
(1964) 07 BOM CK 0006
In the Bombay High Court
Case No : Criminal Appeal No. 286 of 1964

Gorakh Tulji Mahale

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-07-1964

Acts Referred:

Bombay Police Act, 1951 — Section 159, 161
Government of India Act, 1935 — Section 270
Penal Code, 1860 (IPC) — Section 161, 218, 409, 477A

Citation : (1964) 07 BOM CK 0006

Hon'ble Judges : Kantawala, J;Chandrachud, J

Bench : Division Bench

Judgement

Chandrachud, J.—This appeal has been referred to the Division Bench by a learned Single Judge for decision of the question whether the special rule of limitation contained in Section 161(1) of the Bombay Police Act applies to prosecutions under Section 161 of the Indian Penal Code and u/s 5 of the Prevention of Corruption Act. Paranjpe J. sitting on the Nagpur Bench has taken the view in Narharrao Madavrao Patil v. The State (1963) Criminal Appeal No. 153 of 1963 that acceptance of bribe is an act done under colour of office and, therefore, the prosecution of a Police officer for bribery is barred unless it is instituted within six months of the date of the act complained of. The correctness of this view is in question before us.

2. The facts are few and what is necessary to know for the decision of the point is the nature of the act complained of, the date on which the bribe was taken and the date on which the prosecution was instituted. The bribe is alleged to have been taken by the appellant in March 1963 and the prosecution was instituted on November 11, that is, more than six months thereafter. The appellant, a railway police constable, has been convicted by the learned Special Judge, Ahmednagar, u/s 161 of the Indian Penal Code and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, on the charge that he accepted an illegal gratification of Rs. 50 from the complainant as a motive for releasing the

complainant's son, who was arrested by the appellant on the railway platform on suspicion that he was a pick-pocket. The appellant admitted that he received the amount, but contended that it was paid to him not as illegal gratification but by way of loan.

3. One of the grounds on which the conviction is challenged before us is that the prosecution is barred by limitation u/s 161(1) of the Bombay Police Act (Bombay Act No. XXII of 1951), not having been instituted within six months from the date on which the bribe is alleged to have been taken by the appellant. This point was not taken in the trial Court, but since the decision of the point does not require a fresh investigation into facts and as the point is likely to affect a large number of cases, we have permitted the appellant to raise the point for the first time in this appeal.

4. Section 161(1) of the Bombay Police Act (hereinafter called "the Act") contains a provision which is intended for the protection of certain officers from stale claims and accusations of a particular variety. In so far as criminal proceedings are concerned, it contains a special rule of limitation, generally unknown to criminal law, that prosecutions must in certain circumstances be instituted within the stated period. Sub-section (1) of Section 161 of the Act reads thus:

In any case of alleged offence by the Revenue Commissioner, the Commissioner, a Magistrate, Police officer or other person, or of a wrong alleged to have been done by such Revenue Commissioner, Commissioner, Magistrate, Police officer or other person, by any act done under colour or in excess of any such duty or authority as aforesaid, or wherein, it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted, more than six months after the date of the act complained of.

In order that this sub-section may apply, it is necessary in so far as is material for this case, that the alleged offence must have been committed by doing an act "under colour or in excess of any such duty or authority as aforesaid." The words "such duty or authority as aforesaid" are evidently referable to the description of duty or authority contained in Section 159 of the Act, which provides that a police officer, amongst others, shall not be liable to any penalty or to payment of damages on account of an act done in good faith, in pursuance or intended pursuance of

any duty imposed or any authority conferred on him by any provision of this Act or any other law for the time being in force or any rule, order or direction made or given therein.

It is clear from this provision that the rule of limitation contained in Section 161(1) of the Act can apply only if the act complained of was done under colour of duty or in excess of duty imposed or authority conferred on the officer concerned by any provision of the Act or by any other law or by any rule, order or direction made or given under the Act or under any other law.

5. The sole question which arises in the background of these provisions and on the few facts stated above is whether the appellant can be said to have received the illegal gratification by doing an act under colour of duty or in excess of duty or authority imposed or conferred on him either by the Bombay Police Act or by any other law, rule, order or direction. The words "colour of office," "colour of duty" and similar other phrases having more or less the same connotation have been the subject-matter of several decisions to which we will presently refer. Apart, however, from authority, it seems to us difficult to perceive how the act of receiving a bribe can be said to be an act done under colour of duty imposed by law. In order that an act could be said to be done under colour of office or colour of duty, it would at least be necessary that there should be some relationship between the act complained of and the duties appertaining to the office. The existence of such a nexus is indispensable for proof that the act is done under colour of office though in a conceivable class of cases, even such a nexus may not be adequate, in the light of other facts, for proving that the act was done under colour of office. In cases where there is a reasonable connection between the act complained of and the duties attaching to the office, the act can be said to have been done under colour of office or under colour of duty because the act has the external indicia of an official act, though in fact, it may have been influenced by an oblique motive.

