
(1960) 09 AP CK 0007

In the Andhra Pradesh High Court

Case No : Criminal Revision Case No. 272 of 1960

Vadlamudi Kutumba Rao

APPELLANT

Vs

State of Andhra Pradesh

RESPONDENT

Date of Decision : 06-09-1960

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 155(2), 173, 196A(2), 207A, 208
Penal Code, 1860 (IPC) — Section 193, 467, 468, 471

Citation : AIR 1961 AP 448

Hon'ble Judges : Anantanarayana Ayyar, J

Bench : Single Bench

Advocate : Adavi Ramarao, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Anantanarayana Ayyar, J.—This is a petition to revise the Order d/- 5-2-1960 passed by the Judicial Second Class Magistrate, Avanigadda in Cri. M. P. No. 14 of 1960 in p. R. C. No. 8 of 1953 on his file.

2. The relevant facts of the case are briefly as follows;

3. The Deputy Registrar of Co-operative Societies filed a complaint dated 20-6-1955 against Vadlamudi Kutumba Rao, the petitioner herein, to the effect that the latter, as the President of a Co-operative Society, had committed an offence of criminal breach of trust punishable u/s 409 I. p. C. The Sub Inspector of Police, Pamaru registered a crime u/s 409 I. P. C.

After investigation, he filed a charge-sheet against eighteen accused under Sections 120B, 409, 467, 468, 471 and 193 I. P- C. Of these accused, Vadlamudi Kuntumba Rao is A-1 and was charged as the ex-President of the Co-operative Marketing Society, Pedamukthevi and A-2 to A-5 were charged as ex-Directors of the same society. The learned Magistrate took the case on file under various sections as a Preliminary Register Case and held preliminary enquiry. The

examination-in-chief of P. W. 1 was over and the case was taken up on 18-1-1960 for the cross-examination of P. W. 1. Then, A-I put in a petition requesting the Magistrate to adopt the following courses :

1. To order re-investigation of the case, u/s 155(2) Cr. P. C. on the ground that the investigation was perfunctory.
2. If he did not follow the first course, to commence the inquiry into the case according to the procedure laid down u/s 208 Cr. P. C.
3. If he did not follow the second course, then split up the charge-sheet into two, one in respect of section 409 I. P. C. and the other in respect of the other offences which were non-cognizable and to inquire into the latter offence u/s 208 Cr. P. C. and to forward the case u/s 409 I. P. C. for disposal to the First Class Magistrate having jurisdiction. The learned Magistrate dismissed the petition observing thus :

"In the present case, the only witness which the prosecution proposed to examine is P. W.1 and his Chief-examination is already over in May, 1959. The only other stage that remains to be covered is examination of the accused and hearing arguments.

I am therefore, of opinion that this petition is an attempt to invite a premature decision on the merits of the case, and, therefore, deserves to be and is hereby dismissed, as premature at this juncture".

4. The learned advocate for the petitioner, Mr. Adavi Rama Rao, points out that there are nine witnesses mentioned in the charge-sheet and that the procedure which the learned Magistrate is observing was u/s 207A Cr. P. C. He contends that, as he was raising the ground of illegality of the investigation in the case, he had to raise it sufficiently early at that stage and that if he waited till the first witness was completely examined and arguments were heard, it would be open for the Magistrate to hold that the objection had not been raised in time. In H.N. Rishbud and Inder Singh Vs. The State of Delhi, it has been held as follows :

"If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course or investigation does not affect the competence and the jurisdiction of the Court for trial is well- settled, as appears from the cases in AIR 1944 73 (Privy Council) and Lumbhardar Zutshi v. The King AIR 1950 PC 26.

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"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 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".

In view of the first course prayed in the petition (as numbered by me above), it cannot be said that the petitioner ought to have waited till the examination of P. W. 1 was over or that his filing of the petition was premature.

