

(1971) 08 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Letters Patent Appeal Nos. 13, 14 and 15 of 1970

State of J & K

APPELLANT

Vs

Raj Mohammad & Ors.; Gulam Rasool & Ors.; Mohammad
Majid

RESPONDENT

Date of Decision : 23-08-1971

Acts Referred:

Constitution of India, 1950 — Article 311
Constitution of Jammu and Kashmir, 1956 — Section 126
Government of India Act, 1935 — Section 240(2)(3)

Citation : (1971) JKLR 558 : (1972) KashLJ 27 : (1971) 2 SLR 828

Hon'ble Judges : S.M.F.Ali, C.J.; J.N.Bhat, J and Mian Jalal-Ud-Din, J

Bench : Full Bench

Advocate : S.A.Salaria, Amar Chand, Advocates appearing for the Parties

Judgement

Bhat, J.

(1) This judgment will dispose of three Letters Patent Appeals preferred by the State of Jammu & Kashmir, Inspector General of Police,

Commandant, J &K Armed Police Jammu, Superintendent of Police, Poonch etc. against the three judgments delivered by a Single Judge of this

court Mr. Justice Jaswant Singh J on January 8, 1970. These appeals arise out of writ petitions Nos. 37, 38 and 50 instituted by Nazir Hussain,

Raj Mohd and others, and Mohammad: Majid constables. The brief facts necessary for the disposal of these appeals are that the respondents

were appointed as constables by the Deputy Inspector General of Police, Jammu but were ultimately dismissed by the Superintendent of Police,

Poonch. The legal and constitutional grounds taken in the writ petitions, apart from the factual were, that as the petitioners respondents were

appointed by the Deputy Inspector General of Police, Jammu, they could not be

dismissed by the Superintendent of Police, who was an authority subordinate to the D. I. G. Police¹; and secondly that they were not afforded an opportunity of being heard ; the orders of dismissal, therefore, violated the principles of natural justice ; that there was a discrimination between the respondents and others similarly situated. The respondents therefore prayed for the quashing of the order of the Supdt. of Police, Poonch, in writ petition No. 37 of 1969 order No. 191 of 1966 dated 31/1/1966 and D. Q. No. 538CS dated 31/1/1969 ; in writ petition No. 38 Order No. 95 of 1966 dated 25/1/1966 and p. O No. 538CS dated 31/2/1969, and in writ petition No. 50 Order No. 271 of 1966 dated 8/4/1966 and D. O. No.538 CS dated 31/1/1969.

(2) The learned Judge who heard these petitions issued writs in all the three cases on 8/1/1970 relying on a previous decision of his dated 31/1/1969

in writ petition Nos 168 and 169 of 1969 Mohammad Majboud & ors Vs. State holding that the Superintendent of Police was not competent to

issue the orders: of dismissal of the respondents when they had been appointed by the D. I. G. and further that the respondents had not been given

an opportunity to defend themselves as envisaged under section 126 of the Constitution of Jammu & Kashmir. Against these orders of the learned

Single Judge which are all dated 8th of January 1970, the present appeals have been filed.

(3) The appeals came up before a Division Bench of this court which by means of its order dated 17/12/1970 felt that important points of the

interpretation of Constitution were involved in these cases and a judicial pronouncements on the point of the various courts were not uniform,

referred it to the Full Bench.

(4) We have heard the learned counsel for the parties.

The only point that was debated before us was about the competence of the Superintendent of Police to pass the impugned orders of dismissal of

the respondents who were constables. We have gone through the judgments of the learned Single Judge and we feel that the judgments under

appeals are very elaborate and lay down the correct law on the subject. Many authorities have been discussed by the learned Single Judge, and

we shall refer to those authorities and to some others also to elucidate the points. The learned counsel for the appellants relied on AIR 1958 AP

240, AIR 1970 SC 1263, and AIR 1970 SC 122 and on Rules 172 and 335 made under the Police Act and published in the Government

Gazette of December 1960. The learned counsel for the respondents referred to AIR 1955 SC 70, AIR 1970 Punjab 459 and referred to a

passage from Seervai's Constitutional Law of India, (1968 ED) page 1066.

