
(1956) 08 MP CK 0008
In the Madhya Pradesh High Court

Union of India (UOI)

APPELLANT

Vs

Maresh Chandra Sharma

RESPONDENT

Date of Decision : 29-08-1956

Acts Referred:

Penal Code, 1860 (IPC) — Section 161, 165, 165A

Citation : AIR 1954 MP 43 : (1957) CriLJ 184

Hon'ble Judges : Shinde, C.J.; Samvatsar, J

Bench : Division Bench

Judgement

Shinde, C.J.—This revision has been referred to a Division Bench u/s 29, Madhya Bharat High Court of Judicature Act by a Single Bench. The facts out of which this revision arises are briefly as follows:

2. On 5-2-1955 an offence u/s 161, I. P. C. and Section 5(2) read with Section 5(l)(b), Prevention of Corruption Act was registered. On 7-2-1955, the Deputy Superintendent of Police gave a direction to Inspector Saksena and Mr. Saksena applied to Additional District Magistrate, Indore for permission to investigate the case and arrest the accused. The permission was granted by Mr. Acharya and the investigation was conducted by Inspector Saksena.

On 15-6-1955 sanction was obtained u/s 6 (c) of the Prevention Of Corruption Act and on 24-6-1955 a charge-sheet was submitted. On 2-8-1955 the accused sought an adjournment which was granted. On 18-8-1955 an application was moved on behalf of the accused to the effect that the Deputy Superintendent of Police was the competent officer to investigate and that non-compliance with the mandatory provisions violated the Prevention of Corruption Act.

It was prayed that Dy. S. P. be examined to find out why he could not conduct the investigation. On 18-8-1955 the Court ordered that the examination was unnecessary. On 24-10-1955 an application was made for summoning Mr. Acharya and Dy. S. P. as witnesses. In the alternative it was prayed that reinvestigation be ordered. On 3-11-1955 the Special Judge ordered that the

present proceedings are set aside and the accused is discharged.

He also directed that the Dy. S. P., Indore should conduct reinvestigation of the offence from the stage it was entrusted by him to the Inspector and then put up a fresh challan, if he deemed fit, Against this order the Union of India filed the present revision. When it came up for hearing before Samvatsar J. he referred the case to the Division Bench as it involved an important question of law.

3. The learned Advocate-General raised three contentions before us:

1. Can the trial Judge go into the question, whether the Magistrate should or should not have given the permission, as cognizance had been taken?

2. Whether it is necessary for the Magistrate to see why Dy. S. P. cannot investigate the case?

3. Was the trial Court right in discharging the accused and directing the Dy. S. P. to put up a fresh challan if he deemed fit?

4. We propose to deal with these questions seriatim.

5. The point, whether the trial Judge can go into the question whether the Magistrate should or should not have given permission, has to be considered in the light of the provisions of Section 537 Criminal Procedure Code. Section 537 reads as follows:

Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent Jurisdiction shall be reversed Or altered under Chapter 27 or on appeal or revision on account:

(a) Of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code or

(b)...

(c) ...

(d) ...

unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice. Explanation : - In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice. Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

It is clear from the language of the section that no finding, sentence or order can be reversed unless any error, omission or irregularity in any proceeding has in fact occasioned a failure of justice. From the explanation, it is clear that in determining whether a failure of justice has been occasioned or not, the Court is to have regard to the fact whether the objection is raised at an early stage in the

proceedings or not.

It was urged on behalf of the accused in the trial Court that u/s 5-A(c) investigation can be entrusted to an officer of the lower rank only under special and abnormal circumstances.

