
(2009) 07 OHC CK 0004
In the Orissa High Court
Case No : Criminal M.C. No. 851 of 2007

Sri Debasis Panigrahi

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 29-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 193, 197, 197(1), 200
Penal Code, 1860 (IPC) — Section 120B, 307, 324

Citation : (2009) CLT 1536 (Suppl CrI) : (2009) CLT 1526 (Suppl CrI)

Hon'ble Judges : S.C. Parija, J;B.P. Das, J

Bench : Division Bench

Advocate : G.P. Dutta, M. Dutta, M.K. Swain, S.K. Mohanty and A. Ghose, for the Appellant; A.G.A. for O.P. No. 1 and S.N. Kar, for O.P. No. 2, for the Respondent

Final Decision : Allowed

Judgement

S.C. Parma, J.—This is an application u/s 482 Code of Criminal Procedure, assailing the order of the Sessions Judge, Cuttack dated 12.4.2004, passed in Criminal Revision No. 75 of 2005.

2. The complainant-opposite party No. 2 filed a complaint petition before the learned S.D.J.M.(S), Cuttack, which was registered as ICC No. 574 of 2005. In the said complaint, various wild and baseless allegations were made against the present Petitioner, who is a senior police officer of the State, as well as other police officers named therein, alleging that in spite of heavy police protection granted to her at the instance of this Court, some unknown criminals were entering into her residence at Kanika Road, Cuttack between 14.03.2005 to 21.03.2005 in the late night and assaulting her. It was alleged that the unknown criminals have been repeatedly opening the padlocks of the grill gate and kicking the bedroom door of her house, opening the same and assaulting her. It was further alleged that on 18.3.2005, she had reported the matter to the D.I.G. of Police (Central Range), Cuttack, but no action was taken and according to the

complainant, the entry of unknown criminals into her residence is due to the unholy alliance between the police officers and the unknown criminals.

3. Learned Magistrate recorded the initial statement of the complainant and in absence of any witness, considered the complaint petition as well as the initial statement and came to find as under:

On a bare perusal of the initial statement of the complainant, I find that she infers about an unholy combination of unnamed criminals and the police officers named in the complaint as accused Nos. 1 to 4 as despite presence of police in her house, she said unknown criminals could manage to enter into her bed room in the dead of the night between 14.3.2005 to 21.3.2005 and assault her. The complaint petition reveals that she had made allegation against the Supdt. of Police, Cuttack, before the Hon"ble Court and before Hon"ble Governor but since no iota of material is placed before the Court about the involvement of the Police Officers who are shown as accused Nos. 1 to 4 in the complaint, a bald statement of the complainant in her initial statement which appears to me to be based on mere conjectures and surmises does not at all convince me that a prima facie case against the said accused persons in so far as the offences u/s 324/120-B/307 I.P.C. exists.

4. Learned Magistrate also considered the medical papers filed by the complainant and came to find that the said documents did not prima facie establish the involvement of this Petitioner or the other accused persons in the alleged offences. On the merits of the allegations made in the complaint, learned Magistrate on a close scrutiny of the materials available on record and keeping in view the admitted fact that the complainant has been enjoying heavy police protection at her residence for last many years on the orders of this Court, came to hold that the allegations made in the complaint are patently absurd.

5. As the allegations made in the complaint was with regard to dereliction of official duty by the police officers named thereunder, learned Magistrate was of the view that prior sanction u/s 197 Code of Criminal Procedure was required to prosecute such police officers, who are public servant and the act alleged is with regard to their laches and negligence in discharge of their official duty. Accordingly learned Magistrate came to hold that prior sanction of the appropriate Government is required before taking cognizance and issuing process against the police officers named in the complaint.

6. In view of such findings, learned Magistrate proceeded to dismiss the complaint petition u/s 203 Code of Criminal Procedure

7. Being aggrieved by the order of the learned Magistrate dismissing the complaint petition, the complainant moved the Sessions Judge, Cuttack, in Criminal Revision No. 75 of 2005. By his order dated 12.06.2006, learned Sessions Judge set aside the order of the learned Magistrate and directed that the complainant should be noticed to produce her mother for examination and if the complainant so likes, she may produce any other documentary evidence if

any and thereafter learned Magistrate is free to consider whether there are materials before him to issue process against the accused persons, keeping in view the observation made thereunder.