(5) We have given our careful consideration to the points involved in these cases. It is admitted that the appointments of the respondents as

Constables were made by the D. I. G. Police, Jammu Province. It is also admitted that they were dismissed from service after some enquiry by the

Supdt. of Police, Poonch Mr. Amarchand's argument is that when the appointment of the respondents was made, the D. I. G. under the Police Act

and the Rules in force at that time was the authority to appoint and dismiss a constable. But this Police Act was amended in the year 1960 vide Act

No. XIV of 1960. Sec. 8 of the Police Act was reenacted as under :

Appointment, dismissal etc. of inferior Officers : Subject to the provisions of Sec. 126 of the Constitution of Jammu & Kashmir and to such rules

as the Government may from time to time make under this Act, the Inspector General, Dy. Inspector General, Assistant Inspector General, and

Superintendents of Police may at any time dismiss, suspend or reduce any police officer of the Subordinate rank whom they may think remiss or

negligent in the discharge of his duty or unfit for the same.,." Rule 172 of the Rules made under this Act in the year 1960 lays down the authority

empowered to make appointments and appoint Constables. The Supdt. of Police has full powers to appoint a Constable subject to the J & K

Nongazetted Recruitment Rule. Rules 335 of these Rules lays down then the power of punishment and the power of dismissal and removal from

service of a constable and of a Headconstable Junior grade Vests in the Supdt. of police as will be clear from the following:

Rule 335 of the J & K Police rules, 1960.

Power of punishment:

The authorised departmental punishments may be inflicted on the officers of the various ranks down in headings of Columns 3 to 7 by the officer

named below each heading in each case or by any officer of higher rank:

Sl. No. Punishment Inspector Sub Inspector Assistant Sub Inspector Head constable senior Grade Head constable Junior Grade and constable

1. Dismissal Inspector General Police Inspector Gen. of Police Dy. Inspector Gen. of Police Dy. Inspector Gen. of Police Supdt. Of Police

2. Removal do do do do do

(6) Mr. Amarchand's argument therefore is that these rules issued under the Police Act as amended in 1960 have statutory force and therefore the

D, I. G who was empowered under the old Act to appoint and dismiss Constables was replaced by the Supdt. of Police and as such powers

exercised by the D. I. G before the amendment were to be exercised by the Supdt, of Police. According to Mr Amar chand it was not the rank of

the officer exercising power that was important, it was the powers exercised by the particular authority that would govern the interpretation of this

section. According to him the. appointing authority must be exercising the same powers as the dismissing authority, that is sufficient and it is of no

consequence whether the rank of the appointing authority is superior or higher , to that of the dismissing authority.

(7) Now the relevant section for the disposal of these cases is Sec. 126 of the Constitution of the Jammu & Kashmir which corresponds to Art.

311 of the Constitution of India. This Sec. 126 reads as under:

(1) No person who is a member of a civil service of State or holds a civil pose under the State shall be dismissed or removed by an authority

subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the

charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed} after such inquiry, to,

impose on him any such penalty, until he, has been given a reasonable opportunity of making representation on the penalty proposed, but only on

the basis of the evidence adduced during such inquiry :

(8) A similar provision existed in the Govt. of India Act 1935, Section 240 (2) and (3) read as under:

(2) No such person as aforesaid shall be dismissed from service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as; aforesaid shall be dismissed ,ot reduced in rank until he has been given a reasonable opportunity of showing cause against

the action proposed to be taken against him.

(9) In a case, reported as AIR 1949 P.C. 112 their Lordships were considering an amendment of certain rules in the North West Frontier Police

Rules (1917). An amendment was made of the rules by a Correction Slip on 2411934 by substituting "'Dy. Inspector General of Police'" for

Inspector General of Police" as entitled to dismiss a Sub Inspector. It was held that as this amendment was inconsistent with Section 96B(1) of

Govt. of India Act of 1919 it was invalid and inoperative and it was further held that SubSection (3) of section 240 of the Govt of India Act, 1935

was a statutory term of service of the Crown, which qualifies the provisions of SubSection (1) and is mandatory and not permissive. Similarly

subsection (2) of Sec. 240 though it obviously does not apply in the case of dismissal by the Crown itself, is a statutory term of the service of the

Crown, and is mandatory and not permissive. It follows that the dismissal of a Sub Inspector of Police by an authority subordinate to that by which

he was appointed would be unlawful and inoperative under that section. This would completely answer Mr. Amarchand's point. In my opinion the

facts of this case are covered by a number of Supreme Court authorities which I shall mention first. After these authorities are mentioned some

more authorities will be cited to support my point of view.

