Om Prakash vs The State on 23 December, 1954

Equivalent citations: AIR1955ALL275, 1955CRILJ754, AIR 1955 ALLAHABAD 275

JUDGMENT

H.S. Chaturvedi, J.

1. I have had the advantage of reading the judgment of my learned brother, Mulla J.

2. Om Prakash, who has come up in revision, was a divisional accountant in the Sarda Canal, Sitapur section, and in that capacity he was entrusted with Government monies. On an inspection of the accounts by the Accounts Officer, it was discovered that certain sums of money amounting to Rs. 1,491/9/- had been embezzled by the applicant. He reported the matter to the officers of the canat department, who handed over the case to the police with the result that, after investigation, the applicant was prosecuted for offences under Section 409 and other sections of the Indian Penal Code. He was tried in the Court of Sri Abul Maqtadir, a Magistrate of the first class, Sitapur. At the trial, the applicant pleaded that he should have been prosecuted and tried for an offence under Section 5(1)(c), Prevention of Corruption Act (2 of 1947) and not under the general law. The other plea raised was that the applicant could not be prosecuted without previous sanction of the Accountanl General, and as no sanction had been obtained, it vitiated the trial. The defence plea found favour with the trial Court, who discharged the accused holding that the applicant should have been prosecuted under the Prevention of Corruption Act 2 of 1947, and that the trial under the general law was, therefore, improper, On behalf of the State the matter was taken up in revision and the learned Additional Sessions Judge who heard the revision held that the prosecution of the applicant under the provisions of Section 409, I. P. C., was quite valid. The result was that the Additional Sessions Judge directed the Magistrate to proceed with the enquiry of the case in accordance with law. Dissatisfied with the order, the applicant filed a revision to this Court. When the revision came up for hearing before a Division Bench of this Court, it decided to refer the case to a Full Bench in view of the importance of the questions involved in the case.

3. The points that arise for consideration are three:

> "(I) Whether Section 5(l)(c) of the Special Act 2 of 1947, 'pro tanto' repealed Section 409, I. P. C., in its application to" public servants.
>
> (2) Whether Article 14 of the Constitution is infringed if the accused is tried under the general law.
>
> (3) Whether the applicant could not be prosecuted for an offence under Section 409,

I. P. C., without the erevious sanction of the proper authority."

4. The first question for determination is whether after the coming into force of the Prevention of Corruption Act of 1947, and so long as it was allowed to remain in force, Section 409, I. P. C., in so far as it related to offences by public servants stood repealed. Section 5(1) (c) is to the following effect:

> "5(1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty,--
>
> (a)" ....
>
> (b) ....
>
> (c)if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other persons so to do....."

The offence of criminal breach of trust as defined in Section 405 runs thus:

> "Whoever, being in any manner entrusted with property, or with any dominion over property, - dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

The punishment for criminal breach of trust by a public servant is provided under Section 409, I. P. C.

5. It would thus appear that the act of a public servant in dishonestly misappropriating or otherwise converting for his own use any property entrusted to him or under his control as a public servant or in allowing any other person so to do is an offence both under Section 5(1) (c) of Act 2 of 1947 and also under Section 409, I. P. C.

6. An examination of the scheme of Act 2 of 1947 will show that if a public servant is prosecuted under Section 5(1)(c) of the Special Act, the maximum punishment that can be awarded is only seven years. The accused has the right to appear/ in the witness box, and he cannot be prosecuted without previous sanction of the authority concerned. If, however, a public servant is prosecuted under the general law, the maximum punishment provided in Section 409 is transportation for life. No sanction is necessary for his prosecution and he cannot examine himself as a witness when standing his trial under Section 409, I. P. C. It is argued that in view of the fact that certain privileges have been conferred on the accused by the special Act a repeal of the general Act has been brought about by implication. In support of this contention reliance has been placed upon a

Divisional Bench case of the Punjab High Court, -- 'State v. Gurcharan Singh', AIR. 1952 Fimj 89 (A). In that case Falshaw J. took the view that in view of the changes introduced by Act 2 of 1947, Section 5(1) (c) repealed 'pro tanto' Section 409, I. P. C. With great respect for the decision, I am unable to subscribe to the view enunciated in that decision.