In other words, Mr. Deviprasad Bhargava, learned Counsel for the accused, contended that investigation by a Dy. S. P. was the rule and that by an officer of the lower rank was an exception. Consequently unless it was proved to the satisfaction of the Magistrate that a Dy. S. P. was unable to conduct the investigation, the Magistrate should not give permission to an officer of the lower rank. If this contention be correct, then in view of the fact that an objection is to be raised at an early stage of the proceedings u/s 537 Criminal P. C., the trial Judge can go into the question of irregularity and pass suitable orders. In fact that was the course directed by their Lordships of the Supreme Court in *H.N. Rishbud and Inder Singh Vs. The State of Delhi*, . Their Lordships observed as follows:

It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such re-investigation as the circumstances of an individual case may call for.

Such a course is not altogether outside the contemplation of the scheme of the Code as appears from Section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. Nor can it be said that the adoption of such a course is outside the scope of the inherent powers of the Special Judge, who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case.

When the attention of the Court is called to such an illegality at a very early stage it would not be fair to the accused not to obviate the prejudice that may have been caused thereby, by appropriate orders, at that stage but to leave him to the ultimate remedy of waiting till the conclusion of the trial and of discharging the somewhat difficult burden u/s 537, Cri. P. C. of making out that such an error has in fact occasioned a failure of Justice.(Vide para 10, sub-paras 1 and 2).

In the same case, their Lordships of the Supreme Court made the following observation:

In our opinion, therefore, when such a breach is brought to the notice of the Court at an early stage of the trial the Court will have to consider the nature and extent of the violation and pass appropriate order for such reinvestigation as may be called for, wholly or partly, and by such officer as it considers appropriate with reference to the requirements of Section 5-A of the Act. It is in the light of

the above considerations that the validity or otherwise of the objection as to the violation of Section 5 (4) of the Act has to be decided and the course to be adopted in these proceedings, determined.(Vide para 10, sub-para 5).

It is thus clear from the observations of their Lordships of the Supreme Court that an objection regarding any error or irregularity if raised at an early stage, the Special Judge has power to consider it and pass suitable orders, whether in this particular case any irregularity has been committed or not is quite a different matter with which we shall deal later. There is, therefore, no doubt whatsoever that the trial Judge has the power to go into the question whether the Magistrate, in giving permission to a police officer of the lower rank, has committed any irregularity or not.

6. The most important point in this case in the determination of the question as to whether it is necessary for the Magistrate to satisfy himself that the Dy. S. P. is unable to conduct the investigation, before giving permission to an officer of the lower rank, u/s 5-A (c), Prevention of Corruption Act. Before dealing with this question, it would be advisable to trace the historical evolution of Section 5-A. Before 1947 an offence u/s 161, I. P. C. was non-cognizable.

Under Section 155(2), Cr. P. C. no police officer could investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such Case or commit the case for trial or of a Presidency Magistrate. In 1947 Prevention of Corruption Act No. 2 of 1947 was passed. u/s 3 of this Act, an offence punishable u/s 161, I. P. C. was made cognizable; but a proviso was added to this section, which reads as follows:

Provided that a police officer below the rank; of Deputy Superintendent of Police shall not investigate any such offence without the order of a Magistrate of the first class or make any arrest therefore without a warrant.

Thus it is clear that although Section 3, Prevention of Corruption Act made an offence u/s 161, I. P. C. cognizable, in effect it remained non-cognizable as far as officers below the rank of a Deputy Superintendent of Police were concerned. By the same Act a new offence called criminal misconduct was created. For the investigation of an offence of criminal misconduct, the same restriction was placed on officers below the rank of a Deputy Superintendent of Police by Section 5(4) of the Act. The Act of 1947 was amended in 1952 and Section 5-A was inserted after Section 5. This Section 5-A is as follows:

Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898), no police officer below the rank:

- (a) in the presidency towns of Madras and Calcutta, of an assistant commissioner of police,
- (b) in the presidency town of Bombay, of a Superintendent of Police, and
- (c) elsewhere, of a deputy superintendent of police, shall investigate any offence

punishable u/s 161, Section 165 or Section 165A of the Indian Penal Code (Act XLV of 1860) or under Sub-section (2) of Section 5 of this Act, without the order of a presidency magistrate or a magistrate of the first class, as the case may be, or make any arrest therefore without a warrant;