(10) In AIR 1967 SC 459 an Assistant Secretary had to appoint teachers on the advice of a Board and therefore he could dismiss those who

were appointed by him. It was further held that he could not dismiss those who were appointed before the Assam Elementary Education Act of

1962 came into force which empowered him to make the appointments. It was further held that appointments made under the earlier Act could not

also be deemed to have been made by the Assistant Secretary. It would be useful to quote in extenso some portions of the judgment. In

paragraph 13 of the Judgment Justice Wanchoo remarked even though the Assistant Secretary had to make the appointments on the advice of the

Board still the appointing authority would be deemed to be the Assistant Secretary. Then in paragraph 14 His Lordship stated:

But there is another difficulty in the present case which stands in the way of the Assistant Secretary having the power to dismiss teachers who had

been taken over under Sec, 34 (2) of the Act and thus had been appointed before the Act came into force. Sec. 18 of the 1915 Act says that the

authority having power to take an appointment shall have the power to suspend or dismiss any person appointed by it in exercise of that power.

Therefore, the authority which appoints can only dismiss such persons as have been appointed by it. It cannot dismiss persons appointed by any

other authority, for such persons have not been appointed by it in the exercise of its power as appointing authority. In the present case, as we have

already pointed out the office of the Assistant Secretary of the State Board was created for the first time by the Act. Therefore, all those persons

who had been appointed before the Act came into force could not possibly be appointed by the Assistant Secretary for there was no such

authority in the earlier enactment repealed by the Act. In the earlier Act the appointing authority was the School Board for there was no Assistant

Secretary of the State Advisory there under. Therefore, a person appointed before the Act came into force by the School Board cannot be said to

have been appointed by the Assistant Secretary of the State Board or its predecessors the State Advisory Board for there was no such authority

in the earlier enactment. In the circumstances we are of opinion that the Assistant Secretary could not dismiss teachers appointed before the Act

came into force, for there was no such authority existing before that.

(11) In paragraph 15 His Lordship further viewed the matter from another angle and observed that :

It is however, urged that Sec. 55 provides that all appointments under the 1945 Act shall be deemed to have been made under the Act and

therefore, the appointments under the 1954 Act by the School Boards must be deemed to have been made by the Assistant Secretary under

section 14(3)(iii) of the Act. We are of opinion that this contention cannot be accepted in view of the specific provision contained in the Act under

sec. 34(2) & Sec. 38. Sec. 34(2) lays down that all teachers and other employees of schools maintained by the School Board would be taken over

by the State Board. This being a specific provision relating to teachers, we cannot take recourse to the general deeming provision contained in Sec.

55 (2) with respect to appointment of teachers and other employees of schools maintained by School Board. Further Sec. 38 specifically says that

all teachers then existing would be deemed to have been employed by the state Board. Reading therefore Sec. 34 (2) and Sec. 38 together, the

conclusion is inevitable that there is no occasion for the application of the deeming provision in Sec. 55 in the case of these teachers. In the face of

.these two specific provisions the general deeming provision contained in sec 55 (2) cannot be used to come to the conclusion that those teachers

who were existing from before are to be deemed to have been appointed by the Assistant Secretary u/s 14 (3) (iii) We are, therefore in agreement

with the High Court, though for slightly different reasons, that the services of the respondentteachers could not be terminated by the Asstt.

Secretary of the State Board u/s 14 (3) (iii) of the Act read with Section 18 of the 1915Act.

(12) This authority completely covers the facts of this case. However in another authority, reported as AIR 1970 SC 1263 cited by Mr,

Amarchand himself, His Lordship Justice Sikri held that there is nothing wrong if a member of subordinate service is transferred from one

department to another permanently yet powers of his dismissal can be exercised by an officer other than the appointing authority provided he is not

subordinate in rank to the appointing authority. At page 1265 (paragraph 12) of the judgment His Lordship says :

"..... In the context there is not doubt that it was the intention to give disciplinary jurisdiction over the entire staff on deputation to the Development

Commissioner. The previous order dated July 15, 1956 had vested the power of transfer and punishment in the Development Commissioner. It

seems to us that the later order in no way confers lesser powers on the Development Commissioner. There is nothing in the Constitution which

debars the Government from conferring powers on an officer other than the appointing authority to dismiss a Government servant provided he is

not subordinate in rank to the appointing officer or authority....."