8. It is this order of the learned Sessions Judge, which is under challenge in the present application filed by the Petitioner u/s 482 Code of Criminal Procedure

9. On a perusal of the impugned order, it is seen that the learned Sessions Judge has come to find that as the learned Magistrate had examined the complainant on oath, he should have recorded the finding that there was no material to issue process against the accused persons while dismissing the complaint petition and therefore the finding of the learned Magistrate that cognizance of the offence alleged in the complaint is not taken, is not correct. Learned Sessions Judge has further found that in Column No. 6 of the complaint petition, it had been mentioned that the mother of the complainant is the only witness to the alleged occurrence and admittedly she has not been examined. Learned Sessions Judge further found that neither the complainant filed a petition to produce her nor the Magistrate has directed the complainant to produce her mother for examination, the dismissal of the complaint petition, without examining the witness is improper. Learned Sessions Judge has also found that the Magistrate while considering issue of process against the accused persons is only required to be satisfied that there are materials showing a prima facie case for taking cognizance and he is not required to go into the correctness, probability or improbability of the allegations.

10. Learned Counsel for the Petitioner submitted that the learned Sessions Judge has committed apparent error by giving an opportunity to the complainant to examine her mother, when she had not chosen to produce any witness after recording of her initial statement by the Magistrate, in support of her complaint. The Magistrate had categorically found in his order that in Column No. 6 of the claim petition the name of the witnesses had not been mentioned, for which learned Magistrate did not take recourse u/s 202(2) Code of Criminal Procedure Moreover, as the complainant had not filed any petition seeking permission to examine her mother, not produced her mother for examination, the impugned direction given by the learned Sessions Judge amounts to granting further opportunity to the complainant to fill up the lacuna.

11. It is further submitted by the learned Counsel that as the Magistrate had scanned the allegations made in the complaint and the materials in support of the same and after elaborate discussion had come to the conclusion that the allegations made in the complaint are absurd and rejected the complaint petition u/s 203 Code of Criminal Procedure, the observations given by the learned Sessions Judge remanding the matter back and permitting the complainant to adduce fresh evidence in support of the complaint, is wholly improper and illegal. In this regard, it is submitted that as it was open for the complainant to produce witnesses and materials in support of the allegations made in the complaint and she having failed to do so and the learned Magistrate having passed orders on

merit, after applying his judicial mind to the allegations made in the complaint and the materials available on record in support of the same and also taking all relevant facts and circumstances into consideration, learned Sessions Judge was not justified in interfering with the same.

12. Learned Counsel has further submitted that even otherwise, as no cognizance can be taken by the learned Magistrate in absence of prior sanction of the appropriate Government, as required u/s 197 Code of Criminal Procedure, especially when the present Petitioner as well as the other police officers named therein are public servant and the allegations in the complaint is with regard to their inaction or negligence in discharging their duties, as has been found by the learned Magistrate, the non-consideration of the same by the learned Sessions Judge is wholly improper and illegal.

13. Learned Counsel for the complainant on the other hand submits that as serious allegations against senior police officers have been made in the complaint and no opportunity was provided to the complainant to substantiate the same by adducing evidence, learned Sessions Judge was justified in remanding the matter back and permitting the complainant to adduce further evidence and therefore no interference in the impugned order is warranted. It is further urged that the learned Magistrate was only required to consider the allegations made in the complaint petition and the materials produced in support of the same, to ascertain whether there are prima facie materials disclosing commission of any offence. It was not open for the learned Magistrate to delve into the merits and correctness of the allegations, which are subject matter of trial. Accordingly it is submitted that the dismissal of the complaint was not proper and justified.