6. If, for example, an officer "has the power to make a panchnama or to record a statement and he introduces a false detail in it, it may be possible to say that the act is done under colour of office or under colour of duty imposed by law. In such cases, the officer is under a duty to make a correct record, but what he does under the cloak of discharging that duty is to introduce into the record a false recital. He is then said to act under colour of office for, the duty imposed upon him by his office is utilised by him as a cover or shield for doing a wrongful act. If again, a Police officer has the right to disperse an unlawful assembly by the use of reasonable force, and if he uses unreasonable force, it may be possible to say that he acted under colour of authority for, the right of dispersal of an unlawful assembly by the use of reasonable force is utilised by him as a cloak for committing an unjustifiable assault. Many more instances can be cited for demonstrating in what circumstances an act can be said to have been done under colour of office, but, as is often said, in matters of this nature, hypothetical cases are perhaps best avoided. Multiplying instances will also not assist either in the formulation of a principle or in the deduction of a rule of common application because, as observed by the Federal Court in AIR 1939 43 (Federal Court) a question of this nature is substantially one of fact, to be determined with reference to the act complained of and the attendant circumstances. The only importance, perhaps, of these hypothetical cases is that they present at least two common features: (1) there is in these cases a reasonable relationship between the act complained of and the duties of office and (2) the officer, if challenged in the doing of the act can apparently justify it by referring to the nature of duties which his office imposes on him or the rights which it confers on

him. That briefly is the reason why such acts are described as having been done under colour of office or under colour of duty.

7. Acceptance of bribe cannot, in our opinion, be described as an act done under colour of office or under colour of duty because it is wholly unconnected with the rights and duties attaching to the office. It is an act which is entirely extraneous to the nature of duties which the office imposes on the incumbents. The only connection, if at all, between the office and the acceptance of bribe by the officer is that the office affords an opportunity to the officer to demand and accept the bribe. That, however, is not a relevant consideration because what law requires is not that the act must be done by virtue of office but that it must be done under colour of office. As stated in Wharton's Law Lexicon, 14th edn., p. 214, an act is said to be done under colour of office when it

is unjustly done by the countenance of an office, being grounded upon corruption, to which the office is as a shadow and colour;

or as stated in Stroud's Judicial Dictionary, 3rd edn., p. 52,1,

Colour of office:...signifies an act evil done by the countenance of an Office, and it bears a dissembling face of the right of the Office, whereas the Office is but a veil to the falsehood, and the thing is grounded upon Vice, and the Office is as a shadow to it.

A public servant who accepts an illegal gratification cannot, either in justification or in explanation point to the rights and duties of his, office if he is challenged in the act of taking the bribe, that is to say, he cannot ever use the office "as a veil to his falsehood," though of course he exploits his office to extort the bribe.

8. In coming to the conclusion that the act of receiving an illegal gratification is an act done under colour of office, Paranjpe J. has relied on a judgment of the Supreme Court in Virupaxappa Veerappa Kadampur Vs. The State of Mysore, . The learned Judge observes in his judgment that counsel for the State was inclined to urge that the act of receiving a bribe could not be said to be done under colour of office but the submission was not pursued as it was "" effectively answered in paras. 9 to 11 in the Supreme Court decision referred to above." With respect, we are unable to agree that the decision of the Supreme Court is an authority for the proposition that acceptance of bribe is an act done under colour of office. In the case before the Supreme Court, a head constable had attached 15 packets of Ganja from a person who was suspected to be engaged in smuggling the packets. The head constable drew a panchnama showing that only 9 packets were seized and on the next day, he prepared another panchnama stating that an unknown person had thrown the 9 packets, and had run away. On the basis of the second panchnama, the head constable prepared a report of the matter and forwarded it to his superior officer. On these facts he was charged for an offence u/s 218 of the Indian Penal Code, the allegation being that he, a public servant, who was charged with the duty of preparing a correct report, framed an incorrect report with the intention of saving the real offender from