If the Legislature intended to repeal Section 409, I. P. C. it would have expressly said so in the special Act itself but there is no indication to that effect. ' There must appear some strong reason to suggest that the previous enactment which has not been expressly repealed by the subsequent Act stands repealed by implication. In this connection one may usefully refer to Section 5, I. P. C. which provides that the provisions of the Code shall remain uneffected by any special or local law. That being so, if the intention of the Legislature was to substitute Section 5(1) (c) of Act 2 of 1947 in place of Section 409, I. P. C. in relation to public servants, one would expect a specific provision to that effect in the special Act itself. In the absence of any such express provision it would be difficult to read any repeal by implication. The mere fact that under the special Act the accused have been given certain privileges which are not available to him-under the general law will hardly be any good reason for inferring repeal by implication.

The 'same act or omission may constitute an offence under one or more enactments. All that is required is that for the same act or omission a person shall not be prosecuted twice as laid down in Section 26, General Clauses Act of 1897, which runs as follows :

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

In view of this provision in the General Clauses Act, if an act constitutes an offence under two or more separate enactments, then the only restriction imposed by Section 26, General Clauses Act is that a person cannot be punished twice for the same offence. In other words, if a person has been punished under the Penal Code for an act or omission, then for that very act or omission he cannot again be tried and punished under the special law. It is implicit in Section 26, General Clauses Act that the two separate enactments can exist side by side, although both of them make the same act punishable as an offence. With respect, I am unable to subscribe to the view enunciated in 'AIR 1952 Punj 89 (A)', that Section 5(1) (c) of Act 2 of 1947 repealed 'pro tanto' Section 409, I. P. C.

7. The Punjab case has not been followed by other High Courts, and my learned brother Mulla J. has referred to those cases. Suffice it to say that we find ourselves in agreement with the view taken in -- 'Bhup Narain v. State', AIR 1952 All 35 (B). We are, therefore, of opinion that Section 5(1) (c), Prevention of Corruption Act of 1947 had not the effect of repealing Section 409, I.--P. C. in its application to public servants.

8. Coming to the second question, the argument advanced by the learned counsel for the applicant was that if the prosecuting authorities are permitted to pick and choose and are given the option of choosing whether they should prosecute a public servant under the Special Act 2 of 1947 or under the general law, then it would create discrimination in the same class of public servants, which is

against the spirit of Article 14, Constitution of India. The argument, though ingenious has little substance. Neither the general law nor the special law has been assailed on the ground that they are of a discriminatory character. So far as the two enactments are concerned, they are good and are not hit by Article 14 of the Constitution. The so-called discrimination complained of arises because, owing to existence of two valid enactments, the option rests with the prosecution agency either to prosecute a public servant under Section 409, I. P. C. or under the Special Act 2 of 1947. If a public servant commits an offence of criminal breach of trust, he renders himself liable for prosecution either under Section 409, I. P. C. or under Section 5(1) (c) of the Special Act.

By virtue of Section 26, General Clauses Act, it becomes incumbent on the prosecution agency either to prosecute the public servant under the general law or under the special law. The police Officer of the State, whose duty it is to exercise his discretion may even say that the case should not be prosecuted at all. The decisions of the prosecuting agency in matters like these cannot be treated as discriminatory acts so as to attract the provisions of Article 14 of the Constitution. If a case comes within the purview of either of the two Acts of the Legislature, and if the prosecution agency decides to prosecute a person under one of the Acts, his action will be quite proper and no exception can be taken to it on the ground that it is discriminatory. Any other view would create an anomalous position. A person prosecuted under the general law would say that he should have been prosecuted under the special law, and if a person is prosecuted under the sepcial law he would say that he should have been prosecuted under the general law. The prosecution of a person does not depend upon his wish or whim, but on what the officer in charge of the prosecution thinks proper to do when any particular illegal act or omission is covered by more than one enactment.

The discretion which a prosecuting officer is called upon to exercise is not an unguided discretion. He has to take into consideration the gravity of the "offence and other matters, and if he finds that the facts disclose the commission of a serious offence for which the punishment provided under a Special Act is not sufficient, it is open to him to charge the accused under the general law where a more severe punishment is provided for the same kind of offence. Such exercise of a discretion will not contravene Article 14. In my opinion, therefore, the prosecution of the applicant under general law is not hit by Article 14 of the Constitution.

9. The third question that arises for determination is:

> "Whether the prosecution of the applicant under Section 409 is bad in law for want of previous sanction of the appropriate authority?"