Section 190 Code of Criminal Procedure Provides for taking of cognizance by Magistrate upon receipt of a complaint of facts which constitutes such offence or upon a police report of such facts or upon information received from any person other than a police officer or upon his knowledge that such offence has been committed. Section 200 Code of Criminal Procedure provides for examination of complainant and requires that a Magistrate taking cognizance of an offence on a complaint shall examine the complainant upon oath and the witnesses present, if any, and the substance of such examination to be reduced to writing. Section 202 Code of Criminal Procedure provides that the Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, may, if he thinks fit, postpone the issue of process against the offender and either inquire into the case himself or direct for investigation by the police, for the purpose of deciding whether there is sufficient ground to proceed against the accused. Section 203 Code of Criminal Procedure provides for dismissal of complaint, if, after considering the initial statement of the complainant and the statement of the witnesses, the Magistrate is of the opinion that there is no sufficient ground for proceeding further.

On a cumulative reading of the aforesaid statutory provisions makes it abundantly clear that cognizance is taken at the initial stage when the Magistrate

peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the materials placed before it, the Court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that after taking cognizance and examining the complainant on oath, the Court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that the Magistrate on examining the allegations made in the complaint, the initial statement of the complainant and statement of witnesses, may not take cognizance at all, where he finds that the allegations are absurd and inherently improbable and no case is made out or that cognizance of the offence alleged to have been committed cannot be taken without the prior sanction of the competent authority.

14. The duty of a Magistrate to exercise care and caution while taking cognizance on a complaint petition has been highlighted by a Division Bench decision of this Court in the case of *Tribikram Misra v. State of Orissa* and Anr. 67 (1989) CLT 729, wherein it has been held as follows:

At the stage of cognizance, however, the court is not required to enter into a detailed discussion of the merits or demerits of the case so as to find out if the allegations and the charges are true or not. It is nevertheless desirable for the court to see that innocent persons are not roped in so as to suffer the rigour of a trial with the sword of Damocles hanging on his head, merely because some of the witnesses make bald statements implicating him in criminal offences. It is also settled law that the Magistrate taking cognizance of offences should not act as an automation and believe and swallow what a few witnesses state about a person having been involved in a criminal offence, but has to apply his judicial mind and test the materials on record with eagle eyes so as to discern the complicity or otherwise of the person concerned. For this purpose, he is bound to give free play to his sense of criticism. Unless this course is adopted at the initial stage of a criminal case, it is very likely that innocent persons would be involved in criminal cases, may be falsely and without any basis. It is also to be borne in mind that unless this salutary caution is excised, crafty litigants will be encouraged to implicate innocent persons or their rivals in criminal cases by setting up a few band followers to speak against such persons.

15. In the case of *Punjab National Bank and others Vs. Surendra Prasad Sinha*, , the Supreme Court has observed that judicial process should not be an instrument of oppression or needless harassment. There lies the responsibility and duty on the Magistrate to find out whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the accused persons impleaded then only process would be issued. At that stage the Court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complaint as vendetta to harass the

persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance.

16. On a perusal of the allegations made in the complaint, it is seen that the complainant has alleged that in spite of security provided to her by armed police personnel of Orissa State Armed Police (for short "O.S.A.P."), some unknown criminals were entering her house in the night and assaulting her regularly, which is being done with the aid and assistance of the police officers. There is no medical evidence to show any injury caused to her and the involvement of the police officers including the present Petitioner. The allegations appear to be wild and baseless and inherently improbable, when seen in the light of fact that the complainant had been enjoying round-the-clock security cover by armed police personnel of O.S.A.P. since last many years, pursuant to the direction of this Court.

17. Applying the above principles to the case at hand, it is seen that the learned Magistrate had adopted the right approach in exercising due caution and circumspection in examining the allegations made in the complaint and the initial statement of the complainant in coming to the finding that the allegations are absurd and no offence is made out against the accused persons therein. Learned Magistrate had further taken into consideration the fact that taking cognizance in such a case, where there is no material to support the accusations made in the complaint petition and issuing process against the named police officers, who are public servants is bound to be an instrument in the hands of the complainant as vendetta to harass the public servants needlessly and had accordingly dismissed the complaint u/s 203 Code of Criminal Procedure. This finding of fact having been arrived at by the learned Magistrate, on the basis of his subjective satisfaction, after analyzing the available materials, learned Sessions Judge was not justified in interfering with the same, especially when there was no apparent error or irregularity in the said order.