(13) In AIR1970 SC 122 it was held that the expressions "District Superintendent of Police"" in the Police Act of 1861 and ""Superintendent of

Police"" in Rules under the Act refer to the same authority. Therefore it was held that a Superintendent of Police though not designated as District S.

P. can dismiss a Sub Inspector working under him. However the important remarks appear on page 124 (paragraph 8) of the judgment and it is

contained in these sentences..... ""It is nobody's case that a Superintendent of Police is an authority inferior to that of a District Supdt. of Police,

each Magisterial district having in many cases more than one Supdt. of police. There is thus no incongruity between the Act and the Rules which

have to be read together and as Jaganath, Supdt. of Police, was undoubtedly the Supdt. of Police, City of Delhi with jurisdiction over the police

station Faiz Bazar where the plaintiff was posted, he was competent to pass the order of dismissal on him.

(14) In another Supreme Court authority reported as AIR 1955 SC 70 their Lordships held that though Art. 311 (1) of the Constitution and R

1705 (c) of the Railway Establishment Code cannot be read as implying that the removal must be by the very same authority who made the

appointment or by his direct superior. It is enough that the removing authority is of the same rank and grade.

(15) In AIR 1960 M. P. 183 it was held that the power under article 309 to frame rules cannot be exercised so as to contravene article 311 (1).

The power of Assistant Security Officer cannot, by framing a rule, therefore extend to dismiss employees who were appointed actually by a higher

authority namely the Supdt. Watch and Ward who was the head of the Department. It was further stated :

"The test whether Art. 311 (1) is contravened or not is not that the authority should be performing the same functions but that it should not be

lower in rank than the authority that appointed a civil servant."

(16) In AIR 1956 Madras 419 the petitioner was appointed to the post of Deputy Jailor by the Inspector General of Prisons, though the Supdt. of

Jails could have made the appointment under the statutory rules. By an order of the Supd. the petitioner was dismissed from service and on appeal

to the I. G. of Prisons, the order of dismissal was changed into one of removal. It was held that the order of dismissal passed by the Supdt. of Jail

who was an authority lower in rank than the appointing authority was in violation of the provisions of Art. 311(1) and must be set aside. The fact

that the order was modified on appeal by the I. G. of Prisons would not be sufficient to cure the initial lack of jurisdiction to punish the petitioner.

The learned Judge remarked that:

"The competence of the authority to order removal or dismissal will have to be determined with reference to the requirements of Art 311(1) of the

Constitution and one of the requirements is that the authority that orders the

dismissal or removal should not be one subordinate in rank to that by which the civil servant in question was appointed.

(17) In AIR 1958 A. P. 240 it has been held :

Art 311 says that a member of a civil service of a State cannot be dismissed by an authority subordinate to that by which he was appointed i e. if

the officer is appointed by the State Govt. he cannot be dismissed by a person subordinate to that Government. It does not prevent the authority

duly and legally substituted in the place of the original authority, who appointed the member of a civil service, from dismissing him for in that case

the substituted authority is not an authority subordinate to that appointing him. Thus, when by reason of Sec. 58, Andhara State Act, 1953 the

pending proceedings against a Govt. servant is transferred to the Andhra Government the Andhra Government, being the substituted authority, has

power to continue the proceedings initiated by the Madras Govt. and impose punishment on the said servant.

(18) In AIR 1960 A. P. 29 an appointment was made by the Excise Commissioner and an order of compulsory retirement was passed by the

District Prohibition Officer holding the rank of Assistant Excise Commissioner. His Lordship P. Chandra Reddy C. J. remarked in paragraph 5 of

the Judgment that the Article 311 (I) does not require that dismissal must be by the very, same officer who appointed him. ""The competent

authority can be either the officer who initially made the appointment or any other officer who is coordinate in rank to him. That is the purport of

the clause 'dismissed or removed by any authority subordinate to that by which he 'was appointed.' By reason of this article, no subordinate officer

has jurisdiction to inflict any of the punishments contemplated by the Madras Civil Services (Classification, Control and appeal) Rules. ""His

Lordship further remarked that admittedly the order of compulsory retirement was passed in this case by the District Prohibition Officer who is

said to held the rank of an Excise Assistant Commissioner, it does not satisfy the requirements of Art. 311(1) as the petitioner was shown to have

been appointed by the Commissioner of Excise. The order was as such vacated.