10. When a public servant is prosecuted for an offence under Section 409 he is governed by the rules of procedure as contained in the Criminal Procedure Code. It is concealed that the ordinary procedure does not require the obtaining of any sanction for the prosecution of a public servant under Section 409. Learned counsel for the applicant has, however, relied upon Section 6, Cl. (1) of the Special Act 2 of 1947 in support of his .argument that a public servant cannot be prosecuted under Section 409, I. P. C., also without previous sanction. It is, therefore, necessary to set out Cl. (1) of Section 6 which runs thus:

> "No Court shall take cognizance of an offence punishable under Section 161 or Section 165, I. P. C., or under Sub-section (2) of Section 5 of this Act, alleged to have been committed by a public servant except with the previous sanction etc."

11. A plain reading of the words in the aforesaid section indicates clearly that a previous sanction is necessary only when a public servant is charged for an offence punishable under Section 161 or Section 165, I. P. C., or when he is placed for trial for an offence punishable under Sub-section (2) of Section 5,' Prevention of Corruption Act. While mentioning Sections 161 and 165, I. P. C., the Legislature could have easily incorporated Section 409, I. P. C., also in Section 6 but this was not done. It is, however, argued that Section 409 was not mentioned because the offence under Section 409 is the same as, the offence under Section 5(1) (c), Prevention of Corruption Act. This argument does not appeal to me. If a person is prosecuted for an offence under Section 409, I. P. C.,. he is punishable under that section, if the offence is proved, and not under Sub-section (2) of Section 5, Prevention of Corruption Act. The words 'punishable under Sub-section (2) of Section 5' occurring in Clause (1) of Section 6, Prevention of Corruption Act do not mean or include an offence punishable under Section 409, I. P. C. If a person is prosecuted under Section 409, he will be governed by the procedure prescribed in the Criminal Procedure Code which does not require the obtaining of previous sanction. The words 'punishable under Sub-section (2) of Section 5', Prevention of Corruption Act postulate a situation when a public servant is prosecuted for an offence of criminal misconduct falling within (a), (b), (c) and (d) of Clause (1) of Section 5 of the Special Act. It is only when a public servant is accused of any of these offences that his act becomes punishable under Sub-section (2) of Section 5 of Act 2 of 1947. I find no sufficient justification for importing into Clause (1) of Section 6 something which the Legislature did not expressly include in that section. By omitting to mention Section 409, it is plain that the Legislature intended that the provision for sanction as laid down in Section 6, Prevention of Corruption Act did not apply to an offence punishable under Section 409, I. P. C. If the Legislature has not chosen to include Section 409 within the ambit of Section 6 of the Special Act, it is not competent for a Court to extend the meaning so as to include Section 409 which is not there. It is a well recognised principle that a statute should he interpreted according to the plain meaning of the words and should not be given a wider meaning than what the words used would actually denote.

12. The rule about sanction, as laid, down in Section 6, Prevention of Corruption Act has no application when a public servant is prosecuted under the general law for an offence under Section 409, I, P. C., which does not find place in that section. No question of any sanction arises in the case before us because the applicant is being prosecuted for an ofEence under Section 409, and the rules of Criminal Procedure do not require that a previous sanction of the appropriate authority is necessary.

13. I am, therefore, of opinion that the revi sion application should be rejected and the order of the learned Sessions Judge should be upheld.

Randhir Singh, J.

14. I have had the benefit of reading the judgments of my learned brothers Hari Shankar and Mulla JJ. I entirely agree with the conclusions arrived at by my learned brothers on the first two points and I do not think I can make any useful contribution by discussing these points oven again.

15. With regard to the third point, i.e., whether the applicant could not be prosecuted for an offence under Section 409, I. P. C., without the previous sanction of the proper authority, it has been argued on behalf of the applicant that even though Section 409 was not mentioned along with Sections 161 and 165, I. P. C., in Section 6, Prevention of Corruption Act (2 of 1947) the words "an ofEence punishable under Section 161 or Section 165, I. P. C., or under Sub-section (2) of Section 5 of this Act" show that the intention of the Legislature was that the sanction of the proper authority should be obtained for an offence under Section 409 also as the acts and omissions which constituted the offence under Section 409, I. P. C., were also punishable under Section 5(2), Prevention of Corruption Act. Any act or omission is 'per se' not an offence. It will be an offence only when it is made punishable by some law. If an act or omission is made punishable as an offence under two enactments, then 'the same act or omission is an offence under one enactment and also an offence under the other law.