18. Coming to the question regarding requirement of prior sanction for prosecution u/s 197(1) Code of Criminal Procedure, it is now well settled that the protection given u/s 197 of the Code is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the

performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty.

19. Section 197(1) of the Code reads as under:

197. (1) When any person who is or was Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government 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, no Court shall take cognizance of such offence except with the previous sanction-

(a) in the case of person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government:

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government."

xx xx xx xx

20. The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is if the conditions mentioned are not made out or are absent then no prosecution can be set in motion. For instance no prosecution can be initiated in a Court of sessions u/s 193, as it cannot take cognizance, as a court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or the Code expressly provides for it. And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than police officer, or upon his knowledge that such offence has been committed. So far public servants are concerned the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specified the persons to whom the protection is afforded but it also specified the conditions and circumstances in which it shall be available

and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, "no court shall take cognizance of such offence except with the previous sanction. Use of the words, "no" and "shall" make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is the complaint, cannot be taken notice of. According to Black's Law Dictionary the word "cognizance means "jurisdiction" or "the exercise of jurisdiction or "power to try and determine causes." In common parlance it means "taking notice of. A court, therefore, it precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty.

21. In *State of Orissa v. Ganesh Chandra Jew* AIR 2004 SCW 1926: 2004 (I) OLR (SC) 621, it was held that the expression "any offence alleged to have been committed by public servant while acting or purporting to act in the discharge of his official duty" implied that the act or omission must have been done by the public servant in the course of his service and that it should fall within the scope and range of his official duty. It was then observed that the test is whether omission or neglect to do that act would be brought on a public servant, the charge of dereliction of his official duty. The protection is available only when the alleged act done by the public servant is reasonable, connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act.

22. In *Shri S.K. Zutshi and Another Vs. Shri Bimal Debnath and Another*, , while considering to what extent an act or omission performed by a public servant in discharge of his official duty can be deemed to be official, the Supreme Court observed:

Use of the expression, "official duty" implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omission which are done by a public servant in discharge of official duty.

It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its

official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the Section has to be construed narrowly and in a restricted manner. But once it is established that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the Section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated.

23. In *K. Kalimuthu Vs. State by D.S.P.,* , the Supreme Court observed that the protection given u/s 197 of the Code is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. But the said protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act.

The Hon'ble Court accordingly proceeded to hold that if on facts, therefore, it is prima facie found that act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed.

24. In *Rakesh Kumar Mishra Vs. The State of Bihar and Others,* , Supreme Court while reiterating the object behind enacting Section 197 of the Code and also the prerequisites for application thereof, held as follows:

The protection given u/s 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if it chooses to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty. but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official

capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, not is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty: if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case.

25. The aforesaid views regarding the extent of protection available to a public servant while acting in discharge of his official duty, u/s 197(1) Code of Criminal Procedure has been reiterated and affirmed by the Apex Court in *Sankaran Moitra Vs. Sadhna Das and Another*, and *Anjani Kumar Vs. State of Bihar and Another*, .

26. In the case at hand, as the act complained of are alleged to have been committed by the present Petitioner as public servant in discharge of his official duty or in dereliction of the same, the protection envisaged u/s 197 (1) Code of Criminal Procedure is attracted. We are therefore of the considered view that the Petitioner, who is a senior police officer of the State and is not removable from their office save by or with the sanction of the Government, cannot be prosecuted without previous sanction of the appropriate Government.

27. Applying the principles of law as discussed above to the facts of the present case, the conclusion is irresistible that the impugned order of the learned Sessions Judge suffers from inherent legal infirmities which cannot be sustained and therefore the same is accordingly set aside.

The Crl. M.C. No. 851 of 2007 is accordingly allowed.

B.P. Das, J.

28. I agree.