

(1994) 08 BOM CK 0065

In the Bombay High Court

Case No : Criminal Revision Application No. 192 of 1993

Shri Maroti Kaharade

APPELLANT

Vs

The State of Maharashtra and Another

RESPONDENT

Date of Decision : 01-08-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 155, 173, 198
Penal Code, 1860 (IPC) — Section 497

Citation : (1996) 1 BomCR 371 : (1994) MhLj 1720

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : S.U. Nemade, for the Appellant; Kishor Pande, Assistant Public Prosecutor for Non-applicant No. 1 and Mohan Sudame, for Non-applicant No. 2, for the Respondent

Judgement

V.S. Sirpurkar, J.—The applicant herein challenges the judgment passed by the Judicial Magistrate, First Class, Digras, by which he has acquitted original accused Nos. 1 and 2 for the offence u/s 497 of the Indian Penal Code. The present revision is in the nature of a revision against the acquittal and the complainant (applicant herein) seeks retrial thereby of the accused.

2. This case is a classic example of the callous, ignorance on the part of the investigating agency, Court, Police Prosecutor and the defence, of the provisions of the Criminal Procedure Code. The present complainant filed a report against accused No. 1, Anandrao Gulabrao Gawande, and alleged therein that he had committed adultery with his wife Usha, without his consent. This offence u/s 497, Indian Penal Code, being a non-cognizable offence, the Police Station Officer of Digras Police Station sought a permission of the Judicial Magistrate, First Class, Digras, for investigating this offence. The illegality crept in there itself. Section 155 specifically creates a bar against the investigation by a police officer, in case of a non-cognizable offence. All that a police officer can do is to enter the substance of information in a book to be kept in the prescribed form and refer the informant to the Magistrate. Section 155(2) creates a specific bar and there

is no doubt about the provisions that unless a police officer has obtained permission in that behalf from the competent Magistrate, he shall not investigate into a non-cognizable offence. In this application dated 12-12-1989, it was stated by the Police Station Officer, Digras, that there was a report made to the police station on 20th July, 1989, but since that was not a cognizable offence, the further steps were taken and the complainant was sent to the Court of the Magistrate. However, in the second paragraph, it has been specifically stated that since the offence was of non-cognizable nature, the permission to investigate was liable to be granted. There appears to be an order passed on 12-12-1989 that the permission was so granted.

3. Now, as a matter of fact, even if this permission was granted and even if in pursuance of such permission, the investigation could be commenced, yet such investigation would be rendered futile for the simple reason that as a result of this investigation, no report u/s 173 of the Criminal Procedure Code could be filed, muchless on such report, the Magistrate could not have taken a cognizance. The provisions of section 198 of the Criminal Procedure Code are mandatory in nature. Section 198 applies to all the offences which are covered under Chapter XX of the Indian Penal Code and it provides specifically as under :

"198(1) No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code, except upon a complaint made by some person aggrieved by the offence :

Provided that -

(a) where such person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the local customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf."

Proviso (b) speaks of the contingency where such person is the husband and he is serving in any of the Armed Forces. In that contingency, it is provided that some other person authorised by the husband may make a complaint in that behalf. Further, proviso (c) to sub-section (1) of section 198 enumerates the persons who could be said to be the aggrieved person in an offence u/s 494 or section 495 of the Indian Penal Code, if the complainant is a wife. There is nothing in whole section 198 of the Criminal Procedure Code which entails the Court to take a cognizance of the offences under Chapter XX in any other manner except as provided in the said section.

4. It will be seen that throughout this section, the word "complaint" is used signifying that it is only on a "complaint" by aggrieved person that a Magistrate may take cognizance and in no other manner. "Complaint" is defined in Criminal Procedure Code as under :

"2(d)- "Complaint" means any allegation made orally or in writing to a

Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report".

Thus, the terms "complaint" and "police report" are mutually exclusive. One cannot be other and vice versa. Therefore, on an investigation by police, where a police report was submitted in respect of the offence u/s 497 of the Indian Penal Code, the Court could not take the cognizance at all. Where the Court could not have taken cognizance on the basis of police report on investigation, then there was no question of permitting such investigation under the provisions of section 155(2) of the Criminal Procedure Code. The learned Magistrate should have straightway realised this. One, therefore, fails to understand as to how the learned Magistrate proceeded to permit the investigation for the offence and thereafter took the cognizance on the report filed by police on that investigation.

5. Thus, the investigation of this offence, the filing of the charge-sheet for an offence u/s 497 of the Indian Penal Code, the taking of the cognizance of that offence and further continuation of trial are absolutely illegal. It is obvious that no party, either the Court or the Prosecutor, bothered to consult the Criminal Procedure Code before proceeding with the matter.

6. There appears to be an application on record, whereby an objection is raised by the original accused No. 2, a lady, that the police had no right to accept the report to investigate on that basis and to file the charge-sheet. Again, it had been reiterated further that the Court should not have taken cognizance against the accused No. 2 and the said cognizance was without jurisdiction and, therefore, it should be quashed. A long reply has been filed by the prosecution wherein the only defence appears to be that the said charge-sheet was filed with the permission of the Court. It should not have been forgotten that there was absolutely no power in the Court to grant such permission, particularly in view of the mandatory language of section 198 of the Criminal Procedure Code. However, this was not even adverted to. The application made by the original accused No. 2 also appears to be completely confused. She only contended that a lady, who was the wife with whom the alleged adultery was committed could not be made an accused. It is only on that ground that the application seems to have been made. Interestingly enough, there is a clearcut mention of section 198 of the Criminal Procedure Code in that application, and yet neither the prosecution nor the Court bothered to look into the provisions of section 198 and proceeded with the whole trial.

7. Of course, ultimately, in the judgment, the trial Court has held that it could not proceed against the accused No. 2, who was a wife, and has dropped the charges against her. However, in the wake of section 198 of the Criminal Procedure Code, which was specifically pointed out to the Court, the Court should not have taken the cognizance of the offence and as it had committed an error of taking cognizance, it should have itself dropped the proceedings. That the Court can drop the proceedings if the cognizance is illegally taken, has now been

accepted by the Apex Court. Such course could have been undertaken by the trial Court. However, the trial Court has obviously ignored everything, with the result that an illegality, which was created in the beginning, was perpetuated right till the judgment.

8. The original complainant (applicant herein) now is coming up in this revision application, challenging the acquittal of accused No. 1. The only thing that can be said about this revision application is that this application will have to be allowed. The judgment of acquittal and the whole proceedings will have to be quashed on the grounds indicated above. It is made clear that the present applicant may file a complaint or may pursue such other remedy as is open to him in law. With these observations, the following order is passed :

The impugned judgment of the trial Court and the whole proceedings are quashed and set aside as illegal and non est. The revision to that extent is allowed.