It is clear that even after the amendment of 1952 the position regarding an offence u/s 161, I. P. C. and under Sub-section (2) of Section 5, Prevention of Corruption Act remained the same as it was under the original Act of 1947 in respect of investigation. An offence u/s 161, I. P. C. or one under Sub-section (2) of Section 5, Prevention of Corruption Act is cognizable so far as officers of the rank of a Deputy Superintendent of Police and above are concerned. But so far as the officers below the rank of a Deputy Superintendent of Police are concerned, the said offences are non-cognizable in so far as they cannot investigate them without the permission of a Magistrate of the first class,

7. Mr. Deviprasad Bhargava, learned Counsel for the accused contends that investigation by a Deputy Superintendent of Police is the rule and that by an officer of a lower rank is an exception. He relies for this proposition on the observations made by their Lordships of the Supreme Court in *H.N. Rishbud and Inder Singh Vs. The State of Delhi*, . I shall refer to those observations presently. The learned Counsel contends that a Magistrate should not give permission to an officer of the lower rank to investigate unless he is satisfied that the Deputy Superintendent of Police is prevented from doing so on account of some good reason.

He further argues that in the instant case the Magistrate only referred to the F.I.R. but did not satisfy himself that the Dy. S. P. was prevented from investigating the case on account of some good reason. We have to examine how far the proposition, put forward by the learned Counsel of the accused, is tenable in law. As far as Section 5-A is concerned, which has already been reproduced, there does not appear to be any warrant for the proposition that investigation by a Dy. S. P. is the rule and that by an officer of the lower rank is an exception.

All that the section states is that no police officer below the rank of a deputy superintendent of police shall investigate an offence u/s 161, I. P. C. or under Sub-section (2) of Section 5, Prevention of Corruption Act, without the order of a Magistrate of the first class. In other words all that the section enjoins is that if investigation is to be conducted by a Deputy Superintendent of Police he does not require any order from a Magistrate. But If investigation is to be conducted by an officer of the lower rank then permission of a Magistrate of the first class is necessary. Giving the words their ordinary meaning, it appears to me that investigation by a Deputy Superintendent of Police and investigation by an officer of the lower rank authorised by a Magistrate are placed on the same footing. . There does not appear to be any priority given to one or the other.

8. Mr. Deviprasad Bhargava referred me to several passages from the decision of their Lordships of the Supreme Court given in *H.N. Rishbud and Inder Singh Vs.*

The State of Delhi, In para 5 of the said judgment, the learned Counsel referred to the following words:

Therefore, it is clear that when the Legislature made the offences in the Act cognizable, prior investigation by the appropriate police officer was contemplated as the normal preliminary to the trial in respect of such offences under the Act. (Vide sub-para 3.)

I do not see how these words support the proposition put forward by the learned Counsel. The words "investigation by the appropriate police officer" were used in relation to an investigation of a cognizable offence. I have already stated that offences u/s 161, I. P. C. and under Sub-section (5), Prevention of Corruption Act, are both cognizable and non-cognizable. They are cognizable if investigation is conducted by a Deputy superintendent of Police or an officer of a higher rank; but they are non-cognizable if investigation is conducted by an officer of a lower rank.

Consequently referring to the said offences as cognizable, the appropriate police officer is, no doubt, a Dy. S. P, or an officer of a higher rank. Jagannadhadas J, was referring to the offences in the Act as cognizable. Consequently, the appropriate police officer will, no doubt, be a Dy, S. P. It is also evident from the words which follow the sentence referred to by the learned Counsel. The words are as follows:

In order to ascertain the scope of and the reason for requiring such investigation to be conducted by an officer of high rank (except when otherwise permitted by a Magistrate), it is useful to consider what "investigation" under the Code comprises.

