
(1952) 08 BOM CK 0010
In the Bombay High Court

Narsayya Lachmayya

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 27-08-1952

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 107
Penal Code, 1860 (IPC) — Section 332

Citation : (1953) CriLJ 1569

Hon'ble Judges : Sen, J

Bench : Single Bench

Judgement

Sen, J.—The applicant Narsayya was convicted and sentenced to 6 months" rigorous imprisonment u/s 332, Penal Code, for causing hurt to Pandharinath (P.W. 4), a public servant in execution of his duties. His conviction and sentence were upheld in appeal by the 1st Additional Sessions Judge, Akola.

2. The applicant is a resident of Malipura in Akola. He occupied the first storey of the building belonging to Harroon Seth. Mst. Gangu is his wife and Mst. Laxmi Is his daughter. Laxman is his son. On 5.10.1950, separate proceedings u/s 107, Criminal P.C. were started against the applicant, the members of his party and the party of Laxman Dhobi of Nawabpura. An application was made for issuing warrants of arrest. Shri J.Y. Deshmukh, magistrate first class, issued the warrants u/s 114 of the Code for the arrest of the applicant and the members of both the parties. The warrant against the applicant is Ex. P-22. Pandharinath, who was Station Officer to rifle range, Akola, within whose jurisdiction the applicant lived, received the warrant Ex. P-22 and some other warrants for execution on the same date in the evening. He went to the house of the applicant at about 7.30 p.m. for arresting him. He took with him Baburao (P.W. 8) and some constables.

3. The case of the prosecution briefly stated is as follows. The applicant was in his house. Pandharinath told him that there was a warrant of arrest against him and asked him to come out of the house. The applicant came out to the gallery

of the first floor and started abusing him. Pandharinath told him that it was no use abusing him as the warrant was issued by a magistrate and he was entrusted with the duty of executing it. The applicant, however, continued to abuse him. A big crowd gathered there Pandharinath, therefore, sent telephonic message to the District Superintendent of Police and the Town Inspector B.P. Dubey (P.W. 13) to send additional police force for help. Narsanna (P.W. 2), sub-Inspector, Amarpalsingh (P.W. 6), head constable, Abdul Kuddus (P.W. 3), head constable, and other police officials went to the spot. Later Abdul Rahim (P.W. 5) and B.P. Dubey also proceeded to the spot. The latter told the applicant that there was a warrant against him and that he should surrender. The applicant persisted in abusing them and stones were thrown from his house. The police officials were hit by the stones. Dubey asked Pandharinath to break open the door and effect his arrest. Pandharinath went up followed by S.I. Deshmukh, Abdul Kuddus, Amarpalsingh and some constables. The door of the upper storey was closed from inside. He knocked the door for about ten to fifteen minutes. The applicant, however, suddenly opened the door and gave a kick to him with the result that he rolled down the stair-case. Thereafter the door of the house was opened by means of a hammer. Pandharinath with some persons entered the room. The applicant attacked him with a stick. The members of his family had also joined in attacking the police party. The applicant was arrested and brought down. As he had injuries, he was taken to the hospital in a bus Pandharinath made a report Ex. P-1 at 10.45 p.m.

4. Pandharinath produced a cane Article A and a piece of stick Article B. They were duly seized. As Pandharinath, S.I. Narsanna, head constables Abdul Kuddus and Amarpalsingh, Namdeo, Pundlik, Newritti, Sheikh Haider, Kamruddin, Ramchandra and Sitaram had injuries, they were sent to the hospital for examination. The injury reports are Exs. P-4 to P-15. Laxman, Narsamma, Laxmi and Nirmala were examined and the injury reports are Exs. P-15, P-16, P-17 and P-19. The injury report of the applicant is Ex. P-23. As he had fractures, an X-ray photograph was taken on 7.10.1950 by Shri G.S. Nakade (P.W. 11), Assistant Medical Officer. Gangu, Laxman, Narasamma and Laxmi were also prosecuted along with the applicant. They were charged u/s 353, but were acquitted as the magistrate did not believe that they had thrown stones and stick at the police party.

5. The applicant in his examination admitted that Pandharinath had come to his house in the evening, but denied that any warrant was shown to him. He was not aware that proceedings u/s 107 of the Code had been started against him. He did not abuse or kick Pandharinath. He did not beat him with the stick article A. On the other hand, he was beaten severely and he became unconscious. He did not obstruct Pandharinath in the discharge of his duties. He declared that he had told Pandharinath that he would come out of the house in the morning. In his defence, he declared that he had not resisted the arrest. The police had assaulted and had falsely prosecuted him. He examined two witnesses Haridutt and Madhao in support of his defence.