legal punishment. It was held by the Supreme Court that if a police officer who was authorised under the Bombay Prohibition Act to seize prohibited articles, prepares a false panchnama and forwards an untrue report regarding the seizure of the articles, he is clearly using the existence of his legal duty as a cloak for his corrupt action or as a veil to his falsehood. In para. 7 of the judgment, their Lordships have observed that it was the duty of the head constable to prepare a correct panchnama and to forward a true report of the incident to his superior officer. That is why the preparation of the false report was held to be an act done under colour of duty. It is thus clear that the Supreme Court was dealing with a set of facts distinguishable from the facts of the case like the one before us in which the act complained of is the acceptance of a bribe. The charge against the accused in this case is that he received an illegal gratification as a motive or reward for showing official favour. In the first place, the act of receiving illegal gratification is not connected, reasonably or remotely, with the duties of office, and one cannot indeed conceive of a stronger case in which the two are so completely disassociated. Secondly, the bribe taker, if challenged, cannot possibly justify the act by a reference to the nature of his duties. In our opinion, therefore, the decision of the Supreme Court does not lend support to the proposition that acceptance of illegal gratification is an act done under colour of office.

9. Rather than lend such support, it is significant that their Lordships have referred approvingly to a decision of this Court in *Parbat Gopal v. Dinkar* (1960) 63 Bom. L.R. 189 in which it was held that the act of a constable-driver in driving a police jeep rashly and negligently when he was carrying "a sub-inspector of police who was proceeding for investigation, was not done under colour or in excess of duty imposed upon him as a constable-driver. In discussing this decision, the Supreme Court has observed that on the facts of that particular case the decision

may well be justified on the ground that injuring a person by a rash and negligent driving had no relation to the duty of the constable to drive the motor vehicle." A part of the decision was not approved by the Supreme Court but that has a different bearing and it does not affect the real question which arises on this appeal. Incidentally, the decision in *Parbat Gopal v. Dinkar* is important in that it was not only the duty of the accused therein to drive the police jeep, but at the time of the accident the accused was driving the jeep in the discharge of his duties as he was carrying a sub-inspector of police who was proceeding for investigation and yet it was held that the act of driving rashly and negligently was not done under colour of duty.

10. As we have stated at the outset of our judgment, the words "colour of office", "colour of duty" and the other cognate phrases have been construed in a large number of decisions. We shall notice some of the decisions to which our attention has been drawn by Mr. V.S. Kotval, who appears on behalf of the appellant and by the learned Government Pleader, who appears on behalf of the

State. In *Hori Ram Singh v. Emperor*, a Sub-Assistant Surgeon was prosecuted under Sections 409 and 477-A of the Indian Penal Code on the allegation that when he was in charge of a hospital he had removed a certain quantity of medicines to his own quarters and had omitted to enter the particular stock of medicines in the appropriate register. It was contended before the Federal Court that the prosecution was liable to fail as the consent of the Governor of the Province was not taken as required by Section 270(1) of the Government of India Act, 1935, which provided that no proceedings could be instituted against a person "in respect of any act done or purporting to be done in the execution of his duty", except with the consent of the authority mentioned therein. The question whether the want of consent vitiated the prosecution depended on whether the breach of trust and the falsification of accounts committed by the accused were acts which he had done or which he had purported to do in the execution of his duty. In dealing with this question, Sulaiman J. observed that Section 270(1) was not intended to apply to acts done purely in a private capacity by public servants and that it was necessary that the acts must have been ostensibly done by the public servant in his official capacity in execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office nor even necessarily because he was engaged in his official business at the particular time. Sulaiman J. has taken a hypothetical illustration of an officer taking a bribe and has observed at p. 52 of the report as follows:

...For instance, if a public servant accepts as a reward a bribe in his office while actually engaged in some official work, he is not accepting it even in his official capacity, much less in the execution of any official duty, although it is quite certain that he could never have been able to take the bribe unless he were the official in charge of some official work. He does not even pretend to the person who offers the bribe that he is acting in the discharge of his official duty, but merely uses his official position to obtain the illegal gratification.

Varadachariar, J.

who delivered a separate but concurring judgment classified the several decisions of the High Courts in India on the question and stated that the correct view was "that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it" in order that it could be said that the act was done by the public servant in the purported execution of his duty. The Federal Court took the view that consent of the Governor was not necessary for the offence of breach of trust u/s 409 because the official capacity of the accused was material only in connection with the entrustment and did not necessarily enter into the later act of misappropriation or conversion. It was, however, held that consent of the Governor to the prosecution u/s 477-A was necessary as the official capacity of the accused was involved in the very act complained of, the gravamen of the charge being that the accused, had acted fraudulently in the discharge of his official duty. The decision of the Federal Court

is important from two points of view: one, that it emphasises that the question of the present nature is substantially one of fact to be "determined with reference to the nature of the act complained of and the attendant circumstance, and two, that it lays down a workable test which has been subsequently approved of by the Privy Council and the Supreme Court. The test applied by the Federal Court was whether there was something in the nature of the act complained of that attaches it to the official character of the person doing the act.