The words in the bracket viz., "except when otherwise permitted by a Magistrate" are particularly significant. They clearly indicate that investigation by an officer of a high rank and investigation by an officer of a lower rank authorised by a Magistrate both stand on the same footing.

9. The next passage referred to by the learned Counsel for the non-applicant is para 6 of the judgment which is as follows:

It is in the light of this scheme of the Code that the scope of a provision like Section 5(4) of the Act has to be judged. When such a statutory provision enjoins that the investigation shall be made by a police officer of not less than a certain rank, unless specifically empowered by a Magistrate in that behalf, notwithstanding anything to the contrary in the Code of Criminal Procedure it is clearly implicit therein that the investigation (in the absence of such permission) should be conducted by the officer of the appropriate rank.

This passage no doubt states that the investigation is to be conducted by the officer of the appropriate rank. But it is made specifically clear that this observation is to apply in the case where there is no permission granted by a Magistrate. His Lordship has made it abundantly clear by using the words "unless

specifically empowered by a Magistrate in that behalf" and, "in the absence of such permission". Consequently it cannot be said that their Lordships of the Supreme Court have laid down that investigation by a Dy. S. P. is the rule u/s 5-A, Prevention of Corruption Act.

10. Reference has also been made by the learned Counsel for the non-applicant to sub-para 4 of para 6 of the said judgment. This sub-para reads as follows:

When, therefore, the Legislature thought fit to remove the protection from the public servants, in so far as it relates to the investigation of the offences of corruption comprised in the Act, by making them cognizable, it may be presumed that it was considered necessary to provide a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a police officer of a designated high rank.

Emphasizing the words "normally" It is argued that their Lordships of the Supreme Court held that investigation by a police officer of a designated high rank is the rule, Reading the paragraph as a whole, there is no doubt whatsoever that Jagannadhadas J. was dealing with the offences of corruption comprised in the Act as cognizable offences.

It is clear from the language used his Lordship also has used the expression "substituted safeguard". The expression "substituted safeguard" undoubtedly refers to a police officer of a high rank, This leaves no doubt whatsoever that his Lordship was dealing with the offences comprised in the Prevention of Corruption Act as cognizable offences. He was not dealing with that aspect of offences in which investigation cannot be carried on without the permission of a Magistrate, Besides, the word "normally" does not appear to have been used in a popular sense in which it means "usually" or "as a general rule".

Under Section 5-A when permission is not obtained from a Magistrate, investigation must be conducted by a police officer of a designated high rank. There is no choice left, to the police. Consequently the word "normally" should not have been used in a popular sense. In the Webster's Dictionary one meaning attributed to the word "normal" is "according to, constituting, or not deviating from an established form, rule or principle". According to this meaning, "normally" means "according to or not deviating from the rule".

This appears to be the meaning in which the word "normally" is used by his Lordship. However, whatever may have been the sense in which the expression "normally" is used, there can be no doubt whatsoever that the observation relates purely to the cognizable nature of the offences comprised in the Prevention of Corruption Act. By no stretch of imagination can this observation be construed to refer to both the cognizable and non-cognizable aspects of the offences comprised in the Act. Consequently, it is not correct to say that these observations support the proposition put forward by the learned Counsel for the non-applicant.

11. It may be argued that as Section 5-A requires that an officer below the rank of a Deputy Superintendent of Police requires the permission of a Magistrate to investigate, the section intends that the investigation be conducted as a general rule by a Dy. S. P. The answer to this argument will depend upon the object of such permission. Their Lordships of the Supreme Court have laid down the underlying policy in Rishbud's case. They observed:

The underlying policy in making these offences by public servants non-cognizable appears to be that public servants who have to discharge their functions-often enough in difficult circumstances should not be exposed to the harassment of investigation against them on information levelled, possibly, by persons affected by their official acts, unless a Magistrate is satisfied that an investigation is called for, and on such satisfaction authorises the same. This is meant to ensure the diligent discharge of their official functions by public servants, without fear or favour. (Vide para 6, sub-para 3.)