6. The first contention of Shri M.N. Phadke, learned Counsel for the applicant, is that the warrant was not a valid warrant. As no order u/s 112, Criminal P.C. was passed, the magistrate was not competent to issue a warrant u/s 114. The warrant was not issued in exercise of the powers u/s 107(3) of the Code. He urged that the view of the learned Additional Sessions Judge contained in the following passage is erroneous:

The proper section, in my opinion, is Section 107(3), which empowered Shri Deshmukh to issue a warrant of arrest against the appellant, even in the absence of initiation of proceedings u/s 107(1). Shri Deshmukh, in my opinion, appears to have acted u/s 107(3), though it appears Section 114 was erroneously mentioned in the warrant. Quoting of a wrong section in the warrant does not make it invalid. What has to be seen is whether the conditions for issue of a warrant u/s 107(3), Cr.P.C. are satisfied & in my opinion, they were satisfied. The warrant will, therefore, be deemed to blunder Section 107 (3), Criminal P.C. and is a legal warrant.

The second contention is that Pandharinath was not authorized to execute the warrant. It was addressed to the City inspector and he alone could execute the warrant. It was no doubt open, to him to get it executed, but there was no endorsement on the warrant showing that Pandharinath was given the necessary authority. The third contention is that the warrant was not shown to the applicant and consequently there was no compliance of Section 80 of the Code. The last contention is that the applicant was justified in defending himself by using force. He had an apprehension that grievous hurt would be caused to him. There was no justification for the merciless beating to which he was subjected.

7. I am of opinion that the lower appellate Court was wrong in holding that Shri Deshmukhs had acted u/s 107(3), Criminal P.C. The trial Court had examined the record of the miscellaneous criminal case (No. 38 of 1950) u/s 107 against the applicant. It was of opinion that the warrant was issued u/s 114 and not u/s 107(3) of the Code. I sent for the record in order to find out whether Shri Deshmukh had acted u/s 107(3) or Section 114 in issuing the warrant against the applicant. The record had unfortunately been eliminated and could not, therefore, be examined by me. In view of the elimination of the record, I considered it necessary to examine Shri Deshmukh and S.V. Garde, the then station officer, Akola City, in this Court. It appears from the evidence of Garde that he produced the challans u/s 107 of the Code in the Court of the Sub-Divisional Magistrate, Akola. The Magistrate was on tour. He, therefore, went to the Additional District Magistrate, Shri Tobin, as he wanted warrants for the arrest of the applicant and other persons against whom the challans were filed. An application had been made for the issue of warrants. Shri Tobin passed an order directing Shri Deshmukh to deal with the cases. Both Garde and Shri Deshmukh are unable to remember the contents of the order. Thereafter Garde took the challans to Shri Deshmukh who examined him and gave the warrant Ex. P-22 and other warrants. The challans were sent to the Court of the Sub-

Divisional Magistrate, Akola by him. It is clear that he did not pass any preliminary order u/s 112 of the Code before issuing the warrant.

8. The first question is whether Shri Deshmukh acted u/s 107(3) or Section 114. He was a Food Officer and was not doing any criminal work at the material time. He was not empowered proceed under Sub-section (1) of Section 107. If he thought that a warrant was necessary to prevent a breach of the peace, he could have done so under Sub-section (3) of Section 107. He did not and could not act under this sub-section in view of the special authority given by the Additional District Magistrate to deal with the cases. The order of the Additional District Magistrate meant that Shri Deshmukh should take cognizance of the cases u/s 107(1) and take appropriate action. I hold that Shri Deshmukh did not Issue the warrant in exercise of the powers u/s 107(3).

9. A Magistrate acting u/s 107(1) is required to make an order in writing u/s 112. The relevant portion is as follows:

Where a Magistrate acting u/s 107 deems it necessary to require any person to show cause under such section, he shall make t an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

Section 114 empowers a Magistrate to issue warrant for the arrest of a person if there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person.

10. The question is whether a Magistrate can issue a warrant for arrest without issuing an order u/s 112 as contemplated by the Code. I am of opinion that he has no jurisdiction to do so unless he complies with the terms of Section 112 and passes an order. This will also be clear from Section 115 which says that:

every summons or warrant issued u/s 114 shall be accompanied by a copy of the order made u/s 112, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

An order must be passed u/s 112 before a Magistrate issues a warrant u/s 114. The lower appellate Court took the same view. It observed:

It will be seen, however, that the warrant purports to have been issued u/s 114, Criminal P.C. On going through the section, it appears to me that the warrant could not have been under the proviso to that section (which only empowers a magistrate to issue a warrant) for it could not have been issued unless an order u/s 112, Criminal P.C. had been passed. Admittedly, no order under the latter section had been passed.

