

Bombay High Court

Narendra Kishanrao Ashtikar & Ors vs State Of Mah & Anr on 17 November, 2016

Bench: V.K. Jadhav

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910 CRI.APPLICATION.762 OF 2005.odt

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

APPELLATE SIDE JURISDICTION

CRIMINAL APPLICATION NO. 762 OF 2005

1. Narendra Kishanrao Ashtikar,

Age. 51 years, Occu. Service,
2. Gautam Kachru Gangawane,
Age. 40 years, Occu. Service,
3. Kaduba Godhaji Dudhe,
Age. 40 years, Occu. Service,
4. Sahebrao Rajaram Suradkar,
Age. 35 years, Occu. Service,
5. Chootiram Roopaji Dudhe,
Age. 35 years, Occu. Service,
6. Shaikh Asif Shaikh Azagar,
Age. 39 years, Occu. Service,

7. Ambadas Kaduba Dhormare,
Age. 36 years, Occu. Service,
8. Prabhakar Kishanrao Shinde,
Age. 35 years, Occu. Service,
9. Attaullah Khan Munir Khan Pathan,
alisa Moin Kha,

Age. 38 years, Occu. Service,
10. Vithal Rangnath Dorkhe,
Age. 39 years, Occu. Service,
11. Dilip Sitaram Salve,
Age. 34 years, Occu. Service,
12. Devidas Ganpat Kudal,
Age. 30 years, Occu. Service,

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910 CRI.APPLICATION.762 OF 2005

13. Sambhaji Bhimrao Wagh,

Age. 35 years, Occu. Service,
all R/o Nagar Parishad Sillod,

R/o Sillod, Tq. Sillod,
District Aurangabad.

... APPLICANTS
(Orig. Accused)

V E R S U S

1. The State of Maharashtra.
(Copy to be served on Public Prosecutor
High Court of Bombay Bench at

Aurangabad).

- 2.

Harishkumar S/o Arjundas Shamnani,
Age. 42 years, Occu. Business,
R/o House No.258, Sindhi Colony,

Jalgaon, Dist. Jalgaon.

... RESPONDENTS
(Orig. Complainant)

...

Mr. V. S. Bedre, Advocate for the Applicants.
Mr. S. P. Tiwari, APP for Respondent No.1.

Mr. H. H. Palodkar, Advocate for Respondent No.2.

...

CORAM : V. K. JADHAV, J.
DATE : 17th November, 2016.

JUDGMENT:

. By this criminal application, the Applicants seek to quash and set aside the order of issuance of process below Exhibit-1 dated 5th March, 2005 passed by the learned Judicial Magistrate First Class, Sillod, in Miscellaneous Application No.292 of 2004.

910 CRI.APPLICATION.762 OF 2005.odt 2 Brief facts giving rise to the present criminal application are as under:

Respondent No.2 has filed a complaint against the Applicants for having committed an offence punishable under Section 379 read with 34 of the Indian Penal Code. It is alleged in the complaint that Respondent No.2 / original Complainant is the owner of Maruti Omni Car bearing registration No. MH-20-U-49. On 12 th December, 2004, he had parked his vehicle before Nanak Cloth Store, Sarafa Market, Sillod and left the town for business purpose.

He returned on 29th December, 2004, and found that the vehicle was not there. He had enquired with his brother Sacchanand Shamnani and nephew Mahesh. They informed to him that all the Accused in furtherance to their common intention had seized the said vehicle and taken away it alongwith them. It is, therefore, alleged in the complaint that all the Accused persons have committed the offence of theft.

3 On presentation of complaint, the learned Magistrate when observed that Applicant No.1 is the Chief Officer of Municipal Council, Sillod and other Applicants are staff members of the Municipal Council, passed the order below Exhibit - 1 dated 1 st 910 CRI.APPLICATION.762 OF 2005.odt January, 2005, in M.A. No.292 of 2004, with the observations that Accused No.1 (Applicant No.1 herein) is the public servant not removable from office except with the sanction of Government and thus thought it fit to call his explanation in view of the law laid down by the Supreme Court in the case P. K. Pradhan Vs. State of Sikkim, reported in, AIR 2003 S.C. 2547 and accordingly called upon Accused No.1 (Applicant No.1 herein) to submit explanation as to whether he acted in discharge of official duty or otherwise.

Accordingly, Applicant No.1 / original Accused No.1 has submitted his explanation on 5th February, 2005 before the learned Judicial Magistrate First Class, Sillod.

4 The learned Judicial Magistrate First Class, Sillod vide its impugned order dated 5th March, 2005 below Exhibit - 1 in M.A.

