K.K. Patel And Anr vs State Of Gujarat And Anr on 12 May, 2000

Equivalent citations: AIR 2000 SUPREME COURT 3346, 2000 AIR SCW 3564, 2000 CRILR(SC MAH GUJ) 521, 2000 (7) SRJ 143, 2001 SCC(CRI) 200, 2000 (4) SCALE 572, 2000 ALL MR(CRI) 1232, 2000 CRIAPPR(SC) 411, 2000 (6) SCC 195, 2000 CRILR(SC&MP) 521, (2000) 7 JT 246 (SC), 2000 (3) LRI 163, (2000) 157 TAXATION 636, (2000) 113 TAXMAN 324, (2000) 162 CURTAXREP 42, 1999 ALLMR(CRI) 2 2030, 2000 CHANDLR(CIV&CRI) 234, (2000) 3 CURCRIR 1, (2000) 244 ITR 55, (2000) 2 EASTCRIC 748, (2000) 4 GUJ LR 3599, (2000) 3 GUJ LH 30, (2000) 2 RECCRIR 863, (2000) 4 SUPREME 160, (2000) 28 ALLCRIR 1658, (2000) 4 SCALE 572, (2000) 41 ALLCRIC 351, (2000) 2 CHANDCRIC 197, (2000) 3 ALLCRILR 99, (2000) 2 CRIMES 314, (2000) 5 BOM CR 505

Bench: K.T. Thomas, D.P. Mohapatra

CASE NO.:
Special Leave Petition (crl.) 3774 of 1999

PETITIONER:
K.K. PATEL AND ANR.

Vs.

RESPONDENT:
STATE OF GUJARAT AND ANR.

DATE OF JUDGMENT: 12/05/2000

BENCH:
K.T. THOMAS & D.P. MOHAPATRA

JUDGMENT:

Thomas J.

Leave granted.

L...I...T.....T.....T.....T.....T.....T.....T..J This case is policeman versus policeman. For six years now the case is still drifting in the first phase itself, as its very right of entry into the criminal court is

under challenge. The Sessions Court in revisional proceedings upheld the objections raised by the accused that prosecution is not maintainable but the High Court in a second revision held that sessions court had transgressed the jurisdiction as no revisional powers could have been exercised by the Sessions Judge at that stage. It is the said decision of the Division Bench of the High Court of Gujarat which is being challenged in this appeal.

A Deputy Superintendent of Police (for convenience he can be referred to hereinafter as "the respondent-police officer) filed a complaint before the Metropolitan Magistrate, Ahmedabad, against two other police officers one of whom was a Superintendent of Police and the other was a Deputy Superintendent of Police. (They will hereinafter be referred to as "the appellants".) The offences alleged against the appellants in the complaint are those under Sections 166, 167, 176, 201, 219, 220, 342, 417 of the Indian Penal Code (IPC for short) read with Sections 120B, 34 and 109 of the same Code. The offence under Section 147(G) of the Bombay Police Act is also included in the complaint.

A brief account of the events which preceded the filing of the said complaint is necessary. On 24.8.1992, one Jaffer Khan lodged a complaint with the magistrate alleging that his brother (Jahangir Khan) was kidnapped by some persons named in the complaint. The magistrate forwarded the said complaint to the police for action under Section 156(3) of the Code of Criminal Procedure (hereinafter referred to as "the Code") and then FIR was registered on its basis. The respondent-police officer was arrested by the appellants on 28.8.1992, but the alleged kidnapped person (Jahangir Khan) appeared before all people concerned. Respondent-police officer was later released on bail. After investigation the police submitted "final report" on 3.3.1994 holding that the accused are untraceable and requested the court to grant "A" Summary (which means that the complaint could not be substantiated due to want of proof). But the court after hearing the respondent-police officer also in the matter, passed an order granting "B" Summary, (which means that the complaint was found false). It was in the above background that the respondent-police officer filed the present complaint on 25.7.1994.

The present complaint runs into more than 70 typed pages and has been prepared in a flummoxed fashion. It is very clumsily prepared. It was difficult even for the learned counsel appearing for the respondent-police officer to decipher the lengthy sentences as well as circumlocuted paragraphs. Nonetheless he found out the core allegations in the complaint which is extracted below:

> "The conspiracy has been made by making false complaint and I have illegally been arrested in which accused No.1 and 2 have helped since they were in crime branch since long period and having relation with Muslim politicians/leaders/anti social elements and having good relations with them and to get their help in continuing in the crime branch and in view of their other weaknesses and under political pressure to please the Muslim leaders and in doing so, getting benefit inter se, have played main role in arresting us and in making ex parte inquiry against me which would become clear from perusal of all the aforesaid facts and the grounds. Investigating Officer cannot make such illegal ex parte inquiry under political or other pressure or for any other cause for illegally arresting by misusing the power under the pretext of

> law and though the complaint was going to be proved wrong, ultimately, instead of "B"

Summary, "A" Summary has been prayed for and for preventing repetition of such things in future, the accused should be severely dealt with to set example in the interest of justice and I am filing this complaint only for the sake of justice and therefore, it is prayed that the accused be strictly and severally dealt with. Otherwise, when a Class I Police Officer has been dealt with in this fashion and has been arrested in this manner, there would be nothing like safety of any common subject or citizen."

