framed the notice in respect of offences, including the offence u/s 354 IPC on 08.09.2006. That order was appealed against before the learned Additional Sessions Judge, who directed the deletion of the charge u/s 354 IPC. On the strength of this appellate decision, it was contended by the petitioner before the trial Court that the surviving charge u/s 323 could not be framed as the investigation was conducted without compliance of the mandatory provision of Section 155(2) of the Code. That submission of the petitioner was rejected by the Courts below. The petitioner Chaman Prakash also relied on the decision of this Court in Brahm Dutt (supra) and Kanshi Ram v. State 2000 (II) AD 528, in support of his submissions. This Court rejected the submission of the petitioner. Para 8 of the said decision is relevant and reads as follows:

8. I am not persuaded to accept the line of reasoning in the cases cited on behalf of the petitioner. Undoubtedly there are certain observations in those cases suggestive of the entire investigation being vitiated if the court discovering, at a later stage that no cognizable offence is made out. However each case had to be decided on the facts and attendant circumstances. In this case the court in the first instance did not accept the submission that only a non-cognizable offence was made out. Further Section 460(2) lists out irregularities which vitiate the proceedings. A reading of this would show that if the Magistrate proceeds to make an order to investigate the offence, u/s 155 into the incident which may turn out to be one involving a non- cognizable offence, that does not by itself vitiate the proceedings. This is further strengthened by Section 155(4), which provides that if two offences, one non-cognizable, and the other cognizable, are alleged, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non- cognizable. Such being the situation investigation and further proceedings in respect of an FIR, where eventually only non-cognizable offences can be pressed, would not vitiate the entire proceedings.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/dr-kamal-kishore-kalra-appellant-…

There is no taint of illegality attached to the investigation. This aspect was not discussed in the judgments cited; they did not consider the impact and effect of Section 460, or Section 155(4)

20. I find myself in complete agreement with the aforesaid view taken by this Court. For the aforesaid reasons, I dismiss this petition, leaving the parties to bear their own respective costs. Trial court record be returned forthwith.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/dr-kamal-kishore-kalra-appellant-…