5. On this ground alone, the present petition could have been allowed and the learned Magistrate could have been asked to reconsider the points raised by the learned Advocate for the petitioner. But, I prefer to deal With those points here myself as they have been argued in full by both sides.

6. The main contentions urged by the learned Counsel for the petitioner are:

1. That the investigation was invalid as it involved mostly non-cognizable offences and was still not authorised by an order of a competent Magistrate u/s 155(2) Cr. P. C

2. That there was no order in writing as-contemplated in Section 196A(2) Cr. P. C.

7. Point No. 1: The sections under which the Police filed charge-sheet and under which the learned Magistrate has taken cognizance are Sections 120B, 467, 468, 471, 193 and 409 I. P. C. It is seen from Schedule II to the Code of Criminal Procedure that the offence of criminal breach of trust u/s 409 I. P. C. is cognizable. In paragraphs 8 and 9 of the charge-sheet, it is mentioned as follows:

"All the accused who are the close associates and partisans of the 1st accused have entered into a criminal "conspiracy to commit criminal breach of trust" by forging and fabricating false and fraudulent documents with the dishonest and fraudulent "idea" of making wrongful gain for themselves by causing wrongful loss to the other members of the Society. In pursuance of the said conspiracy, the accused have misappropriated the funds of the Society to the tune of Rs. 16,250/- by forging and fabricating the documents set out below.

"Accused 1 to 5 who are the President and Directors of the Society committed Criminal breach of trust in respect of Rs. 16,250/-belonging to the Society and are, therefore, liable u/s 409 I. P. C."

The word "idea" underlined (in single quotation here--Ed.) in the above passage is used obviously to mean the "object" of the conspiracy which is the offence of breach of trust u/s 409 I. P. C. The entry against Section 120B in Column 3 of Schedule II runs :

"May arrest without warrant if arrest for the offence which is the object of the conspiracy may be made without warrant, but not otherwise".

Therefore, the offence u/s 120B I. P. C. in this case is cognizable.

8. The other offences under; Sections 467, 468, 471, and 193 I. P. C. are said to have been committed in pursuance of the conspiracy. Each of them is non-

cognizable. All these offences as well as the offence u/s 120B I. P. C. appear in the charge-sheet but they did not find place in the F.I.R. which mentioned only Section 409 I. P. C. and only A-I and was registered only u/s 409 I. P. C. which did not require any order of a Magistrate u/s 155(2) Cr. P. C. for investigation. It is beyond doubt or dispute that the Police did not take any order u/s 155(2) Cr. P. C. for investigating the non-cognizable offence.

9. Section 155 Cr. P. C. reads:

"Information in non-cognizable cases. (1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information and refer the informant to the Magistrate.

Investigation into non-cognizable cases : (2) No police officer shall 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 same to try such case or commit the same to trial, or of a Presidency Magistrate.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case".

Sections 155(2) Cr. P. C. prohibits police officer from investigating only "non-cognizable case" and not "non-cognizable offence" without the order of a Magistrate. The distinction between non-cognizable case and non-cognizable offence is specifically made by the Code of Criminal Procedure. Section 4(1)(n) Cr. P- C. runs:

"non-cognizable offence" means an offence for, and "non-cognizable case" means a case in, which a police officer, within or without a presidency town, may not arrest without warrant" :

(9a) "Section 4(1)(f) Cr. P. C correspondingly, defines "cognizable offence" and "cognizable case" as below :

"Cognizable offence" means an offence for, and "cognizable case" means a case in. which a police officer, within or without the Presidency towns, may, in accordance with the second schedule or under any law for the time being in force, arrest without warrant".

In the present case, a police officer could arrest the accused without warrant as regards the offences under Sections 409 and 120B I. P. C. But, he could not arrest the accused without warrant as regards the Other offences. The "case" as investigated by the Police Officer thus included cognizable offences as well as noncognizable offences. u/s 4(1)(f) Cr. P. C., the case would be a "cognizable case", if it was one in which a police officer could arrest without warrant.