These observations clearly state the object of the requisite permission u/s 155, Cr. P.C. and u/s 5-A of the Prevention of Corruption Act. The object according to their Lordships is to prevent harassment of investigation against public servants on information by disgruntled persons. When, however, the offences of corruption were made cognizable under the Prevention of Corruption Act of 1947, another safeguard was introduced and that safeguard is investigation by a police officer of a designated high rank.

With regard to the officers of lower rank, the offences still remained non-cognizable. It was presumed that the high rank of a police officer would afford some sort of a safeguard against frivolous & vexatious prosecution of public servants. With regard to police officers of the lower rank, requisition of permission of a Magistrate was still maintained. The logical conclusion, therefore, is that investigation by a police officer of a designated high rank and investigation by an officer below the rank of a Deputy Superintendent of Police but with the permission of a Magistrate are on the same footing.

The object underlying in both the cases is to save public servants from frivolous and vexatious harassment at the instance of disgruntled persons. This view is fully supported by the observations of their Lordships in Rishbud's case, Their Lordships observed:

It may be of considerable importance to the accused that the evidence in this behalf of collected under the responsibility of the authorised and competent investigating officer or is at least such for which such officer is prepared to take responsibility. It is true that the result of a trial in Court depends on the actual evidence in the case but it cannot be posited that the higher rank and the consequent greater responsibility and experience of a police officer has absolutely no relation to the nature and quality of evidence collected during investigation and to be subsequently given in Court.(Vide para 7 sub-para 3.)

Their Lordships further observed:

But this is not any indication by the Legislature that an investigation by an officer of a lower rank without such permission cannot be said to cause prejudice. When a Magistrate is approached for granting such permission he is expected to satisfy himself that there are good and sufficient reasons for authorising an officer of a lower rank to conduct the investigation. The granting of such permission is not to be treated by a Magistrate as a mere matter of routine but it is an exercise of his judicial discretion having regard to the policy underlying it.(Vide para 10 sub-para 4.)

These observations fully support the view that it is the high rank of a police officer that provides a guarantee against frivolous and vexatious prosecution and in the case of an officer below the rank of a Deputy Superintendent of Police, it is the Magistrate, who guards against such an eventuality. There is, therefore, no doubt in my mind that both the investigations are on the same footing and that Section 5-A gives no priority to an investigation by an officer of a designated high rank.

The Magistrate in giving permission to an officer below the rank of a Dy. S. P. has to see whether there are good and sufficient reasons to conduct the investigation. As laid down by their Lordships in Rishbud's case, the object of making these offences non-cognizable is to avoid exposure of public servants to the harassment of investigation on information levelled, possibly, by persons affected by their official acts.

Consequently all that the Magistrate has to see before granting permission is, whether there is a prima facie case or not. If he considers that the information is frivolous or vexatious, he should refuse permission to investigate. There is no warrant for the proposition that he can give permission to an officer below the rank of a Deputy Superintendent of Police only if it is proved to his satisfaction that a Dy. S. P. is unable to undertake the investigation. The argument put forward by the learned Counsel for the non-applicant, therefore, cannot be sustained.

12. In the present case the Magistrate, who granted the permission, perused the F.I.R. before giving permission. It cannot be said, therefore, that the Magistrate did not satisfy himself regarding good and sufficient reasons to conduct the investigation. In our opinion the Magistrate did exercise judicial discretion in granting permission to the inspector of Police.

13. In view of the decision of the second contention, it is unnecessary to determine the third contention. As in our opinion, the order of the trial Court is erroneous In law, it is not necessary to consider whether the trial Court should have discharged the accused or not.

14. In this view of the matter, the revision must be accepted. Accordingly, the revision is accepted and the order of the trial Court is set aside. The learned Special Judge is directed to deal with the case according to law.

Samvatsar, J.

15. I agree.