No.292 of 2004, issued process against all the Applicants / original Accused under Section 379 read with 34 of the Indian Penal Code.

Hence this criminal application.

5 The learned counsel for Applicants submitted that Applicant No.1 is the Chief Officer of the Municipal Council, Sillod and all other Applicants are employees of the Municipal Council and are 910 CRI.APPLICATION.762 OF 2005.odt public servants. Respondent No.2 / original Complainant, Sacchanand Arjundas Shamnani and Mohanlal Arjundas Shamnani are all real brothers and are joint in all respects and also running jointly the business named and styled as "Nanak Cloth Center, Sillod".

The said cloth center property No.584 is in the name of brother Sacchanand and the property tax of said property is due towards holders of the property. Applicant No.1 being the Chief Officer of the Municipal Council, Sillod, caused to demand the said arrears of tax through Council's employee and accordingly, bill of demand No.96597 dated 3rd July, 2004 (due tax of Rs.74,260/-) was given to Sacchanand Arjundas Shamnani. However, he had failed to pay the dues. After following due procedure, warrant of attachment was served on him. On 13th December, 2004, the Applicants visited the said property. The brothers alongwith said Sacchanand were present.

The said warrant of attachment was to be executed on the said property No.584, but it is found that entrance of the shop and residence of the said Shamnani family is from the shop only and if it is closed, the property holders in his family members would not have access to their residential house. Thus, said Sacchanand and his brother Mohanlal and son Mukesh Sacchanand requested the 910 CRI.APPLICATION.762 OF 2005.odt Applicants that instead of attaching property No.584 / cloth center, distrain their motor vehicle car bearing registration No.MH-20-U-49, which is in the name of their joint family member Harishkumar (Respondent No.2 / original Complainant herein). Even they have handed over the key and papers of the said vehicle to the Applicants.

Accordingly, the vehicle was distrained / attached as provided under Section 155 of the Maharashtra Municipal Councils Nagar Panchayats and Industrial Townships Act, 1965 (hereinafter called as "the Act of 1965"). The Panchas including brother Mohanlal and nephew Mukesh signed on the said panchanama and for safety the vehicle was then placed in Sillod Police Station premises which is adjacent to Municipal Council Office, Sillod.

6 The learned counsel submits that the said Maruti car is distrained in discharging public duties by the Applicants / public servants for the recovery of due taxes and it is not at all theft as alleged in the complaint. There is no any dishonest intention in attaching the property. The learned counsel submits that by suppressing all these facts, Respondent No.2 has filed a false complaint in collusion with his family members. The learned counsel submits that in view of the provisions of Section 302 of the Act of 1965 910 CRI.APPLICATION.762 OF 2005.odt the Applicants are the public servants and in absence of any sanction as provided under Section 197 of the Code of Criminal Procedure the Magistrate cannot take cognizance of the complaint. The learned counsel submits that the order of issuance of process is therefore, liable to be quashed and set aside and the complaint is also liable to be dismissed.

7 The learned counsel for the Applicants in order to substantiate his contention placed reliance on the following cases:

- i) Vithal Yedu Khalse Vs. The State of Maharashtra, reported in, 1982 CRI. L. J. 1873.
- ii) Criminal Appeal No.722 of 2015, delivered by the Supreme Court on 27th April, 2015, (D. T. Virupakshappa Vs. C. Subash).

8 The learned counsel for Respondent No.2 / original Complainant submits that Respondent No.2 has purchased said Maruti Omni Motor Vehicle bearing registration No.MH-20-U-49 in the year

1998 and since then, he is the owner and possessor of the same. His name is also recorded in the R.T.O. Office at Aurangabad.

910 CRI.APPLICATION.762 OF 2005.odt He is permanent residence of Jalgaon and occasionally visit Sillod.

The learned counsel submits that the said vehicle was removed by the Applicants with common and dishonest intention. The learned counsel submits that on 13th December, 2004, when all the Applicants came to Nanak Cloth Store to attach the property of Sacchanand Shamnani, it was informed to them that said motor vehicle does not belong to Sacchanand Shamnani. However, under the garb of attachment and with dishonest intention, the Applicants had stolen the said vehicle. They have committed the offence of theft within the meaning of Section 378 of the Indian Penal Code for which they are liable to be prosecuted as per Section 379 of the Indian Penal Code.

The learned counsel submits that after giving an opportunity of explain about the allegations made in the complaint to Applicant No.1 / Accused No.1 the learned Magistrate has passed the impugned order.

