

(2021) 03 J&K CK 0050
In the Jammu And Kashmir High Court
Case No : Criminal Appeal (D) No. 7 Of 2020

National Investigation Agency

APPELLANT

Vs

Mohd. Iqbal Rather And Another

RESPONDENT

Date of Decision : 24-03-2021

Acts Referred:

National Investigation Agency Act, 2008 — Section 21
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 120B, 121, 121A, 122, 123, 307
Arms Act, 1959 — Section 7, 25, 26, 27, 35, 39
Unlawful Activities (Prevention) Act, 1967 — Section 16, 18, 19, 20, 21, 38, 39, 45(1)
Code Of Criminal Procedure, 1973 — Section 4(e), 155(1), 155(2), 173, 196, 196(1A), 196A, 196B
Explosive Substances Act 1883 — Section 4, 5, 7
Indian Wireless And Telegraphic Act, 1933 — Section 6(1A)
Foreigners Act, 1946 — Section 14(c)

Citation : (2021) 03 J&K CK 0050

Hon'ble Judges : Rajnesh Oswal, J;Dhiraj Singh Thakur, J

Bench : Division Bench

Advocate : Vishal Sharma

Final Decision : Allowed

Judgement

1. This is an appeal under Section 21 of the National Investigation Agency Act, 2008, against the order dated 25.02.2020 passed by the learned Special Judge, NIA, Jammu, to the extent the accused respondents herein have been discharged under Sections 120-B and 121-A RPC in RC No.29/2018/NIA/DLI and RC No.30/2018/NIA/DLI.

2. Briefly stated the material facts are stated as under:

3. An FIR bearing No.89/2018 dated 12.09.2018 came to be registered in P/S Jhajjar Kotli, Jammu under Sections 307, 120-B, 121, 122, 123 RPC and Sections 7, 25, 26, 27 of Arms Act as also under Sections 16 and 18 of the Unlawful Activities (Prevention) Act, 1967, in relation to a firing incident by some unknown

terrorists with automatic weapon on the police party of P/S Jhajjar Kotli on the Jammu-Srinagar National Highway on the same date.

It appears that the terrorists who were hiding in the truck managed to escape from the spot and subsequently three of them were neutralized on 13th September, 2018 in Village Dhirthi in the jurisdiction of P/S Katra in which it is stated that some security personnel were also injured. A large number of arms and ammunitions, explosive substances etc, were recovered near the bodies of the slain terrorists. Accordingly, FIR No.191/2018 dated 13th September, 2018 under Sections 307, 120-B, 121, 122, 123 RPC as also Sections 7, 25, 26, 27 of the Arms Act, 1959, along with Sections 16, 18, 38 of the Unlawful Activities (Prevention) Act, were registered at P/S Katra.

4. Subsequently, vide orders dated 24th September, 2018 and 27th September, 2018, issued by the Ministry of Home Affairs, Government of India, the NIA re-registered the cases as RC No. 29/2018/NIA/DLI dated 25.09.2018 and RC No.30/2018/NIA/DLI dated 28.09.2018 arising out of FIR No.191/2018 of P/S Katra and FIR No.89/2018 of P/S Jhajjar Kotli, respectively. Investigation is stated to have been initiated and both the cases were clubbed with the approval of the competent authority and upon investigation, the following offences were stated to have been made out against the respondents. Mohammad Iqbal Rather: Under Section 307 RPC, under Sections 7/25 and 35 of the Arms Act, 4/5 Explosive Substances Act, 13, 18, 19,20,21, 38 and 39 of the Unlawful Activities (Prevention) Act, 6(1A) Indian Wireless Telegraphy Act, 1933 and 14 (C) Foreigners Act read with Section 120-B and 121-A RPC. Reyaz Ahmad Nengroo: Under Sections 307 RPC, Sections 7/25 and 35 of the Arms Act, 4/5 Explosive Substance Act, 13, 18, 19, 20, 21, 38 and 39 of the Unlawful Activities (Prevention) Act, 6(1) Indian Wireless Telegraph Act, 1933 and 14(C) Foreigners Act read with Section 120-B and 121-A RPC.