When the Police Officer could arrest without warrant for offences under Sections 120B and 409 I. P. C. which were offences involved in this case, it was obviously

a case in which the police officer could arrest without warrant. The fact that the case also included some offences under Sections 497, 468 I. P. C., etc. for which the police officer could not arrest the accused without warrant--would not affect or take away the right of the police officer to arrest and the corresponding liability of the accused without warrant which right is given because of the offences under Sections 409 and 120B I. P. C. For, the right and power to arrest without warrant is a positive right and power given to the Police by the Statute.

On the other hand, regarding the non-cognizable offences, the Code has only chosen not to give the right and power to the Police to arrest without warrant but has not conferred a positive privilege from arrest or bestowed a positive immunity from liability to arrest, on the persons accused of such offences. The Code is mainly concerned with the procedure for trial and punishment of offenders for offences committed by them.

Provisions regarding arrest are not meant or framed so as to benefit or reward those who have committed certain non-cognizable offences from liability to arrest, as regards cognizable offences which also they had committed. To hold otherwise would be not only illogical but also Opposed to the spirit, object and purpose of the Code and lead to startling consequences, as seen From the following example. If a case under investigation included an offence u/s 302 I. P. C. against an accused for murdering a person (cognizable offence), he would be liable for arrest.

If in addition to murdering the deceased, the accused caused simple hurt to another person in the course of the same transaction, he would have also committed an offence u/s 323 I. P. C. which is a non-cognizable offence. Such a case must be either a cognizable case or a non-cognizable case under the Code. If such a case (consisting of offences under Sections 302 and 323 I. P. C.) were a non-cognizable case, it would mean that the accused would not be liable to be arrested, even for the offence u/s 302 I. P. C. and also mean that, by committing the non-cognizable offence (in addition to the serious cognizable offence) he would be benefiting himself and giving himself immunity from arrest for the very serious cognizable offence u/s 302 I. P. C. Such a result would obviously be absurd and illogical.

On the other hand, if such a case (which includes non-cognizable offence and also a cognizable offence) be treated as a cognizable offence under the Code, the result would be that the accused would be liable to arrest without warrant for the serious offence u/s 302 I. P. C. unaffected by the fact that the accused is not liable to arrest without warrant for the offence u/s 323 I. P. C. This result is reasonable, correct and logical. Thus, it is clear that a case like the present which includes cognizable offences as well as non-cognizable offences is a cognizable case.

10. The use of the phrase "non-cognizable case" in Section 155(2) Cr. p. C. is of particular significance when contrasted with the use of the phrase

"nonu" cognizable offence" in Section 155

(1) Cri. P. C. and considered with the fact that the two phrases have been distinguished "and separately defined in Section 4(1)(n) Cr. P. C. The learned Advocate for the petitioner has pointed out that the marginal note against Section 155(1) Cr. p. C. mentions non-cognizable cases just as the marginal note to Section 153

(2) Cr. P. C. does. From this, he argues that the intention of the framers of the Code was not to make a distinction between non-cognizable page and non-cognizable offence. This contention cannot be accepted for the following reasons :

1. Distinction between non-cognizable case and non-cognizable offence is clearly made by defining those two phrases and by showing the difference between them in Section 4(1)(n) Cr. P. C.

2. It is well settled that marginal notes to sections of an Act cannot be referred to for the purpose of construing the Act or for interpreting the section itself. Vide *Balraj Kunwar v. Jagatpal Singh* --31 Ind App 132 (PC). There is no justification for restricting the contents of a section by its marginal notes. They are not part of the Act. In construing a section, it is the wording of the section itself which should have preference over anything that has been said, in the marginal note. A marginal note is merely an abstract of the clause intended to catch the eye.