11. In AIR 1944 66 (Federal Court) a station master was tried for an offence u/s 161 of the Indian Penal Code on the charge that he had accepted an illegal gratification of Rs. 20 in order to provide wagons to the complainant. In repelling the contention that the prosecution was bad because the consent of the Governor of the Province was not obtained as required by Section 270(1) of the Government of India Act, 1935, the Federal Court followed its earlier decision in Hori Bam Singh's case and held that the act of the accused in taking the illegal gratification could not be said to have been done by him in the execution or purported execution of his duty. Zafrulla Khan J., who delivered the judgment of the Court, has referred expressly to a passage from the judgment of Sulaiman J. in Hori Bam Singh's case in which the hypothetical illustration with regard to the acceptance of an illegal gratification was cited by the learned Judge and has adopted the reasoning of Sulaiman J. It was held by the Federal Court in this case that the act of receiving illegal gratification could not "surely...be an act done or purporting to be done in the execution of...duty."

12. The question of sanction u/s 197 of the Criminal Procedure Code arose before the Privy Council in H.H.B. Gill Vs. The King, in which the accused was prosecuted u/s 161 of the Indian Penal Code. Section 197 provides, in so far as is material, that no Court shall take cognizance of an offence alleged to have been committed by a public servant "while acting or purporting to act in the discharge of his official duty" unless the consent of certain authorities was obtained. It was urged before the Privy Council that the prosecution was vitiated as consent of the Governor to the prosecution of the accused was not obtained. The Privy Council approved of the two decisions of the Federal Court in Dr. Hori Ram Singh's case and Lt. Hector's case and observed that it was impossible to distinguish between the language of Section 270(1) of the Government of India Act and Section 197 of the Criminal Procedure Code, at least in relation to an offence of bribery and that the words in Section 270 "in respect of any act done or purporting to be done in execution of his duty as a servant of the Crown" had precisely the same connotation as the words in Section 197(1) : "an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty." In a passage which is frequently cited as containing a pithy exposition of law, the Privy Council says that (p. 494):

...A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a judge neither acts nor purports to act as a judge in receiving a bribe,

though the judgment which he delivers may be such an act : nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office. Applying such a test to the present case, it seems clear that Gill could not justify the acts in respect of which he was charged as acts done by him by virtue of the office that he held. Without further examination of the authorities their Lordships, finding themselves in general agreement with the opinion of the Federal Court in the case cited (Hori Ram Singh's case), think it sufficient to say that in their opinion no sanction u/s 197 of the Code of Criminal Procedure was needed.

13. The decision in Gill's case was re-considered and reiterated by the Privy-Council in Phanindra Chandra Neogy v. The King (1948) 51 Bom. L.R. 440 The question which arose in Phanindra Neogy's case was identical with the one which arose in Gill's case but it was argued before the Privy Council that the observations made in Gill's case were obiter and that it was necessary to reconsider the question. The argument that the observations contained in Gill's case were obiter was rejected by the Privy Council and the view taken in Gill's case was confirmed. While upholding the conviction of the accused u/s 161 of the Indian Penal Code, it was observed by the Privy Council that a public servant could be said to act or to purport to act in the discharge of his official duty only if his act was such as to lie within the scope of his official duty and, therefore, sanction for the prosecution was not necessary u/s 197 of the Criminal Procedure Code.

14. The Supreme Court has had occasion to consider this question in a few cases to which we will now refer. In Ronald v. State of West Bengal A.I.R.[1954] S.C. 455, it was argued before the Supreme Court that the conviction of the accused, a public servant, u/s 161 was bad because sanction u/s 197 of the Code of Criminal Procedure was not obtained before instituting the prosecution, Venkatrama Ayyar J. who spoke for the Court rejected this contention by observing that (p. 457):

The question whether sanction u/s 197 was necessary for instituting proceedings against the appellant on charges of conspiracy and of bribery is now concluded by the decisions of the Judicial Committee in "H.H.B. Gill v. The King" and "Phanindra Chandra Neogy v. The King" and must be answered in the negative.

