

(1993) 09 PAT CK 0044

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 168 of 1992

Raj Mangal Ram

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 20-09-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 195
Epidemic Diseases Act, 1897 — Section 2(1)
Penal Code, 1860 (IPC) — Section 172, 173, 174, 175, 176

Citation : (1993) 2 PLJR 776

Hon'ble Judges : S.N. Jha, J; S.K. Chattopadhyaya, J

Bench : Division Bench

Advocate : Kaushalendra Kumar Sinha, for the Appellant; Jagannath Jha, for the Respondent

Final Decision : Allowed

Judgement

S.N. Jha and S.K. Chattopadhyaya, JJ.—The petitioner seeks quashing of the First Information Report of Sakra P.S. Case No. 49 of 1991 u/s 188 of the Indian Penal Code and the resultant investigation. The petitioner is a member of Bihar Administrative Service. At the relevant time he was posted as Child Development Project Officer attached to Bochahan and Sakra Blocks in the district of Muzafarpur. It is said that the Prakhand Vikas Padadhikari of Sakra asked for the names of Lady Supervisors working under him. After the names were furnished to him they were attached with different Mukhiyas of the Block. The petitioner lodged a protest expressing his reservation as the jurisdiction of the Prakhand Vikas Padadhikari to pass any such order. It is said that the Prakhand Vikas Padadhikari took umbrage at the objection and by bringing the Pramukh of the Block in collusion got a written report lodged with the police on 4.3.92 on the basis of which the aforementioned case has been registered. According to the complaint, the petitioner is alleged to have disobeyed the directives of the District Magistrate and thereby has committed the offence u/s 188 Indian Penal Code in terms of clause 9 of the Regulation framed under the Epidemic Diseases

Act.

2. In our opinion, the prosecution of the petitioner has to be quashed for two-fold reasons, firstly because the ingredients of section 188 I.P.C. or, for that matter, any other offence is not made out, and secondly, on account of non-compliance of the provisions of section 195 Cr. P.C. Section 188 I.P.C. reads as follows :

188. disobedience to order duly promulgated by public servant.-- Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, of risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

A perusal of the section, inter alia, makes two things clear, firstly that the order alleged to have been disobeyed must be one which has been promulgated by the public servant concerned, and secondly, that it must be intended to direct persons to abstain from certain property which is in their possession or under their management. We shall consider the question, as to whether a directive issued by the superior authority to his subordinate can tantamount to promulgation later. Before that we would like to make it clear that except where the order relates to certain property in possession of or under the management of the person (s) concerned where positive orders may be passed, the section envisages orders which are negative in nature restraining persons from doing certain act. In the instant case it appears that the District Magistrate, Muzaffarpur, had issued certain instructions or directives to his subordinates including the petitioner in relation to implementation of the anti-Kalazar scheme. We have reservations as to whether an order of such a nature can be said to be an order either relating to property in one's possession or under one's management or directing him to abstain from certain act. We have more serious reservations in accepting the plea of the State that issuance of administrative direction by a superior authority to his subordinate would amount to promulgation of order. In *Nandalal Mitra v. State* (AIR 1968 Calcutta, 523) the Calcutta High Court observed that the term "promulgation" in the context of section 188 connotes two ideas, (i) making known of an order, and (ii) the means by which the order is made known. It was stated that the mode of making known the order must be something done openly and in public, such as, making it known by beat of drum or in a gazette or by reading it in open to public. On this

construction of the term "promulgation", with which we find ourselves in respectful agreement, it is difficult to countenance that mere issuance of administrative instruction contained in letters etc. would amount to promulgation of the order.

3. Counsel for the State, however, pointed out that the temporary regulation framed by the State Government u/s 2 (1) of the Epidemic Diseases Act, 1897, has been published in the official gazette dated 30.11.91 and, therefore, the order must be deemed to have been duly promulgated. Before we refer to the regulation we may point out that the written report (Annexure-1) does not contain any allegation as to contravention of any of its provisions. The only thing that has been stated is that the order of the District Magistrate has been disobeyed. As per the substantive provisions of the regulation, it is the duty of the residents of the locality to inform the municipality or other local bodies that so-and-so is suffering or suspected to be suffering from Kalazar. The regulation further lays down the procedure for taking preventive measures by the officers of the Health Department in the matter of prevention and eradication of Kalazar. Clause 9 provides that any contravention of the regulation will be an offence punishable u/s 188 Indian Penal Code. No allegation has been made in the written report that the petitioner had contravened any provision of the regulation. In absence of any such allegation it is not necessary to go into question as to whether any alleged violation of the regulations per se could attract the mischief of section 188 at all.

4. Reliance on behalf of the State was placed on *J. Choudhary v. The State* (AIR 1963 Orissa, 216). The facts and the point in issue in that case were quite different. The person concerned had refused to get himself inoculated against cholera on the ground that he was Homoeopathic practitioner and according to his belief inoculation is injurious to health and that he had already taken preventive measures. The point canvassed before the learned Judge was whether by reason of the provisions of the Orissa Homoeopathic Act, 1956, recognising homoeopathy as a system of medicines in the State of Orissa, it was open to the accused to take the plea. The Court did not accept the plea of the accused on the ground that no exception clause had been included in the regulation under the Epidemic Diseases Act and, therefore, the accused could not be absolved of the liability of the contravention of the regulation. A token fine was imposed. It would be preposterous if a subordinate authority were to be prosecuted merely because it disobeyed the administrative direction of the superior authority. Such an act of disobedience would, no doubt, amount to dereliction of duty and misconduct and may in appropriate cases occasion administrative action, but in our considered view, cannot constitute a criminal offence.

5. Before we conclude the discussion on the point we would like to refer to the case of *Kali Prosunna Ghose* (7 Calcutta Law Reports, 575) where a person had been convicted for violation of an order of the Deputy Commissioner calling upon the landlord of the village under the relevant Tenancy Law to nominate a village

Watchman. A Division Bench of the Calcutta High Court held that neglect to nominate a watchman pursuant to an executive order of the Deputy Commissioner cannot bring the case under the purview of section 188. The conviction, accordingly, was set aside. No authority taking contrary view has been brought to our notice by either side.

6. The prosecution is fit to be quashed in view of the provisions of section 195 Criminal Procedure Code as well. That section prohibits the court from taking cognizance of any offence punishable under sections 172 to 188 (both inclusive) of Indian Penal Code, or of any abetment of, or attempt to commit any such offence or of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Even if it is assumed that the ingredients of section 188 are made out it is obvious that the prosecution could be launched only on the basis of complaint made by the public servant concerned, namely, the District Magistrate, Muzaffarpur, whose order is alleged to have been disobeyed or some other public servant to whom he is administratively subordinate and that too by lodging a complaint within the meaning of the Code and not lodging a first information report with the police. Counsel for the State, plainly enough, was not in a position to take the stand that the Pramukh who has also described himself as the Chairman of the Kalazar Eradication Campaign Committee is administratively superior to the District Magistrate whose direction is alleged to have been disobeyed by the petitioner. It is true that the case is still in the stage of investigation and the stage of cognizance has not come as yet so as to make the bar of section 195 Cr. P.C. applicable. But if ultimately the court cannot take cognizance on the basis of police report, the investigation will be a futile and uncalled for exercise. In our opinion, for the reasons stated above, we are satisfied that the prosecution of the petitioner, in the facts of the case, would be abuse of process of law. The instant case comes in category of rarest of rare cases. Accordingly, the investigation in Sakra P.S. Case No. 49 of 1991 u/s 188 I.P.C. is quashed. The application is, thus, allowed.

S.K. Chattopadhyaya, J.

I agree.