If a person therefore has done an act which constitutes an offence under Section 409, I. P. C., and also an offence punishable under Section 5(2), Prevention of Corruption Act, it would not be correct to say that the offence under Section 409 is punishable under Section 5(2) or vice versa. It is only an offence under Section 409, I. P. C., which is punishable under Section 409, and only an offence under Section 5(2), Prevention of Corruption Act which is punishable under Section 5(2) of that Act. It would thus appear that an act is an offence only with reference to the particular section of a penal statute, but divorced from it, no act or omission could be called an offence. It would be difficult to call an act or omission an offence in general. A person is punishable under Section 5(2) only when he is charged with an offence under Section 5(2), Prevention of Corruption Act. If it is legitimately open to a prosecutor to prosecute a person under two laws for the same act or omission, and if he chooses to prosecute him under one law, the person so prosecuted cannot be convicted under the other law at the same time.

The words "punishable under Section 5(2), Freventioni of Corruption Act" used in Section 6, Prevention of Corruption Act do not therefore imply that Section 8 was meant to cover an offence under Section 409 also. If that was the intention of the Legislature, Section 409, I. P. C., would also have been mentioned along with Sections 161 and 165, I. P. C., in Section 6, Prevention of Corruption Act. This point arose for consideration before a Division Bench of this Court in AIR 1952 All 35 (B) and it was held that the provisions of the Prevention of Corruption Act were not intended to apply to sections not mentioned in Section 6, Prevention of Corruption Act. A similar view was taken in a Full Bench case off the Bombay High Court in -- 'The State v. Sahibrao Govindrao', AIR 1954 Bom 549 (C).

The provisions of Section 6, Prevention of Corruption Act would not, therefore, be applicable to a prosecution under Section 409, I. P. C. A trial under Section 409, I. P. C., will be regulated by the procedure laid down in the Code of Criminal Procedure. It is only if a "prosecution is launched under Section 5(2), Prevention of Corruption Act that the special procedure prescribed under that

Act will have to be observed and the Court shall not take cognizance of that offence in the absence of sanction obtained from the proper authority. I agree with the views expressed, with respect if I may so, in the two cases referred to above, and am of opinion that the view taken by the learned Sessions Judge that no previous sanction was necessary was correct and I would dismiss the application for revision.

Mulla, J.

16. Om Prakash, a Divisional Accountant of the Sarda Canal, Sitapur Section, was prosecuted under Section 409, I. P. C., for committing criminal breach of trust in respect of certain items of money, which were entrusted to him in his capacity as a public servant. The Magistrate, who tried him, came to the conclusion that the offence committed by the applicant fell under Section 5(1) (c), Prevention of Corruption Act (Act 2 of 1947)' which is punishable under Section 5(2) and under Section 6 of the said Act a previous sanction of a proper authority was necessary for his prosecution, as ha

-was a public servant. In the absence of such sanction, he held that he had no jurisdiction to) proceed with the case and consequently he discharged the applicant.

17. The State went up in revision against the order of discharge and the learned Sessions Judge set aside this order of discharge holding that the provisions pf the Prevention of Corruption Act (Act 2 of 1947) did not repeal the general law as contained in the Indian Penal Code and it was open to the prosecuting authorities to proceed against the applicant either under Section 409, I. P. C. or Section 5(2), Prevention of Corruption Act. He further held that as no sanction was required under Section 409, I. P. C., the order of the Magistrate discharging the applicant was bad in law. He, therefore, directed the Magistrate to proceed with the inquiry and, if a case was made out against the applicant to commit him to the Court of Session.

18. Om Prakash feeling aggrieved by the said order filed an application of criminal revision against it. He prayed that the order of the Sessions Judge be set aside and the proceedings against him be, quashed under Section 561A, Cr. P. C. He supplemented this application in revision by another criminal miscellaneous application later on in which he contended that the order of the Sessions Judge violated the provisions of AH. 14, Constitution of India, and prayed that this Court should withdraw the case against him under Article 228, Constitution of India.

19. These two applications of Om Prakash were heard by a Bench of this Court. After hearing the counsel for Om Prakash, the Bench came to the conclusion that the questions raised in the case were of great importance and, as they would crop up frequently, they should be considered by a bigger Bench. They consequently referred it to a Full Bench.

20. We have to decide the following three Questions in this case:

> "1. Does Section 5(2), Prevention of Corruption Act (Act 2 of 1947) 'pro tanto' repeal Section 409, I. P. C. or is it open to the State to prosecute a public servant for committing criminal breach of trust under Section 409, I. P. C.?