10a. Even assuming without admitting that marginal note can be used to interpret the words of a section, the use of the phrase "non-cognizable case" in the marginal note to Section 155(1) Cr. P. C. can be interpreted as follows- All cases covered by Section 155(1) Cr. P. C. in which the police officer would have to make entry in a book and refer the informant to a Magistrate would be only non-cognizable cases i.e., where the information given to the officer disclosed only non-cognizable offence or offences (the word "offence" would include the plural also u/s 9 I. P. C.) but would not cover cases where the information disclosed a cognizable offence also, in addition to non-cognizable offence or offences. In cases where there was a cognizable offence also in the information, it would become a cognizable case and, therefore, the procedure adopted by the police officer would be u/s 154, Cri. P. C. and not u/s 155 Cri. P. C. In Section 154, Cr. P. C. also like Section 155(1) Cr. P. C. the marginal note contains the word "case" whereas the body of section contains the word "offence".

11. In *Ram Krishna Dalmia Vs. State*, it has been held by the Punjab High Court, as follows :

"At first, however, it seems to me that the provisions of Section 155(1), Criminal Procedure Code, must be regarded as applicable only in those cases where the information given to the Police relates solely to a non-cognizable offence, and that where information is given in the police of a cognizable offence and the case is registered regarding that offence, the investigating officer, while investigating the cognizable offence cannot possibly be debarred from investigating any

subsidiary and non-cognizable offence which may arise out of the facts, and can also include these latter cases in his main report u/s 173" "

"At page 174, it was also observed:

"In the circumstances, I am of the opinion that a Police Officer who is empowered to investigate a cognizable offence must be deemed to be authorised to investigate and mention in his report any incidental offences which arise out of the facts relating to the main offence, even where such offences are non-cognizable and would fall u/s 155 if reported separately and simply as non-cognizable offence and so would require the authority of a Magistrate to Investigate that offence, and I am not prepared to hold in the present case that the case as a whole is not instituted on a report of the Police presented to the Magistrate u/s 173 of the Code".

In that case, the F.I.R. was drawn up and the case was registered u/s 409 I. P. C- just as in the present case and the final charge-sheet was filed by the Police mentioning not only Section 409 I P. C. but also non-cognizable offences, (under Section 477A I. P. C. etc.) just as in the present case.

12. In Cheemalapati Ganeswara Rao v. Public Prosecutor, A. P. (Unreported decision of this Court, D/- 30-1-1960 in Cri. A. Nos. 277 and 278 of 1957 and Cri. R. C. No. 810 of 1957) my learned brother Sanjeeva Row Nayudu J. decided (at page 140) as follows:

"The next legal objection taken by the learned counsel for the accused is in respect of the taking cognizance of the offences forming the subject-matter of charges u/s 477A, Indian Penal Code and Section 467 read with Section 471 Indian Penal Code. It is pointed out that these offences are non-cognizable having regard to schedule II to Chapter XVIII of the Criminal Procedure Code....."

It is pointed out that no order of a competent Magistrate had been obtained in this case to empower the police to investigate into these offences. It is also pointed out that Ex. p-70 which is the complaint given to the police by P. W. 2 in the case itself averred the falsification of accounts, one of the offences alleged to have been committedThe learned Public Prosecutor points out that Section 155(2) Criminal Procedure Code has application only to cases where the information given to the Police embraced only a non-cognizable offence, and it obviously cannot apply to a case where serious cognizable offences are complained against and incidentally a non-cognizable offence is also included in the complaint. He further points out that a contrary interpretation would hamper the police making investigation which they are entitled to do in respect of the main cognizable offence reported to them. I am inclined to agree with the submission made by the learned public Prosecutor and hold that Section 155(2) Cr. P. C. could only apply and could have been intended by the Legislature to apply, to the subject-matter of a wholly non-cognizable case, and not to a cognizable case which also embraces in its fold certain non-cognizable offences, directly or intimately connected with the cognizable offences involved therein....."