(19) There are many authorities which lay down that subordinate as contemplated by Art. 311 must be properly construed to mean subordination

in rank and not subordination of function ; otherwise, the protection referred to

in Art. 311 would be illusory. See for instance AIR 1954 Patna 285, AIR 1962 Cal 3, AIR 1963 Orissa 8, and AIR 1957 M, P. 126.

(20) Where however the departmental head has changed and the subsequent head of the department has the power to dismiss it has been held that

the subsequent head of the department is not inferior in rank to the departmental head who appointed the officer. See for instance AIR 1962 All 166, AIR 1966 Raj. 37.

(21) In AIR 1957 Raj. 148 the petitioner was appointed by the I. G. P. as Sub Inspector of Police on probation and was confirmed by the Dy. I.

G. P. later. It was held that as he had been confirmed by the D. I. G. the D I. G, was competent to dismiss him.

(22) In AIR 1964 Pat. 102 the District Traffic Supdt. on a letter from his superior, the Traffic Manager,, issued orders of appointment to the

petitioner as a temporary Assistant Station Master, Later on the District Traffic Supdt. must be held to be the authority appointing him and

therefore competent to dismiss him, though the appointment was made under the order of the higher authority. To the same effect is AIR 1966 A.

P, 116 and AIR 1957 All. 439.

(23) In AIR 1960 Punjab 646 a certain appointment was deemed to have been made by the Maharaja of Patiala. Later on the said officer was

transferred to the Punjab Government. Their Lordships held that for all intents and purposes the successorininterest of the Maharaja of Patiala was

the Punjab Government and therefore the Punjab Government had the power to dismiss, the petitioner.

(24) There are one or two authorities which appear to lay down the law to the contrary. In this behalf may be mentioned AIR 1958 Calcutta 356.

In that case Shri P. B. Mukherji J. in paragraph 10 has stated as under :

The constitutional rule contained in Art. 311 has not been broken in the facts of this case and in my opinion, has not been violated at all. The

language of Art, 311 material for the present application, is ""No person who is a member of a civil service.....shall be dismissed or removed by an

authority subordinate to that which he was appointed."" The constitutional requirement operates when the former appointing authority exists and

some other authority subordinate to it wants to exercise the power of dismissal over a civil servant. The constitutional expression 'an authority

subordinate' indicates an existing subordination. It proceeds on the sensible view that the order of a superior authority appointing a civil servant cannot be allowed to be nullified by one subordinate to him by dismissing that civil servant. That will be detriment to the morale and security of public service. But this sensible constitutional rule need not be converted into a senseless fetish by seeking to apply it to a situation where the authority dismissing the civil servant at the time of dismissing suffers no subordination because the post of the former appointing authority has ceased to exist.

(25) Here it would appear that the post of the appointing authority had been abolished altogether but His Lordships nonetheless in Paragraph 11 remarked that:

the question of removing authority being of the same rank or grade has to be tested in the light of the facts of the present case Now the only appointing and removing authority in the present reorganized scheme is the Depot Manager. Therefore he must be deemed and regarded to be of the same rank or grade so far as this particular power is concerned.....

(26) In A. I. R. 1963 Tripura 38 it was held:

Article 311 (1) of the Constitution does not apply to a case of termination of service of a temporary employee. Rule 5 of the Central Civil

Services (Temporary Service) Rules permits the appointing authority to terminate such service. The Director of the Department if is an appointing

authority for class III employees on the relevant date and the Govt. servant is a Class III employee, termination of service of the Govt. servant by

such an appointing authority is valid even though the said servant was appointed by the Chief Commissioner."

(27) But this authority is of Single Judge and runs counter to the decisions of the Supreme Court and numerous other decisions cited above and cannot therefore help the case of the appellant at all.