11. In-Jatoi v. Emperor AIR 1926 Sind 288 it was held:

In an Inquiry u/s 110, Criminal P.C. a Magistrate derives jurisdiction to issue a warrant against a suspect only after he had passed an order u/s 112 of the Code and after he has satisfied himself that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by immediate arrest of the suspect.

In-Babu Ram v. Rex AIR 1949 All 21 (B), it was held:

A Magistrate has no power to order arrest with a view to his taking action u/s 107, Criminal P.C. unless the case falls u/s 107(3), that is to say, the Magistrate is not authorised to initiate proceedings under that section. Hence where there is an apprehension of a danger of breach of peace and the Magistrate present on the spot is empowered to proceed u/s 107, it is irregular for the Magistrate to arrest some persons on the spot and then start proceedings u/s 107. The proper course in such case is to formulate then and there an order u/s 107 read with Section 112 and serve it on the persons concerned and then it would be open for the Magistrate to order their arrest u/s 114.

12. The failure of the Magistrate to pass an order was not a mere irregularity, but constituted an illegality. There is an express breach of a mandatory provision of law if a warrant is issued without making an order in writing u/s 112. In-Emperor v. Antoo Cri. Revn. No. 472 of 1946, D/- 10.1.1947 (Nag) (C), the point was whether a warrant of arrest could be issued u/s 117(3) without an order u/s 112. Sub-section (3) of Section 117 reads as follows:

Pending the completion of the inquiry under Sub-section (1) the Magistrate if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order u/s 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed, or in default of execution, until the inquiry is concluded:

Provided that:

(a) no person against whom proceedings are not being taken u/s 108, Section 109, or Section 110, shall be directed to execute a bond for maintaining good behaviour, and

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order u/s 112.

Hemeon, J. held as follows:

Section 117 clearly contemplates that the order u/s 117(3) shall be passed after the order u/s 112 has been made and read or explained to the person concerned u/s 113 and it follows that an order passed u/s 117(3) before such reading or

explanation is passed prematurely. This too was the view taken in-Emperor v. Sidik Ghulam AIR 1943 Sind 163 and in-Emperor v. Yusif Jumo AIR 1943 Sind 175, in which it was also held that the failure to comply with the provisions of Section 117(1) was not a mere irregularity but an illegality which went to the root of the proceedings.

The same principle is applicable here. I consider that the Passing of an order u/s 112 cannot be regarded as a mere formality. A Magistrate-cannot proceed further unless he passes such an order. It is the duty of Magistrate to conform strictly to the provisions of law relating to the issue of warrants for arrest. I hold that the warrant P-22 issued for the arrest of the applicant was invalid. Pandharinath. sub-inspector, who took the warrant and was attacked in the course of execution of the warrant could not, therefore, he said to be acting in discharge of his duties. In-Provincial Govt. C.P. and Berar v. Nonelal AIR 1946 Nag 261, it was held:

The words "in the discharge of his duty as such public servant" mean in the discharge of a duty imposed by law on such public servant in the particular case and do not cover an act done by him in good faith under colour of his office.

The conviction and sentence u/s 332 cannot, therefore, be sustained and the applicant must be acquitted of the charge. It is not necessary in this view to consider the remaining arguments regarding the mode of execution of the warrant.

13. The finding that the applicant had caused hurt to Pandharinath is not open to challenge as it is supported by evidence. Both Courts have believed the evidence in respect of the attack on Pandharinath by the applicant. The evidence of defence witnesses is inconclusive and cannot prevail against the evidence of persons who witnessed the actual attack.

14. Learned Counsel for the applicant, however, contended that the applicant was protected by Section 97, Penal Code. I am unable to agree. He had no apprehension that grievous hurt would be caused. Section 99 lays down that there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable, by law. The evidence is to the effect that Pandharinath told the applicant that there was a warrant against him and he should surrender. The applicant refused to come out of the house and said that he would do so next morning. Pandharinath acted in the belief that it was his duty to execute the warrant and arrest the applicant. The right to private defence did not extend to the act of kicking Pandharinath and beating him with a stick. On a careful consideration of the circumstances and evidence, I hold the applicant guilty u/s 323, Penal Code.

15. The last question is about sentence. The applicant's age is said to be about 65. He was beaten and he received numerous injuries when he was arrested. It is true that the fractures were old and were not the result of beating. The

applicant became unconscious according to Pandharinath immediately after arrest. It has to be borne in mind that the sole charge against the applicant was that he had caused hurt to Pandharinath alone. There was no charge in aspect Of the injuries to other police officials. In the circumstances a sentence of fine will meet the end of justice. I order the applicant to pay a fine of Rs. 100-0-0. In default, he shall suffer one month's rigorous imprisonment.