
(2001) 04 J&K CK 0007

In the Jammu And Kashmir High Court

Case No : Criminal Acq. Appeal No. 76 of 1999

State of Jammu and Kashmir

APPELLANT

Vs

Safdar Ali and Others

RESPONDENT

Date of Decision : 16-04-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 161, 163, 164, 197, 417
Penal Code, 1860 (IPC) — Section 330, 342, 343, 348
Police Rules, 1960 — Rule 349, 349(1)
Ranbir Penal Code, 1989 — Section 109, 193, 302, 330, 342

Citation : (2002) CriLJ 2836

Hon'ble Judges : R.C. Gandhi, J;O.P. Sharma, J

Bench : Division Bench

Advocate : Hafiz-Ul-Rehman, for the Appellant; M.L. Thusoo, for the Respondent

Final Decision : Allowed

Judgement

1. The only question involved for consideration is whether there ought to be a reasonable connection or nexus between the alleged act and the duty

or authority imposed upon a Police Officer in order to attract the application of Rule 349 of the Police Rules, 1960.

2. How the question has arisen will be revealed by the following facts. On January 4, 1990 one Sher Singh was arrested by the Officer-Incharge of

police station, Marwah Tehsil Kishtwar for interrogation in a murder case (FIR No. 13 of 1989 u/s 302, RPC). He died on 15-1-1990 while in

custody. His father Sh. Jai Ram complained to Superintendent of Police, Doda, that he died in Police Custody due to police torture. The

investigation of the case was entrusted to Crime Branch, on whose finding the Director General of Police Sh. J. N. Sexena vide letter dated 10-8-

1991 approached the Government for grant of sanction to the prosecution of the accused in terms of Section 197 of the Code of Criminal

Procedure. The investigation according to the above reference has revealed the following facts :--

(a) The S.P. Doda, vide his order dated December 8, 1989 constituted a team of 19 officials headed by Shri Abdul Latif, Dy. SP Hqrs. Doda, for

the investigation of case FIR No. 13/89 u/s 302, RPC PS Parwah. The deceased Sheer Singh son of the complainant, had been arrested and kept

in the police custody from January 4, 1990 to January 15, 1990, during which period he was tortured and severely beaten up as a result of which

he died on January 15, 1990.

(b) The post-mortem was conducted by a Board of three doctors whose opinion categorically stated that the death of the deceased Sheer Singh

was due to haemorrhage and shock as result of cumulative effect of multiple injuries described in the postmortem report.

(c) The evidence indicated that the then Naib-Tehsildar, Marwah, now Tehsildar Kishtwar, Sh. G. M. Sheikh, had remained actively associated

with the investigation at the behest of the police officers/officials and he had personally also resorted to beating of the deceased Sheer Singh on

various occasions. He had also attempted to fabricate a false report of having recorded the statement of the deceased Sheer Singh u/s 164, Cr.

P.C. at the Government dispensary Swed (Dechhan) whereas the evidence established beyond doubt that the deceased had never remained

admitted in the said dispensary. Under law he was not competent to record the confessional statement of the deceased. He had also not been

approached by any Police Officer for the said purpose. The voluntary recording of statement of the deceased speaks of his over enthusiasm to

fabricate record to save himself as also the police officials involved in the case.

(d) The investigation has also amply proved that the accused Zahoor Ahmed Mattoo son of Mohammad Ibrahim Mattoo resident of Sheerpora

Anantnag also remained actively associated with the investigation team and indulged in beating of the deceased, to avenge the death of his brother,

namely, Mohammad Iqbal Mattoo.

3. The Director General of Police agreed with the conclusion of the Investigating Police Officer and found that accused were required to be sent up

for trial for having committed offence punishable under Sections 302, 109, 342, 330 and 193, RPC also. He therefore, recommended to the

Government that sanction to the prosecution of Abdul Latif, Dy. S. P. and Zahoor Ahmed Mattoo the then Tehsildar be accorded as required u/s

197, Cr. P.C. because both of them could be removed from service only by the order of the Government, Sanction to the prosecution was issued

vide SRO 314 dated 7-11-1991.

4. It appears the defence objected to the trial of the accused on the ground that Rule 349 has been violated and the provisions being mandatory,

no charge can be framed. This objection prevailed with the trial Court, and the accused were discharged.

5. The contention of learned Government Advocate is that accused persons have been wrongly discharged because Rule 349 has no application in

view of the charge that the deceased died of physical torture while in custody. Since the death was in police custody, therefore, his death due to

torture is not covered by the Rule 349 because there is no rule much-less any provision of law which justifies torture or use of physical force

against a person in custody. Mr. Thusoo learned advocate appearing for the accused party on the other hand argued that since cause of death is

not physical violence as alleged, the prosecution is bad. He, further, argued that Rule 349 applies to this case because he was lawfully detained in

custody and if cause of death is different than the torture the accused cannot be tried.