> 2. If a public servant is prosecuted under Section 409, I. P. C., does such prosecution amount to an act of discrimination within the meaning of Article 14, Constitution of India, as it denies to him the equality before the laws or the equal protection before the laws?
>
> 3. Can any Court take cognizance of an offence punishable under Section 409, I. P. C., when committed by a public servant without the previous sanction of the authority competent to remove such public servant from office or is it barred by Section 6, Prevention of Corruption Act (Act 2 of 1947)?"

QUESTION NO. 1.

21. It was argued by the learned counsel for the applicant that the offence punishable under Section 409,. I. P. C., when committed by a public servant is the same which is defined in Section 5(1)(c), Prevention of Corruption Act. He contended that the Prevention of Corruption Act was a self-contained enactment with its own procedure and penalties. It was enacted for dealing with a particular class of offenders, namely the public servants and, though the Legislature has not expressed itself explicitly a repeal of the general law relating to the said offence committed by public servants, can clearly be inferred by implication. Reliance was placed on a Bench decision of the Punjab High Court (AIR 1952 Punj 89,(A)).

22. In deciding this question the first point that arises for decision is whether the offence punishable under Section 409, I. P. C., when committed by a public servant, is identical with the offence of criminal misconduct, as defined in Section 5(1)(c), Prevention of Corruption Act or not. Section 409, I. P. C., runs as follows:

> "Whoever, being in any manner entrusted with - property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with transportation fon life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Criminal breach of trust is defined in Section 405, I. P. C. It reads as follows:

> "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing that mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

Section 5(1)(c), Prevention of Corruption Act (Act 2 of 1947), is as follows:

> "A public servant is said to commit the offence of criminal misconduct in the discharge of his duty, if he dishonestly or fraudulently misappropriates or otherwise converts to his own use any property entrusted to him or under his _ control as a public servant or allows any other person so to do."

23. Prom a perusal of these sections, we find that the definition of criminal breach of trust in Section 405, I. P. C., is a little wider than the definition of criminal misconduct in Section 5(1) (c), Prevention of Corruption Act, but this is due to the fact that when defining it in the Indian Penal "! Code, the authors of the Code had to frame a definition which would apply to all persons to whom an entrustment could be made in the normal transactions of life and they had not the public servants alone in their minds. Still there are two minor changes which theoretically make the scope of Section 5(l)(c), Prevention of Corruption Act, a little wider than criminal breach of trust, as defined in Section 405, I. P. C. The word "fraudulently" has been added to "dishonestly" and "wilfully suffers any other person" has been changed to "allows any other person".

The first addition, in our opinion, hardly makes any difference, but the second change is not ab solutely negligible. It lightens the burden of proof for the prosecution in such a case. Still in spite of these changes an offence under Section 5(l)(c), Prevention of Corruption Act is almost identical! with an offence under Section 409, I. P. C., when it is committed by a public servant. They are two circles, which not only enter into each other, but almost entirely cover each other. The masks may be slightly different, but the face behind the mask is the same. It is almost impossible to imagine an offence committed by a public servant, which would be punishable only under one of these sections and not under the other. We, therefore, find that for all practical purposes they are one and the same offence.

24. It cannot be denied that the State has the right to make a certain act or conduct punishable under a new enactment, which is already penal under an existing law. It is, however, contended that when the State frames such a new law it. "pro tanto" repeals the earlier law. This contention, when analysed, means this, that two laws under which the same act or conduct is punishable cannot co-exist together. In support of this contention reliance is again placed on the Punjab decision quoted above. The learned-Judges who gave that decision, relied on certain opinions expressed by Craies and Maxwell. These opinions were, however, given prior to the enactment of the English Interpretation Act of 1889. They are Inconsistent with Section 33 of the said Act which reads as follows:

> "Where an act or omission constitutes an offence under two or more acts, or both under an act and at Common Law, whether any such act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts" or at Common Law, but shall not be liable to be punished twice for the same offence.
>
> " This section is similar to Section 26, General Clauses Act, which reads:

> "Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence."

These two sections visualize that the same act may be punishable not only under two laws but even under a greater number of laws. If the contention of the applicant is sound, it would mean that Section 26, General Clauses Act, is a dead letter and can never be used. A number of other High Courts have disagreed with the view expressed in the Punjab decision cited above. They have given convincing reasons, which we need not repeat in coming to the conclusion that two laws under which the same act or omission is punishable can co-exist side by side. We approve these decisions. They are: 1. AIR 1952 All 35 (B); 2. -- 'In re, Satya Narayana Murthi', AIR 1953 Mad 137 (D); 3. -- 'Mahomed Ali v. State1, AIR 1953 Cal 681 (E); 4. -- Madho Prasad v. State', AIR 1953 Madh-B 139 (P); 5. -- 'State v. Gulab Singh', AIR 1954 Raj 211 (G) and 6. AIR 1954 Bom 549 (PB) (C).