The Metropolitan Magistrate after taking the sworn statement of the respondent-police officer took cognizance of the aforesaid offences and issued process to the appellants. On appearance before the Metropolitan Magistrate appellants filed a petition for discharging them on the premise that no sanction was obtained to prosecute them. The Metropolitan Magistrate dismissed the said petition on 17.5.1997 with a rider that "appropriate decision regarding prior sanction shall be taken on merits after considering the evidence that may be produced by the parties". (The Metropolitan Magistrate of Ahmedabad has written one of the lengthiest and tautologous orders running into 114 closely typed pages just for reaching the above conclusion. We are unable to appreciate how the heavily boarded courts like the Metropolitan Magistrate's court or a city court could afford writing such fritteringly lengthy orders just for concluding that the questions raised can be considered at a later stage).

Appellants filed a revision before the Sessions Court and in the revision the appellants raised one more additional point based on Section 161(1) of the Bombay Police Act which was made applicable to the State of Gujarat. As per that section no complaint could be filed after one year of the date of the act complained of in respect of offences falling within the purview of that sub- section. By a well considered order learned Additional Sessions Judge of Ahmedabad (V.N. Yagnik) upheld the objections on both counts, one based on Section 197 of the Code and the other on Section 161(1) of the Bombay Police Act. Consequently the process issued by the trial court was quashed and the complaint itself stood dismissed.

Learned Single Judge of the High Curt of Gujarat in the revision moved by the respondent-police officer set aside the judgment of the Additional Sessions Judge mainly on the ground that Sessions Court should not have entertained the revision at all as the order challenged before it was only interlocutory. What the learned Single Judge has stated on that point is the following:

> "The order dated 17th May 1997, made by the learned Magistrate did not conclude the issue raised before him and, therefore, was necessarily an interlocutory order. In view of the provisions contained in Section 397(2) CRPC a revision against the said order would not be maintainable. In my view, therefore, the Revision Application No.198/97 preferred before the learned Additional Sessions Judge was not maintainable. The learned Additional Sessions Judge has thus transgressed her jurisdiction in entertaining and allowing the said Revision Application."

However, learned Single Judge opined that the Metropolitan Magistrate was right in holding that further evidence is required to decide the question relating to Section 197 of the Code, regarding the objections pertaining to Section 161(1) of the Bombay Police Act. The learned Single Judge made following observations:

> "The question of limitation under Section 161 of the Bombay Police Act was never raised before the learned Magistrate. It was, therefore, not open to the accused to raise the said contention before the learned Additional Sessions Judge and the learned Additional Sessions Judge in entertaining and deciding the said issue has clearly transgressed her jurisdiction."

Merely because the appellants did not raise the legal points based on Section 161 of the Bombay Police Act before the Metropolitan Magistrate they are not estopped from canvassing on that additional grounds also before the Sessions Court in revision as they were challenging therein the very issuance of process against them. The position may be different if the Sessions Judge had avoided dealing with the contention based on Section 161(1) of the said Act on the premise that it could be raised before the trial court. But when the Sessions Judge had opted to go into that question and rendered a decision on it on merits it is difficult to concur with the reasoning of the High Court that the said aspect would not be gone into by the High Court as the same was not raised before the trial court.

That apart, the view of the learned Single Judge of the High Court that no revision was maintainable on account of the bar contained in Section 397(2) of the Code, is clearly erroneous. It is now well neigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage. {vide Amar Nath vs. State of Haryana (1977 4 SCC 137); Madhu Limaye vs. State of Maharashtra (1977 4 SCC 551); V.C. Shukla vs. State through CBI (1980 2 SCR 380); and Rajendra Kumar Sitaram Pande vs. Uttam(1999 3 SCC 134)}. The feasible test is whether by upholding the objections raised by a party, would it result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objection raised by the appellants were upheld by the court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable.

Therefore, the High Court went wrong in holding that the order impugned before the Sessions Court was not revisable in view of the bar contained in Section 397(2) of the Code.

Though learned counsel for the appellants endeavoured to contend that want of sanction of the Government is a bar under Section 197 of the Code for taking cognizance of the offences, we do not consider it necessary to delve into that part of the contention in view of our conclusion regarding Section 161(1) of the Bombay Police Act. The said sub-section is extracted below:

> "161. Suits or prosecutions in respect of acts done under colour of duty as aforesaid - not to be entertained, or to be dismissed if not instituted within the prescribed

> period.- (1) In any case of alleged offence by the Commissioner, the Revenue Commissioner, the Commissioner, a Magistrate, Police officer or other person, or of a wrong alleged to have been done by such Commissioner, such Revenue Commissioner, Commissioner, Magistrate, Police officer or other person by any act done under colour or in excess of any such duty or authority as aforesaid or wherein, it shall appeal to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted, more than one year after the date of the act complained of.
>
> Provided that, any such prosecution against a Police Officer may be entertained by the Court, if instituted with the previous sanction of the State Government within two years from the date of the offence."