(28) A great number of authorities have been cited in this judgment only to show what the constitutional guarantees to a civil servant are. The guarantees are :

(i) that he cannot be dismissed or removed from service by an authority who is in rank inferior to that of the appointing authority

(ii) If the two authorities i. e. the appointing authority and dismissing authority are different, they must be atleast of coordinate or equal rank :

(iii) It is of no consequence that the subsequent authority enjoys the same powers as the former :

(iv) Subordination has to be understood in rank and not in the exercise of powers which in other words means if the succeeding authority has all

the powers of the proceeding authority but is inferior in rank and status to the appointing authority, he cannot dismiss a civil servant appointed by

the authority who is superior in rank :

(v) If a certain civil servant is appointed by one authority and subsequently those powers are vested in a different authority, lower in rank but by

some rule or by some enactment appointments made by the previous authority are to be deemed to have been made by the succeeding authority,

even then the succeeding authority cannot dismiss a servant appointed by the superior authority :

(vi) If by means of some transfer of a civil servant from one department to another or from one Govt. to another, the powers of dismissal are to be

exercised by the Head of the Department who is equal in rank to the previous Head of the department or in the case of one Government

succeeding another with equal powers, then dismissal or removal of a civil servant by the succeeding Head of the department or Government is not

invalid and does not violate Article 311 (I) of the Constitution of India or Section 126 of the State Constitution.

(29) In this case admittedly the Superintendent of Police is an officer lower in rank than the D. I G. Although the powers of appointment and

dismissal of constables after 1960 are vested in the Supdt. of Police, yet he could not exercise these powers of dismissal or removal of the

respondents because they were appointed by the D. I. G. Jammu, an officer superior in rank to the Supdt. of Police. Therefore the orders of the

dismissal by the Superintendent of Police in the case of the respondents are not at all valid.

(30) As these appeals fail on this point we need not at all discuss, and that proposition was not at all canvassed before us, that the respondents had

not been given full opportunity to defend themselves as laid down in subsection (2) of Section 126 of the State Constitution.

(31) For the reasons given above we see no force in these appeals, which are hereby dismissed. But as observed by the learned Single Judge the appropriate authority if so advised, can restart the proceedings against the respondents under the Constitution. There will be no order as to costs.

Sd/ J. N. Bhat Judge

I agree. Sd/

S. M. F. Ali Chief Justice.

PER MIAN JALALUDDIN J.

(1) I have had the benefit of perusing the lucid and well reasoned judgment prepared by my learned Brother Hon'ble Shri Justice J. N. Bhat. I do

agree with him that the expression 'authority subordinate to that by which he was appointed'" occurring in Sec. 126 of the Jammu and Kashmir

Constitution has got reference to the rank of the authority and not to his functions. For purpose of section 126 of the State Constitution it is of no

consequence that the authority who dismisses or removes a civil servant from his post must be exercising control over him. Moreover, the word

"appointed" is significant. It refers to past. It implies that only that authority is competent to dismiss a civil servant who had appointed him or who

holds equal rank with the appointing authority. Subordination is, therefore, to be understood with reference to rank and not with reference to the

control exercisable by an authority. Therefore the succeeding authority has been vested with all the powers of the preceding authority and the

former exercises the same superintendence and control which the preceding authority was exercising, but is inferior in rank to the preceding

appointing authority, he in my opinion, will be deemed to be subordinate to the appointing authority within the meaning of Sec 126 of the State

Constitution. As such he cannot remove a civil servant appointed by the authority who held superior rank to him. In the instant case the constables

respondents were appointed by the Deputy Inspector General of Police, Subsequently the powers of appointment and dismissal were delegated to

the Superintendents of police of the districts under rules. But nevertheless the Superintendent of police, notwithstanding the fact that he could

appoint or dismiss a constable, could not in the present case dismiss the constables as these constables had not been appointed by him but by the

D I. G. of Police who was doubtless of superior rank to that of the Superintendent

of Police. For purposes of rank the Superintendent of police held subordinate position to the D.I.G.

(2) I would, therefore, concur with my learned Brother that the appeals be dismissed. I do not however make any observation with regard to the starting of proceedings against the respondents by the competent authority because such a matter entirely rests with that authority and it would be needless to give such a direction or to make such an observation in this case.