6. We are of the opinion that Sub-rule (1) of Rule 349 of the Police Rules has been wrongly invoked by the trial Court which is not even distantly

applicable as is evident from its plain reading. Sub-rule (1) of Rule 349 of the Police Rules reads as under :--

(1) Whenever a Superintendent of police received a complaint against a Police Officer that under colour of his duties he has committed an offence,

as defined in the Ranbir Penal Code, the substance of the complaint, shall be reported immediately to the District Magistrate who will decide

whether the investigation of the complaint shall be conducted by a police officer or by a Magistrate. If he decided that the investigation or a trial or

an inquiry under the Criminal Procedure Code should be held by a Magistrate, he shall proceed according to the instructions laid down in the Rules

and Orders (Criminal) for the Guidelines of Courts Subordinate to the High Court.

The rule will apply only when there is a complaint against a Police Officer that under the colour of his duties he has committed an offence as

defined in the Ranbir Penal Code. It is only when this important ingredient is satisfied that the District Magistrate has to be approached by the

Superintendent of Police. Not otherwise. And in case the District Magistrate is approached even when no offence as contemplated is committed,

the Superintendent of Police acts without jurisdiction.

7. The scope and amplitude of the expression "'under the colour of any duty or authority'" occurring in Sub-section (1) of Section 161 of the

Bombay Police Act, came up before the Supreme Court in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, .. After noticing the

meaning of the expression "'colour of office'". Their Lordships held thus (at page 815-816 of Cri LJ) :--

9. The expression "'under colour of something'" or "'under colour of duty'", or "'under colour of officer'", is not infrequently used in law as well as in

common parlance. Thus in common parlance when a person is entrusted with the duty of collecting funds for, say, some charity and he used that

opportunity to get collecting money for himself under colour of making collections for a charity. Whether or not when the act bears the true colour

of the office or duty or right, the act may be said to be done under colour of that right, office or duty, it is clear that when the colour is assumed as

a cover or a block for something which cannot properly be done in performance of the duty or in exercise of the right or office, the act is said to be

done under colour of the office or duty or right. It is reasonable to think that the legislature used the words "'under colour'" in Section 161(1) to

include this sense. It is helpful to remember in this connection that the words "'colour of office'" have been stated in many law lexicons to have the

meaning just indicated above. Thus in Wharton's Law Lexicon, 14th Edition, we find at page 214 the following :--

Colour of office.

When an act is unjustly done by the countenance of and office, being grounded upon corruption, to which the office is as a shadow and colour.

In Stroud's Judicial Dictionary, 3rd Edition, we find the following at page 521 :

Colour, "'Colour of Office'" is always taken in the worst part, and signifies an act

evil done by the countenance of an office, and it bears a dissembling face of the right of the office, whereas the office, is but a veil to the falsehood, and the thing is grounded upon vice, and the office is as a shadow to it. But 'by reason of the office' and 'by virtue of the office' are taken always in the best part.

10. It appears to us that the words "'under colour of duty'" have been used in Section 161(1) to include acts done under the cloak of duty, even though not by virtue of the duty. When he (the police officer) prepares a false Panchnama or a false report he is clearly using the existence of his legal duty as a cloak for his corrupt action or to use the words in Stroud's Dictionary"' "as a veil to his falsehood"". The acts thus done in dereliction of his duty must be held to have been done "'under colour of the duty.

8. The scope of expression "'act done under the colour of office'", again fell for the consideration of Their Lordships in *State of Maharashtra Vs.*

Narharrao, in which the allegation against a police head constable was that he had accepted bribe for weakening the prosecution case as illegal gratification. Their Lordships formulated the following question for determination :--

The question of law presented for determination in this appeal is whether the alleged act of offence was committed by the respondent under colour or in excess of any such duty or authority as aforesaid within the meaning of Section 161(1) of Bombay Police Act.

After reproducing Sections 159 to 161 of the Bombay Act. Their Lordships observed as under :--

In this connection, it is important to remember that an act is not done under colour of an office merely because the point of time at which it is done

coincides with the point of time the accused is invested with the powers or duty of the office. To be able to say that an act was done under the

colour of an office one must discover a reasonable connection between the act alleged and the duty or authority imposed on the accused by the

Bombay Police Act or other statutory enactment. Unless there is a reasonable connection between the act complained of and the powers and

duties of the office, it is difficult to say that the act was done by the accused officer under the colour of his office.

After giving some examples of cases in which nexus between the act done and

the colour of duty. Their Lordships observed as follows:--

But unless there is a reasonable connection between the act complained of and the powers and duties of the office, it cannot be said that the act

was done by the accused officer under the colour of his office. Applying this test to the present case, we are of the opinion that the alleged

acceptance of bribe by the respondent was not an act which could be said to have been done under the colour of his office or done in excess of his

duty or authority within the meaning of Section 161(1) of the Bombay Police Act.

9. While considering its earlier judgment in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, Their Lordships observed as under:--

On behalf of the respondent reference was made to the decision of this Court in *Virupaxappa Veerappa Kadampur Vs. The State of Mysore*, .