The sub-section imposed a ban on the court from entertaining a prosecution for an offence falling within the purview of the sub-section and was committed by a police officer, if the prosecution was instituted more than one year after the date of the act complained of. The only exception to the said ban is, if the complainant gets sanction from the State Government to prosecute the police officer the aforesaid period of one year would get enlarged to two years. Offences falling within the purview of the sub-section relate to those acts done "under the colour or in excess of any duty or authority as aforesaid". The sub- section then widens the net a little further by bringing within its sweep those offences committed through any acts done which are "of the character aforesaid". The expression "aforesaid" in the sub-section is evidently with reference to what is mentioned in Sections 159 and 160 of the same enactment. Those provisions afford an absolute immunity to a public servant from any penalty or liability to pay damages in respect of any "act done in good faith" in pursuance of or intended pursuance of "any duty imposed or any authority conferred on him by any provision of this Act or any other law for the time being in force or any rule, order or direction made or given thereunder". Such absolute immunity is not afforded in respect of any offence or wrong alleged to have been done by such public servant, if it was done "under colour or in excess of any such duty or authority as aforesaid". Nonetheless the said statute has fixed a time limit for initiation of prosecution proceedings in such cases against the public servant. If prosecution proceedings were not initiated within such time limit, they cannot be commenced thereafter.

A three Judge Bench of this Court in Virupaxappa Veerappa Kadampur vs. State of Mysore (AIR 1963 SC 849) has considered the amplitude of the expression "under the colour of any duty or authority" as envisaged in the sub- section. After making reference to some of the earlier decisions rendered by the Bombay High Court and after noticing the meaning of the expression "colour of office" given in Law lexicons, learned Judges observed thus:

> "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 cloak 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 S.161(1) to include this

> sense. ..... It appears to us that the words `under colour of duty' have been used in S.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."

In this case, there is no scope for contending that the offences alleged would not fall within the purview of "acts done under the colour or in excess of duty or authority" of such police officer. Even the very reading of the ingredients for the offences alleged would show that such offences could not be committed without being in the cloak of a public servant nor could they be committed unless the public servant was at least under the colour of his office. Section 166 of the Indian Penal Code which is one of the offences alleged against the complainant is extracted below:

> "166.Public servant disobeying law, with intent to cause injury to any person.- Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

The indispensable ingredient of the said offence is that the offender should have done the act "being a public servant". The next ingredient close to its heels is that such public servant has acted in disobedience of any legal direction concerning the way in which he should have conducted as such public servant. For the offences under Sections 167 and 219 of IPC the pivotal ingredient is the same as for the offence under Section 166 of IPC. The remaining offences alleged in the complaint, in the light of the averments made therein, are ancillary offences to the above and all the offences are parts of the same transaction. They could not have been committed without there being at least the colour of the office or authority which appellants held.

Shri S.K. Dholakia, learned senior counsel for the State of Gujarat invited our attention to the decisions of this Court in State of Maharashtra vs. Narhar Rao (AIR 1966 SC 1783) and State of Maharashtra vs. Ram and Ors. (AIR 1966 SC 1786). Both the decisions dealt with the scope of Section 161 of the Bombay Police Act. In the former, a Police Head Constable was tried for the offence under Section 5(2) of the Prevention of Corruption Act 1947, for accepting bribe in the course of investigating a criminal case. Though the trial court convicted him of the offence the High Court acquitted him in appeal on the ground that prosecution was barred under Section 161(1) of the Act. A three Judge Bench of this Court has held that the act of accepting bribe is not an act done in the colour of his office. The following observations in that decision are apposite in the context.

> "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."

In the latter decision the same three Judges Bench considered the case of two Police Head Constables who were prosecuted for certain offences and they were convicted under Section 330 of the IPC. There also the High Court took the view, in the appeal filed by them, that prosecution was barred under Section 161(1) of the Act. On the facts of that case learned Judges held that the offence was not relating to an act done in the colour of office. The said decision confined to the fact situation which arose in that case.

We may observe that neither of the above decisions has changed the legal position laid down by the three Judges Bench in Virupaxappa Veerappa Kadampur (supra).

In the present case, it is the admitted fact that the complaint was filed only long after the period indicated in Section 161 of the Act was over, either with or without sanction from the State Government. Therefore, the complaint is irretrievably barred under the said provision.

In view of this conclusion of ours it is unnecessary for us to consider the next question whether sanction under Section 397 of the Code is necessary to take cognizance of the offences alleged.

We, therefore, allow this appeal and set aside the judgment under challenge and restore the order passed by the Sessions Judge dismissing the complaint.