5. According to the appellant, upon completion of the investigation, an investigation report was sent to the District Magistrate Reasi and the District Magistrate, Jammu. On the basis of this report a complaint under Section 196 and 196-A of the Code of Criminal Procedure for prosecution of the accused for the offences under Section 120-B read with Section 121-A of the RPC was forwarded by the competent authority i.e., District Magistrate, Reasi and District Magistrate, Jammu, to the NIA Court at Jammu. Not only this, before filing the charge sheet in the instant case, sanction for prosecution under Section 45(1) of Unlawful Activities (Prevention) Act, 1967, had been obtained from the Ministry of Home Affairs, Government of India. Apart from this, sanction for prosecution under Section 7 of the Explosive Substance Act and under Section 39 of the Arms Act from the District Magistrate, Reasi and District Magistrate, Jammu, which were enclosed with the charge sheet had been obtained.

6. The learned Special Judge NIA, Jammu, after hearing the parties, by virtue of the impugned order dated 25.02.2020 framed charges against the respondents under Section 307 RPC, Sections 7/25, 35 of the Arms Act, Section 4/5 of

Explosive Substance Act, Sections 13, 18, 19, 20, 21, 38 and 39 of the Unlawful Activities (Prevention) Act, Section 6(1A) Indian Wireless and Telegraph Act and Section 14(c) Foreigners Act read with Section 120-B RPC and at the same time ordered their discharge under Section 121-A of RPC.

7. On a perusal of the order impugned, it can be seen that the trial court appears to have discharged the respondents under Section 121-A of RPC, on the ground that no cognizance can be taken in the matter in respect of the said offence, in the absence of a complaint of the District Magistrate, Reasi, as defined under Section 4(e) of the CrPC and without the conduct of a preliminary investigation as provided under the relevant provisions of Section 196-B of the CrPC. Reliance was also placed upon the judgment reported at 2018(1) JKJ page 3 Abdul Latief and others v. State and another, decided on 12.10.2017.

8. Learned ASG, Mr. Vishal Sharma, has vehemently challenged the order impugned inter alia on the ground that the view expressed by the court below was legally unsustainable. Reliance was placed upon two judgments of the Apex Court reported at AIR 1965 SC 1185: Pravin Chandra Mody v. State of Andhra Pradesh and 1996(6)SCC 435 : State of Orissa v. Sharat Chandra Sahu.

9. At this stage, we deem it appropriate to refer to a few legal provisions. Section 121 of the RPC envisages that whoever wages war against the Government of India or attempts to wage such war or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

Section 121-A of the RPC, envisages that whoever within the State or any other place within or without India conspires to commit any of the offences punishable by section 121 or conspires to overawe, by means of criminal force or the show of criminal force, the Government or the Government of India or any other State Government in India, shall be punished with imprisonment for life or with imprisonment of either description which may extend to ten years and shall also be liable to fine.

Section 120-B(1) envisages that whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence. Section 120-B(2) envisages that whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine, or with both.

Section 196-A of the Code of Criminal Procedure, inter alia envisages that no court shall take cognizance of the offence of criminal conspiracy punishable under section 120-B of the Ranbir Penal Code, in a case where the provisions of Section 196 apply, unless upon a complaint made by or under the authority from the Government or some officers empowered by the Government in this behalf.

Section 196-B of the CrPC envisages that in the case of any offence in respect of which the provisions of section 196 or section 196-A apply, a District Magistrate may, notwithstanding anything contained in those sections or in any other part of this Code, order a preliminary investigation by a police officer not being below the rank of Inspector, in which case such police officer shall have powers referred to in section 155, sub-section (3).