The learned counsel submits that dishonest intention is apparent and evident as even after realizing the mistake in terms of the provisions of Section 155 (B) of the Act of 1965, the Applicants had not returned the said vehicle to Respondent No.2. The learned counsel submits that the said act is not an act, which can be termed as official duty and therefore, sanction as provided under Section 197 of the Code of 910 CRI.APPLICATION.762 OF 2005.odt Criminal Procedure is not required. The learned counsel submits that the Applicants / original Accused were having intention to cause wrongful loss to Respondent No.2 though they may not have any wrongful gain as such. The word "dishonestly" as defined under Section 24 of the Indian Penal Code means who ever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person. The learned counsel submits that the intention to cause wrongful loss alone is sufficient to constitute an offence of theft. The learned Magistrate has therefore, rightly issued the process under Section 379 read with 34 of the Indian Penal Code.

9 The learned counsel for Respondent No.2 / original Complainant in order to substantiate his contention placed reliance on the following cases:

- i) K. N. Mehra Vs. State of Rajasthan,
reported in, AIR 1957 Supreme Court 369.
- ii) Pyare Lal Bhargava Vs. The State of Rajasthan,
reported in, AIR 1963 Supreme Court 1094.
- iii) Criminal Appeal No.129 of 2013, (Inspector of Police and

another Vs. Battenapatla Venkata Ratnam and another) 910 CRI.APPLICATION.762 OF 2005.odt decided by the Supreme Court on 13th April, 2015.

10 I have also heard the learned APP for the State.

11 Admittedly, property tax was due and distrain warrant came to be issued against Sacchanand Shamnani, who happen to be a real brother of Respondent No.2 / original Complainant. It is also not disputed that all the Applicants are public servants and on 13 th December, 2004, i.e. the date of incident, all the Applicants visited the said property in respect of which warrant has been issued for recover of property tax. In response to the notice issued by the Magistrate before issuance of process, the Applicant / original Accused who happen to be a Chief Officer of Municipal Council, Sillod, had submitted his explanation and pointed out that Respondent No.2, Sacchanand and Mohanlal are real brothers and joint in all respect including the business named and styled as "Nanak Cloth Center, Sillod" and the said cloth center property No.584 is in the name of Sacchanand Shamnani. On 13th December, 2004, when the Applicants visited the said property, the property holder Sacchanand, his brother Mohanlal and Mukesh were also present. The property holder has pointed out that if the said cloth center is attached and 910 CRI.APPLICATION.762 OF 2005.odt sealed for recovery of the property tax as aforesaid, then the property holder and his family members would not have an access to the residence. Thus, the said brothers including the property holder requested the Applicants to attach the said Maruti Omni vehicle and accordingly, handed over the key and papers of the vehicle to the Applicants. It is to be mentioned here that Respondent No.2 has no where alleged that said vehicle was forcibly taken by the Applicants in execution of warrant with the help of toeing vehicle. Even the aforesaid facts were not denied by the Respondent / Complainant before the Court below. The Applicants had drawn the panchanama wherein it is specifically mentioned that the motor vehicle under attachment is standing in the name of present Respondent No.2 / original Complainant. Even the brother Mohanlal and nephew Mukesh also signed on the said panchanama. It is a part of record that Respondent No.2 thereafter, filed a complaint on 30 th December, 2004 belatedly without any explanation for such inordinate delay in filing the complaint.

12 Section 378 defines the offence of theft and Section 379 prescribes punishment for that. Theft as defined under Section 378 is the dishonest removal of moveable property out of the possession of 910 CRI.APPLICATION.762 OF 2005.odt any person without his consent. The offence of theft consist in the dishonest taking of any moveable property out of the possession of another without his consent. Section 24 of the Indian Penal Code defines the term "dishonestly", which reads as under:

"24. "Dishonestly".- Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly". "

13 In the instant case, Respondent No.2 / Complainant was not present when the Applicants visited

the property for recovery of property tax. It is no where denied that the property holder, who happen to be the real brother of Complainant and other brothers, who were present, handed over the key of the said car for executing the distrain warrant instead of attaching the said property i.e. Nanak Cloth Center. The Applicants being the public servants had no wrongful gain while attaching the said car. The learned counsel for Respondent No.2 has repeatedly submitted that since the vehicle was not returned after realizing the mistake, it would sufficient to infer that the Applicants caused wrongful loss to Respondent No.2 by attaching his property without his consent. In the light of the above facts, I do 910 CRI.APPLICATION.762 OF 2005.odt not think that the offence of theft stands attracted in the facts and circumstances of the present case. By any stretch of imagination, it cannot be inferred that the Applicants, who are the public servants attached the car of Respondent No.2 in execution of a distrain warrant for recovery of property tax, had committed the offence of theft. The dishonest intention is lacking. Even though accepting the allegations as it is made in the complaint, I do not think that the offence of theft stands attracted in this case.