25. In our opinion where a new law makes an act punishable, which is already penal under an existing law and there is nothing in the latter enactment, which either expresses or implies that the operation of the earlier law is excluded, an offender can be prosecuted and punished under either of the two enactments. The earlier law will not be put out of operation merely because their is some change in procedure or some difference in penalties. The effect of the new enactment is to add a remedy and not to repeal the former remedy.

26. The Prevention of Corruption Act has not expressly repealed any of the provisions of the Indian Penal Code. Is there anything in the Act from which a repeal by implication can be inferred? It is contended that because the new law is self-contain id and has been enacted to deal only with one particular class of offenders namely the public servants with its own procedure and punishment, it can be inferred that the Legislature intended to use only this law when an offence which was punishable undar this Act was committed by a public servant. It is difficult to understand why the Legislature did not express itself clearly if such was its intention. ' Again a repeal by implication can only be inferred, if it is consistent with the object and purpose which necessitated the new enactment. But where it is in direct conflict with this object and purpose, it is impossible to infer such an intention.

The Prevention of Corruption Act is, what may be described as an Emergency Law. The emergency arose because bribery and corruption had become rampant in public services. This was a grave menace to healthy administration and effective measures were needed to root out this evil. The existing law was found insufficient to cope with the situation. The intention of the Legislature clearly was to arm the State with a more drastic remedy than the one which existed. Keeping this intention of the Legislature in mind, is it conceivable that they will make such provisions in the new enactment, which will soften instead of tightening the existing law and which will reduce the punishment instead of enhancing it? The preamble of the Prevention of Corruption Act clearly indicates that the intention was to take more effective measures against bribery and coiruption, and yet, if the contention of the counsel for the applicant is sound, they not only made changes in the procedure to the advantage of the accused, but also reduced his punishment Under Section 5(2), Prevention of Corruption Act, the maximum punishment which can be awarded to a public servant

for committing criminal misconduct, is seven years. Can it be possible that although an Emergency Law was being enacted against the public servants in order to deal more strictly with them, yet the Legislature wanted to treat them as their special favourites and while a banker, a merchant, a factor, a broker, an attorney or an agent may be sentenced to transportation for life for committing criminal breach of trust under Section 409, I P. C., a public servant who might have embezzled enormous sums, was" liable to punishment only under Section 5(2), Prevention of Corruption Act, and could not be given a heavier sentence than 7 years. Did the Legislature think that the existing law took too grave a view of the offence of criminal breach of trust committed by a public servant and really it was a much lighter offence which stood 011 the same footing as a similar offence committed by a clerk or servant and which is Dunishable upto seven years only under Section 409, I. P. C.?

It cannot be doubted that criminal breach of trust is a major offence and when it is committed by a public servant, it assumes its gravest aspect. If the Legislature really intended that public servants should not be awarded a greater punishment than seven years, such an intention would not only be in conflict with their declared intention in the preamble of the Act, but defeats the very purpose which necessitated the new enactment. It would not only amount to an act of discrimination in favour of the public servants without any reasonable basis, but would also violate one of the basic principles of criminal justice, namely "The graver the offence, the higher should be the punishment", it is unbelievable that on the one hand they considered the punishment for an, offence under Sections 161 and 165, I. P. C., inadequate and enhanced it, on the other hand, they found the punishment for criminal breach of trust committed by a public servant excessive and reduced it. But if the intention of the Legislature was not to repeal Section 409, I. P. C., all these questions and doubts are immediately set at rest and all these incongruities fade out. We are, therefore, of the opinion that the Prevention of Corruption Act was intended to be only a supplementary measure and there is no substance in the contention that it repealed Section 409, I. P. C., by implication.

27. Perhaps, because these doubts were entertained, the Legislature made its intention clear In the Prevention of Corruption (Second Amendment) Act (Act 2 of 1952) by adding Sub-cluase (4) to Section 5 of the original Act. It reads:

> "The provisions of this section shall be in addition to, and not in derogation of any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding, which might, apart from this section be instituted against him."

The Supreme Court has also maintained the conviction of a public servant under Section 409, I. P. C., which clearly shows that Section 409 does not stand Repealed -- ('Mangleshwari Prasad v. State of Bihar', AIR 1954 SC 715 (H)).