10. On a perusal of the order impugned, it can be seen that the learned Special Judge NIA Court, has discharged the accused/ respondents for the offences punishable under Section 121-A and 120-B, firstly on the ground that there was no preliminary investigation as provided in Section 196-B of CrPC got conducted by the District Magistrate and secondly that communication dated 2nd March, 2019 did not at all par take the character of a complaint as defined in Section 4(e) of the Code of the Criminal Procedure.

11. Section 4(e) of the CrPC as was then applicable to the State of Jammu & Kashmir defines a complaint to mean allegations made orally or in writing to a Magistrate that some persons whether known or unknown has committed an offence. It further envisages that the complaint does not include the report of a police officer.

12. In *Bhimappa Basappa Bhu Sannavar v. Laxman Shivarayappa Samagouda & Ors* : 1970(1) SCC 665, the Apex Court held that there was no particular form prescribed for filing a complaint nor did the CrPC lay down how the same had to be drafted. It held that all that was necessary to do was that the complaint must disclose commission of an offence and contain necessary facts for a Magistrate to take action.

In this backdrop, it can be seen that the District Magistrate, Reasi, vide his communication dated 2nd March, 2019 to the learned Special NIA Court recorded his satisfaction based upon the detailed investigation report prepared after due investigation that offences mentioned therein against each of the accused whose names figured in the said communication were liable to be prosecuted under Section 120-B read with Section 121-A of the RPC. It was in those circumstances that the communication specifically in paragraphs 6 and 7 recorded as under:

"6. And whereas, perusing the Investigation Report and other documents on record, I am satisfied that a complaint for prosecution U/s 120-B read with Sections 121-A of Ranbir Penal Code, 1989, is made out in this case against the accused persons as the case may be.

7. In view of the above, this complaint may be pleased admitted in terms of Section 196-A of Cr.P.C."

13. Considering the ratio of the judgment of the Apex Court in *Bhimappa Basappa Bhu Sannavar v. Laxman Shivarayappa Samagouda & Ors*, it cannot be said that the communication did not par take the character of a complaint as envisaged under Section 196-A of the CrPC. The view expressed by the learned

Special Judge NIA Court to that extent is unsustainable in law.

14. Sections 120-B and 121-A of the Ranbir Penal Code admittedly pertain to offences which are not cognizable. According to Section 155(2) of the Code of Criminal Procedure Svt. 1973 as was applicable then in the erstwhile State of Jammu, specifically envisaged that 'no police officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial'. The Code of 1989 did not have any comparable provision as 155(4) of the Central Criminal Procedure Code, 1973 which provides as under:

"Where a case relating to two or more offences of which atleast one was cognizable one, the case shall be deemed to be a cognizable case, notwithstanding the fact that other offences were non-cognizable."

15. That notwithstanding the absence of provision like 155(4) in the Code of Criminal Procedure, 1989, Justice Falshaw, in the judgment reported at AIR 1958 Punjab 172 : Ram Krishna Dalmia v. State, observed that the provisions of Section 155(1) of the Code must be regarded as applicable in those cases where the information given to police is solely about a non-cognizable offence and further that the Investigating Officer while investigating a cognizable offence could not be possibly debarred from investigating any subsidiary and non-cognizable offence which may arise out of those facts and further that those could also be included in the main investigation report under Section 173 Cr.P.C. This view was subsequently upheld by the Apex Court in Pravin Chandra Mody v. State of Andhra Pradesh : AIR 1965 SC 1185, where in paragraph 6, Hidayatullah, J, while referring to the case of Ram Krishna Dalmia held:

".....Where the information discloses a cognizable as well as a non-cognizable offence the police officer is not debarred from investigating any non-cognizable offence which may arise out of the same facts. He can include that non-cognizable offence in the charge-sheet which he presents for a cognizable offence. We entirely agree. Both the offences if cognizable could be investigated together under Chapter XIV of the Code and also if one of them was a non-cognizable offence.