But the ratio of that decision is not applicable to the present case. In that case, a police officer authorised under the Bombay Prohibition Act to

seize smuggled Ganja, prepared a false Panchnama and a false report as regards the seizure of the Ganja and it was held by this Court that the

provisions of Section 161(1) of the Bombay Police Act were applicable. It is clear that in that case it was the duty of the police head constable to

prepare a Panchnama and the act of preparation of false panchnama was, therefore, done under the colour of his office. There was hence a nexus

between the act complained of and the statutory duty that the police head constable was to perform and the provisions of Section 161(1) of the

Bombay Police Act were applicable. In the present case the material facts are quite different.

Thus the question arises whether there is any nexus or relationship between the act complained of i.e. custodial death because of torture and the

powers and duties of office in this case.

9. Incidentally, one of the charges against the accused is punishable u/s 330 of the Ranbir Penal Code. On a similar charge,, one Atma Ram Police

Head Constable of Bombay Police was convicted under Sections 330, 342, 343 and 348 of the Indian Penal Code. The High Court of Bombay

acquitted him for want of compliance of Section 161(1) of Bombay Police Act. While setting aside the judgment of the High Court, the Supreme

Court in '*State of Maharashtra v. Atma Ram* AIR 1966 SC 1786 : 1966 CriLJ 1498 held as under (at page 1500 of Cri LJ) held as under :--

The provisions of Sections 161 and 163 of the Criminal Procedure Code emphasize the fact that a police officer is prohibited from beating or confining persons with a view to induce them to make statements. In view of the statutory prohibition it cannot, possibly, be said that the acts, complained of, in this case, are acts done by the respondents under the colour of their duty or authority. In our opinion, there is no connection, in this case between the acts complained of and the office of the respondents and the duties and obligations imposed on them by law. On the other hand, the alleged acts fall completely outside the scope of the duties of the respondents and they are not entitled, therefore, to the mantle of protection conferred by Section 161(1), of the Bombay Police Act. This view is borne out by the decision of this Court in *The State of Andhra Pradesh Vs. N. Venugopal and Others*, in which the effect of Section 53 of the Madras District Police Act was construed by this Court and it was held that the protection of that section cannot be extended to police officers accused of beating a person suspected of a crime or confining him in the course of investigation.

10. Thus the proposition laid down in *State of Maharashtra Vs. Narharrao*, that "there must be a reasonable connection or nexus between the alleged act and the duties or authority imposed upon the officer under any enactment or Police Rules on the Police under the colour of which the act may be said to have been done." was reiterated. The power of using physical force against a person in police custody is not traceable to any law which is in force in the State. So there was no reasonable nexus or connection between the alleged act i.e. use of force which resulted in the death of Sher Singh on 15-1-1990 while in custody and the duties or authority imposed upon the officers under any enactment or Police Rules, 1960 under the colour of which the act may be said to have been done.

11. Lastly, Mr. Thusoo took refuge under the procedural law because according to him the order of discharge though revisable u/s 435, Cr. P.C. but is not appealable. The appeal according to the learned counsel was liable to be dismissed.

12. This appears to be an argument in despair because the Code of Procedure is something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties, not a thing designed to trip

people up. Too technical a construction of Sections 417 and 435, Cr.

P.C.) that leaves no room for reasonable elasticity of interpretation should therefore be guarded against provided always that justice is done to

both sides lest the very means designed for furtherance of justice be used to frustrate it.

13. So a literal and unimaginative approach to procedural statute which are meant for advancing the cause of justice has to be avoided lest it may make a mockery of it.

14. So it is not the nomenclature under which the petition is filed which is relevant because that does not debar the Court from exercising

jurisdiction vested in it as laid down in Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, which reads as follows (at page

8; of Cri LJ) :--

26. Nomenclature under which petition is filed is not quite relevant and that does not debar the Court from exercising its jurisdiction which

otherwise it possesses unless there is special procedure prescribed which procedure is mandatory. If in a case like the present one the Court finds

that the appellant could not invoke its jurisdiction under Article 226, the Court can certainly treat the petition as one under Article 227 or Section

482 of the Code. It may not however, be lost sight of that provisions exist in the Code of revision and appeal but some time for immediate relief

Section 482 of the Code or Article 227 may have to be restored to for correcting some grave errors that might be committed by the subordinate

Courts. The present petition though filed in the High Court as one under Articles 226 and 227 could well be treated under Article 227 of the

Constitution.

So the discharge of the accused person by the trial Court on an erroneous view of Rule 349 of the police Rules is an abuse of the process of the

Court. In the view we have taken, this appeal is treated as revision, the same is allowed and the impugned order is quashed. The trial Court of

Additional Sessions Judge is directed to re-admit the Police-Challan to its original number and proceed with the case in accordance with law. The

respondents through their counsel are directed to appear before the trial Court on 10-5-2001 failing which the trial Court shall secure their

presence through coercive process i.e. non-bailable warrants and conclude the

trial with reasonable dispatch. We order accordingly.