28. Our answer to the first question is, therefore, in the negative and in our opinion it is open to the State to prosecute a public servant for committing criminal breach of trust under Section 409, I. P. C. QUESTION NO. 2.

29. As both the laws are good and in force, it naturally follows that the State in its discretion can use either of them. The question, therefore, arises that this option of choosing whether a prosecution should be under the general law or the special law offends against Article 14 of the Constitution or not? Does it not give a discretionary power to the State which may at its sweet will be employed to the detriment of an accused person by discriminating amongst the same, class of public servants and thus depriving him of the equality of treatment in like circumstances and conditions to which he is entitled? Firstly, the general law of the State cannot be ousted unless there is some indication, either expressed or implied, in the special law that it is repealed or modified, or there is some inherent conflict between any of its provisions and the principles and rights laid down in the Constitution of India. Secondly, in our opinion, the State cannot be completely divested of a right to exercise discretion.

Every exercise of discretion is not an act of discrimination. It becomes an act of discrimination only when the pereon against whom that discretion is exercised faces certain appreciable disadvantages, which he would not have faced otherwise. All that Article 14 of the Constitution of India guarantees is a similarity of treatment and not identical treatment. The protection of equal laws does not mean that all laws must be uniform and merely some difference in the two procedures will not amount to a denial of the equality of treatment. The real test is whether the two procedures differ to such an extent that a prosecution under Section 409, I. P. C. will deprive the accused of certain appreciable advantages and he will face certain handicaps in defending himself, which he would not have faced if he had been prosecuted under the Prevention at Corruption Act.

30. The learned counsel for the applicant has painted a very rosy picture of the advantages that are conferred on an accused person under the procedure, laid down by the Prevention of Corruption Act. If his contention is to be accepted, it would mean that the Legislature, instead of passing a more effective measure against the public servants, really enacted the new law for the benefit of the public servants so that they may be protected against the rigours of the General Law. He has presented every change in the procedure in the garb of an advantage. He enumerated five of these advantages which are:

> 1. The maximum punishment under Section 409, I. P. C. is transportation for life, whereas the maximum punishment which can be awarded under Section 5(2), Prevention of Corruption Act is only seven years', rigorous imprisonment or fine. The accused is thus liable to a lesser penalty.
>
> 2. The accused will not be tried by a Magistrate but by an experienced Judge.
>
> 3. The investigation of the case will be conducted by a senior and responsible police officer and this will be a safeguard against questionable evidence being produced against him.
>
> 4. The accused will have a right to appear as a witness and give his statement on oath.

5. The accused cannot be prosecuted without the sanction of a proper authority and this would protect him against a vexatious and irresponsible prosecution,

31. The moment these alleged advantages are analysed, they are found to be more hypothetical than real. Some of them instead of being an advantage, really turn out to be a disadvantage.

32. Only two advantages stand out, namely the liability to a lesser punishment and the necessity of a previous sanction. The first advantage arises only if the general law is held to be repealed. Secondly a punishment is not a part of procedure, but only a penalty. Merely because the punishment is less, an accused secures no advantage in defending himself. It does not affect the course of the trial at all. Thirdly, even if it is an advantage it is not of that nature which will characterise the trial under the General Law as an act of. discriminatory treatment. Where a certain act is punishable under more than one enactment the extent of punishment generally varies and the accused cannot claim as a right to be tried under that law under which only the lesser punishment can be inflicted upon him, and if it is not done he cannot raise the cry of discriminatory treatment.

Lastly, if it is held that it amounts to an act of discriminatory treatment, then it is not the General Law which will stand ousted, but the Prevention of Corruption Act will itself become' a piece of discriminatory legislation, because for the purpose of punishment if has created a classification, ' which is not based on any reasonable ground and it is not only in conflict with the object sought to be attained, but is against all principles of equity and justice.

33. We now come to the last advantage, namely the necessity of a previous sanction. There can be no doubt that it is an appreciable advantage. In fact it is the only advantage in the new procedure laid down by the Prevention of Corruption Act. The question arises whether it amounts to such an advantage that a person, who is being prosecuted under the General Law, can legitimately complain that he is being denied the equality of law and a discriminatory treatment is" being extended to him. In our opinion, this advantage is not of that nature and magnitude. It does not place the accused in a more advantageous position for defending himself and meeting the charge. Moreover, the question of discriminatory treatment cannot be decided by a stray advantage here and a stray disadvantage there. It is the overall picture that counts. We have to take the two procedures as a whole and not a particular provision of any procedure. This overall picture presents no marked features of an advantage in one and disadvantage in the other.