14 In a case of *Vithal Yedu Khalse Vs. The State of Maharashtra* (supra) relied upon by the learned counsel for the Applicants, in the facts of the said case, as per the prosecution case, the accused committed theft of handcuff from Barshi police station when the officer and constables were present in the police station.

The accused claimed that he went to Barshi police station to lodge a complaint in respect of some incident. However, the constables in the police station were sleeping and when he tried to awake them, they threatened him to leave the police station. Thus, the accused feeling aggrieved, took up a handcuff, which was hanging over the table of the police officer and proceeded towards Solapur to produce it before the Superintendent of Police and point out how the constables at the 910 CRI.APPLICATION.762 OF 2005.odt Barshi police station are behaving. Thus this Court has held that the Accused had no intention to cause wrongful loss to the police and thus, the offence of theft is not made out.

15 In the cases of *K. N. Mehra Vs. State of Rajasthan* (supra) and *Pyare Lal Bhargava Vs. The State of Rajasthan* (supra) relied upon by the learned counsel for Respondent No.2, the Supreme Court alongwith other ingredients of the offence of theft observed that presence of dishonest intention in so taking and at the time, is the essential ingredient of the offence of theft. It is observed that very moving out must be with dishonest intention.

16 On careful perusal of the complaint and the allegations made therein, I find a reasonable connection between the act of the Applicants and the official duties performed by the Applicants. It is not possible to draw inference that the act complained, is of the seizure of the vehicle belongs to Respondent No.2, who is no where concerned with the said recovery of property tax.

17 In a case of *D. T. Virupakshappa Vs. C. Subash* referred (supra) relied upon by the learned counsel for Applicants, the Supreme Court in para No.6 of the order has referred the case of 910 CRI.APPLICATION.762 OF 2005.odt *Omprakash and others Vs. State of Jharkhand*, through the Secretary, Department of Home, Ranchi 1 and another and quoted paragraphs 32 and 41 of the said judgment. Paras 32 and 41 read as under:

"32. The trust test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it (K. Satwant Singh). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (Ganesh Chandra Jew). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a 910 CRI.APPLICATION.762 OF 2005.odt conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood.

(Emphasis supplied)

41. The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea. ..."

18 In a case of Inspector of Police and another Vs. Battenapatla Venkata Ratnam and another (supra) relied upon by the learned counsel for Respondent No.2, the Supreme Court has 910 CRI.APPLICATION.762 OF 2005.odt observed the indulgence of the officers / public servants in cheating, fabrication of record or misappropriation and held that it cannot be said to be discharge of their official duty. It is also observed that the official duty is not to fabricate record or permit evasion of payment of duty and cause loss to the revenue. The Supreme Court has made the aforesaid observation in different context by considering the facts and circumstances of the said case and the ratio laid down by the Supreme Court cannot be made applicable to the facts and circumstances of the present case.

19 The protection given under Section 197 of the Code of Criminal Procedure is available to the public servant when the alleged act done by him is reasonably connected with the discharge of his official duty and in doing his official duty, if he acted in excess of his duty, but there is a reasonable connection between the act and performance of the official duty, the excess will not be sufficient ground to deprive the public servant of the protection. In this case, there are unassailable and unimpeachable circumstances on record, which unmistakably pointed out that the Applicants were acting in performance of their official duty. Furthermore, it also appears that the Applicants have not acted in excess of their duty as the property 910 CRI.APPLICATION.762 OF 2005.odt holder is the real brother of Respondent No.2 and the brothers including the property holder of Respondent No.2, who were present at the time of incident, voluntarily handed over the keys and papers of the vehicle to the Applicants for attachment in execution of the distrain warrant. Thus, the Applicants must get protection as contemplated under Section 197 of the Code of Criminal Procedure as the act complained of is integrally connected with or attached to their office.

Thus, the sanction is a precondition for taking cognizance of the offence. The complaint filed by Respondent No.2 thus bound to fail on all counts; firstly, the offence of theft is not attracted against the Applicants even though the allegations made in the complaint are accepted as it is, and secondly, in absence of previous sanction, as required by the provisions of Section 197 of the Code of Criminal Procedure, the Magistrate cannot take cognizance.

20 In view of the above, I proceed to pass the following order:

O R D E R I. Criminal Application No.762 of 2005, is hereby allowed in terms of prayer clause (B).

910 CRI.APPLICATION.762 OF 2005.odt II. Rule is made absolute in above terms.

III. Criminal application is accordingly disposed of.

[V. K. JADHAV, J.] ndm