13. The learned Advocate for the petitioner has relied on the decision in Public Prosecutor Vs. A.V. Ramiah, wherein it was held as below:

"It follows that an offence u/s 12 of the Gaming Act is not a cognizable offence within the meaning of Section 4(1)(f) Criminal Procedure Code, and a Police Officer cannot investigate into it without the order of a Magistrate as required by Section 155(2), Criminal Procedure Code."

But, if a police officer does investigate into an offence u/s 12 of the Gaming Act without the order of a Magistrate and files a charge-sheet, it is nonetheless to be treated as a complaint and not as a police report. The label put on it by the Sub-Inspector of Police is of no significance."

In that case, the accused was charged with only a non-cognizable offence, pure and simple. He was not charged with any cognizable offence in addition to non-cognizable offence. So, that decision does not apply to the facts of this case.

14. Thus, the position of law is as follows: A case can include one offence or more than one offence. It must be either a cognizable case or a non-cognizable case. It would be a non-cognizable case only if every one of the offences is a non-cognizable offence. It would be a cognizable case u/s 4(1)(n) Cr. P. C. even if one or more (not necessarily all) of the offences in the case are cognizable offences. The Code does not contemplate any case to be partly non-cognizable.

A case cannot be partly non-cognizable any more than a woman can be partly virgin. A woman is considered to be chaste only if every one of her acts which decide her moral conduct and character (with reference to chastity) is chaste. If any one of the acts is unchaste, then the woman is unchaste and cannot be called Partly chaste or moderately chaste or almost wholly chaste. The position regarding non-cognizable case appears to be similar.

15. In the present case, it is obvious that the case which the Police investigated was a cognizable case, because it related to cognizable offences under Sections 409 and 120B I.P.C. and in spite of the fact that it also related to non-cognizable offences under Sections 467, 468, 471 and 193 I.P.C. So, the investigation of the case did not require any order from a Magistrate, as contemplated u/s 155(2) Cr. P. C. In effect, the charge-sheet in the case was instituted on a police report, as contemplated in Section 207A Cr. P. C. and with the consequence that the procedure specified in Section 207-A Cr. P. C. was the appropriate procedure.

16. Point No. 2: Section 196A(2) Cr. P. C. runs:

"196-A. No Court shall take cognizance of the offence of criminal conspiracy punishable u/s 120B of the Indian Penal Code (45 of 1860)..... (2) in a case where the object of the conspiracy is to commit any non-cognizable offence or, a cognizable offence not punishable with death (imprisonment for life) or rigorous imprisonment for a term of two years or upwards unless the State Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the State Government has, by order in writing, consented to the initiation of

the proceedings."

17. I have already pointed out that, according to the charge-sheet, the object of the conspiracy is to commit an offence u/s 400 I.P.C. which is a cognizable offence punishable with imprisonment for life. Consequently, it is clear from the wording of the Section that no order u/s 196-A (2) Cr. P. C. is necessary for the offence of criminal conspiracy in this case being taken cognizance of by the Court i.e., the Court of the Judicial Second Class Magistrate, Avanigadda. As already seen, non-cognizable offences mentioned in the charge-sheet were committed only in pursuance of the conspiracy and for carrying out the object of the conspiracy. All the same, I am dealing below with the various decisions relied on by both aides.

18. The learned Advocate for the petitioner seeks to rely on the decision of Sanjeeva Row Naidu J. in Kandimalla Subbiah, in Re 1958 2 Andh WR 523 at p. 525 wherein it was observed at page 525:--

".....It is clear that the offences mentioned in the charge-sheet, namely, Sections 466, 467, Indian Penal Code, are non-cognizable. Consequently, in respect of a prosecution for a simple conspiracy to commit these offences u/s 120B, Indian Penal Code, the consent contemplated by Section 196-A(2) is prerequisite to any court taking cognizance of that offence. In this case, no such consent has been produced. In fact, the learned Public Prosecutor conceded that no such consent was obtained. In the circumstances, the Special Judge is clearly precluded from taking cognizance of the said offence, namely, of criminal conspiracy to commit the offences under Sections 466 and 471, Indian Penal Code, which are non-cognizable. At the same time, I must make it clear that as Section-196A, Criminal Procedure Code, does not apply to a case of criminal conspiracy to commit an offence u/s 420 which is a cognizable offence punishable with seven years" rigorous imprisonment, it was perfectly competent for a criminal court to take cognizance of the said offence, without any sanction or consent as Section 196-A would not be applicable to such a case."