A somewhat similar question arose before the Supreme Court in a subsequent case in Shreekantiah Ramayya Munipalli Vs. The State of Bombay, . The question was whether sanction u/s 197 of the Code of Criminal Procedure was necessary for the prosecution of a public servant u/s 409 of the Indian Penal Code. The Supreme Court approved of the view expressed by Varadachariar J. in Hori Ram Singh's case that the question involved was substantially one of fact to be determined with reference to the nature of the act complained of and the attendant circumstances and held that the offence of breach of trust u/s 409 can

in conceivable cases be said to have been committed while the public servant was acting or purporting to act in the discharge of his official duty. It was held on the facts of that case that the entrustment was made to the accused in his official capacity and that "...there could in this case be no disposal, lawful or otherwise, save by an act done or purporting to be done in an official capacity." In view of the finding that both the entrustment and the disposal were done in an official, capacity, it was held by the Supreme Court that sanction was necessary u/s 197 of the Criminal Procedure Code for the prosecution of the accused u/s 409 of the Indian Penal Code. Yet another case on similar facts came up before the Supreme Court in *Amrik Singh Vs. The State of Pepsu*, . The accused was charged u/s 409 of the Indian Penal Code and the argument was that the prosecution was vitiated for want of sanction u/s 197 of the Criminal Procedure Code. Venkatarama Ayyar J. observes in the judgment of the Court that though there was considerable divergence of judicial opinion on the scope of Section 197(1) the position could be taken to be fairly well-settled. After referring to the decision of the Federal Court in *Hori Ram Singh's* case, the two decisions of the Privy Council in *Gill's* case and *Phanindra Chandra Neogy's* case and to the two earlier decisions of the Supreme Court in *Ronald v. State of West Bengal* and *Ramayya v. State of Bombay*, Venkatarama Ayyar J. has summed up the position thus (p. 3.12):

...It is not every offence committed by a public servant that requires sanction for prosecution u/s 197(1), Criminal P.C. nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution." It was further observed that (p. 312):

...If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction u/s 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required.

It was held on the facts of that case that sanction to the prosecution was necessary u/s 197 and since the sanction was not obtained the conviction was bad.

15. It is urged by Mr. V.S. Kotval, who appears on behalf of the appellant, that these decisions can afford no assistance in the matter before us because the wording of Section 161 of the Bombay Police Act is in material respects different from the wording both of Section 197(1) of the Criminal Procedure Code and Section 270(1) of the Government of India Act, 1935. We are unable to

appreciate that there is material difference in the language of these statutes. Section 197(1) of the Criminal Procedure Code says, in so far as material, that previous sanction must be obtained to the prosecution of a public servant if he is accused of any offence alleged to have been committed by him "while acting or purporting to act in the discharge of his official duty." The language used by Section 270(1) of the Government of India Act is that no proceeding shall be instituted without the previous sanction against a public servant in respect of any act "done or purporting to be done in the execution of his duty." That there is no difference in principle between the language of these two provisions, at least in so far as the offence of bribery is concerned, is clear from the decision of the Privy Council in *Gill v. King*. Now, in so far as the wording of Section 161 of the Bombay Police Act is concerned, it is true that it uses a slightly different expression, namely, "that the act must be done under colour of duty or in excess of duty"; but "acting under colour of duty" has the same connotation" as "purporting to act in the discharge of official duty." In either case the duties attaching to the office are used as a cloak or shield to do a wrongful act. The gist is that official duty acts as a mere pretence to the doing of the act complained of. In our opinion, therefore, there is no substance in the distinction which Mr. Kotval seeks to make.

16. The decisions cited above have uniformly taken the view that an act cannot be said to be done under colour of office or under colour of duty or in the purported execution of official duties unless there is a reasonable connection between the act and the office. A view has also been taken in these decisions that one of the tests for determining whether an act has been done in the purported discharge of official duties is whether the public servant can defend his act by reference to the nature of the duties of his office if he is challenged while doing the act. Some of the decisions which we have discussed are indeed directly in point because the question which arose therein, as for example in the case of *Lt. Hector* before the Federal Court or in the cases of *Gill* and *Phanindra Chandra Neogy* before the Privy Council, was whether the act of accepting illegal gratification could be said to be done in the purported execution of official duties. The Federal Court and the Privy Council have taken the view which is approved by the Supreme Court in the subsequent cases that it is difficult to discover any connection between the acceptance of illegal gratification and the official duties of a public servant.

17. As the act of the appellant in accepting illegal gratification does not lie within the scope of his official duties, as there is no reasonable relationship between the acceptance of the illegal gratification and the duties attaching to his office, and lastly as the appellant, if challenged, could not have reasonably claimed, that what he was doing was being done in virtue of his office, it must be held that the act was not done by him under colour of duty. The provisions of Section 161(7) of the Bombay Police Act cannot, therefore, be attracted.

18. In the result, the contention that the prosecution is barred by limitation u/s

161(1) of the Bombay Police Act must fail and the appeal must be, heard on merits.