16. Following the ratio of these judgments, it can be seen that although the offences under Section 120-B and 121-A RPC were non-cognizable yet on account of the closely interwoven facts which might have emerged during the course of investigation arising out of the incident which was being investigated by the police agency in terms of the FIR registered against the accused, it cannot be said that the investigation into the offences which were non-cognizable under Section 120-B and 121-A was in any manner contrary to the provisions of Section 155(2) of the Code of Criminal Procedure, Svt. 1989.

17. It needs to be noticed that it was pursuant to the decision of the Apex Court on this issue that an amendment was incorporated in 1973 where Section 155(4) was incorporated.

18. The next issue that arise for consideration is whether any preliminary investigation was required to be ordered in terms of Section 196-B CrPC by the District Magistrate before filing the complaint?

On a perusal of Section 196-B, it can be seen that it vests in the District Magistrate the discretion to order a preliminary investigation by a police officer not below the rank of an Inspector in the case of any offence in respect of which offence Section 196 or 196-A apply.

19. By adopting the rule of literal interpretation as regards the interpretation of statutes, the word 'may' figuring in Section 196-B to our mind cannot be construed to mean to as 'shall'. In any case, Section 196-B cannot be construed to mean that an investigation initiated other than by way of a direction emanating from the District Magistrate, could never become the basis of a complaint by the empowered officer in terms of Section 196-A.

20. In the present case, a detailed investigation appears to have been conducted on the basis where of the District Magistrate has recorded his satisfaction and issued a communication dated 2nd March, 2019 which can be said to be nothing but a complaint in terms of Section 4(e) of the CrPC. If we were to hold that the complaint could have been filed by the District Magistrate only upon the basis of a report obtained in a preliminary investigation ordered by none else than a District Magistrate himself, then in that case it would make redundant the provisions of Section 156 of the CrPC which authorizes any officer-in-charge of a police station without the order of a Magistrate to investigate any cognizable case which a Court having jurisdiction over the local area within the local limits of such station would have power to inquire into or try under the provisions of Chapter XV. For purposes of reference Section 156 of CrPC is reproduced as under:

"156. Police officer's power to investigate cognizable case.-

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned."

21. A bare perusal of the aforementioned provisions would make it clear that once information is received in regard to commission of cognizable offence by an officer in charge of a police station, such officer in terms of Section 154 is required to reduce it into writing and is also required to investigate the same in

terms of Section 156. Reference in this regard can also be made to the Apex Court judgment in *Lalita Kumari v. Government of Uttar Pradesh & Ors.* : (2014) 2 SCC 1. Even otherwise the Apex Court in *State of Karnataka and another v. Pastor P. Raju* : (2006) 6 SCC 728 in para 8 held:

"8.....the bar created by the provision is against taking of cognizance by the Court. There is no bar against registration of a criminal case or investigation by the police agency or submission of a report by the police on completion of investigation, as contemplated by Section 173 Cr.P.C. If a criminal case is registered, investigation of the offence is done and the police submits a report as a result of such investigation before a Magistrate without the previous sanction of the Central Government or of the State Government or of the District Magistrate, there will be no violation of Section 196(1-A) Cr.P.C. and no illegality of any kind would be committed."

22. Be that as it may, we have no hesitation in holding : (a) that the investigating agency could have investigated not only the offences which were cognizable but even those which were non-cognizable in terms of the ratio laid down in *Ram Krishna Dalmia v. Statet* (Supra); (b) that it was not mandatory for the District Magistrate to first order a preliminary investigation before filing a complaint in terms of Section 196-A of the Code of Criminal Procedure, Svt., 1989; and (c) that the communication dated 2nd March, 2019 can be said to be a complaint in terms of Section 196-A of the Code of Criminal Procedure, Svt., 1989.

23. For the reasons mentioned above, we cannot persuade ourselves to accept the view expressed by the NIA Court to the extent of discharging the respondents for the offences punishable under Section 120-B and 121-A of the RPC. The impugned judgment and order to that extent is, therefore, set aside. Trial Court is directed to frame the charges for commission of offence under Section 121-A and 120-B RPC.