That decision does not apply to the present case in which the object of the conspiracy is only to commit cognizable offence u/s 409 I. P. C, and not to commit offences under non-cognizable Sections namely Sections 467, 468, 471 and 193 I.P.C.

19. In Public Prosecutor, Andhra Pradesh v. Ponnapaty Raghava Reddi (Unreported decision of this Court in CrI. Appeal Nos 182, 623 and 624 of 1958, D/- 10-54960 (AP)), it has been held by my learned brother, Basi Reddy, J. as follows (at pages 37 and 38):

".....The distinction between the object of a conspiracy and the method or device adopted to achieve that object must be kept in view. The object is the end and the steps taken towards the fulfilment of the object are the means. The Concise Oxford Dictionary gives the following meanings to the word "object": Thing aimed at, end, purpose. Since the object of the conspiracy was not to forge the

letter of authorisation Ex. P-7, no consent was necessary under Sub-section (2) of Section 196A for the initiation of proceedings against the accused for offences under Sections 467 and 471 read with Section 467. Vide Durgadas Tulsiram Sood Vs. State, ."

In the present case, the object of the conspiracy was to commit the offence u/s 409 I. P. C. On the other hand, the offences under Sections 467, 468 I. P. C. etc. were only means to the end.

20. In K. Ranga Rao, in Re: (Unreported decision of this Court in CrI. R. C. Nos. 342 and 343 of 1960 D/- 8-8-1960 (AP)) my learned brother Narasimham J. considered a similar objection and. after discussing the case law on the subject, concluded as follows; (at page 13):

"On a careful scrutiny, I am inclined to take the view that the object of the criminal conspiracy was to dishonestly misappropriate the funds earmarked for scholarships i.e., to commit an offence u/s 409 I. P. C. a cognizable offence and that the other offences were only the means to achieve the object. That is made clear by the later part of the charge-sheet. The mere fact that all these offences were jumbled together in the last para, does not warrant an inference that the two accused had agreed at the outset to commit all these offences and that each of these offences was an object of the conspiracy. Such an interpretation would obviously miss the importance of the vital clause "the object of the conspiracy". It would be tantamount to reading every offence committed as an object of the conspiracy. This interpretation does not commend itself to me. The allegations have to be interpreted rationally and reasonably, having regard to the vital clause "the object of the conspiracy" occurring in Section 196-A(2), Cr. P. C. and the current of authority laying emphasis on the recognizable difference between the object of a conspiracy and the means adopted to realise that object."

21. In Kannan, in Re 1949 2 MLJ 52 (CrI. M. P. No. 2686 of 1949) Horwill and Balakrishna Aiyer JJ. held as follows:

"Where the principal object of a conspiracy was cheating, and the forgery, fabrication of false documents and the like were merely steps taken by one or other of the accused for the purpose of effecting the object of their conspiracy and were clearly subsidiary and subordinate to the main object of cheating, no sanction of the Provincial Government or of one or the other Of the authorities mentioned in Section 196A of the Criminal Procedure Code is necessary."

22. I find that this contention of the learned Advocate for the petitioner on the basis of Section 196-A Cr. P. C. is also not tenable.

23. In effect, none of the three prayers asked for by the petitioner in his original petition in P. R. C. 8 of 1956 can be granted. The order of disposal by the learned Magistrate, therefore, did not cause prejudice to the petitioner-accused.

24. In the result, I dismiss the revision petition.