There is a dissimilarity in procedure but the accused is not, denied the benefit of a fair and normal trial under the General Law. Where the act of discrimination consists only in using another law which is good -and in force and which creates no added difficulties or hardships for an accused, it may be objectionable on other grounds, but it cannot be described as a discriminatory treatment within the meaning of Article 14, Constitution of India. Moreover, if the interpretation of Section 6, Prevention of Corruption Act, which I will give under the third question, is correct, this disadvantage does not exist at all. We, therefore, find that the difference between the two procedures is not of that character which should warrant a conclusion that the equality of. law or the equal protection of laws is being denied to an accused, if he is prosecuted under the General Law.

34. There is another aspect, which makes Article 14, Constitution of India inapplicable to the present case. Proceedings "against, the applicant were started in 1949 and the Constitution came into force on 26-1-1950. These proceedings, therefore, cannot be challenged on the ground of discrimination, because retrospective effect cannot be given to the provisions of the Constitution

-- (Qasim Razvi v. State of Hyderabad', AIR 1953 SC 15G (I)).

35. While dealing with this question, only one decision was cited before us, in which this point was raised and decided. That decision is reported in -- 'Gopal Das v. State', AIR, 1954 All 80 (J). In that case the learned Judges held that the prosecution of a public servant under Section 409, I. P. C. does not go against Article 14, Constitution of India. We approve their decision, but with great respect to them, we are unable to accept their reasoning. In that case probably the ques-

tion of sanction was not raised and they only discussed the difference of punishment. In their opinion the difference of punishment was immaterial in view of Section 71, I. P. C. They observed:

> "For such conduct which could lead to a charge both under Section 409, I. P. C. and under Section 5(1) (c) of Act II of 1947, the offender will be punished within the lower limit provided for either of the two offences."

We find it difficult to accept this interpretation of Section 71, I. P. C. The relevant portion of Section 71, I. P. C. reads as follows :

> "The offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences".

In our opinion Section 71, I. P. C. is not applicable to a case where the charge is only under one offence. It also does not restrict the extent of punishment to the lower limit provided for either of the two offences. It merely protects an accused against the multiplicity of punishment and if his act falls within two or more separate definitions of any law in force, it limits the punishment to the maximum term which could! be awarded to him for any single offence. This means that if his conduct amount to an offence within the meaning of two different penal laws, one of which is punishable upto five years and the other is punishable upto seven years, he cannot be awarded a punishment of more than seven years, for then it would amount to punishing him twice over for the same offence. We, therefore, find that Section 71, I. P. C. is not a bar to punishing a public servant under Section 409, I. P. C. to more than seven years.

36. Our answer to the second question Is also in the negative.

QUESTION NO. 3.

37. We have now to see, whether any rule of procedure laid down in the Prevention of Corruption Act affects or modifies any part of the procedure to be followed under the General Law or not. Normally the procedure laid down in a, special law is meant to apply to the trial of offences under

that enactment alone. But if there is a clear direction, express or implied, It can apply also to other existing procedures. Where the same act is an offence both under the General Law and the special law, and the special law containing a different procedure was enacted later, it is not improbable that the legislature should make some rule of the new procedure applicable to the existing procedure also. We have, therefore, to interpret Section 6, Prevention of Corruption Act to find out if it contains any such expressed or implied direction.

Section 6 reads as follows :

> "(1) No Court shall take cognizance of an offence punishable under Section 161 or Section 165, Indian Penal Code (XLV of 1860) or under Sub-section (2) of Section 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction,
>
> (c) in the case of any other person, of the authority competent to remove him from his office."

From a reading of this section, it is clear that an express direction is given that no Court shall take cognizance of an offence punishable under Sub-section (2) of Section 5, Prevention of Corruption Act, except with the previous sanction of a proper authority. There can be no doubt that an offence defined in Section 5(l)(c), Prevention of Corruption Act is punishable under Sub-section (2) of Section 5 of the said. Act.

We have already held in the first part of this decision that an offence under Section 409, I. P. C. when committed by a public servant is the same offence which is defined in Section 5(1) (c) of this Act. Is it open to the prosecuting authorities to prosecute a public servant for an offence defined in Section 5(1) (c) and punishable under Section 5(2) without obtaining the necessary sanction, merely by giving it a different label? The answer depends upon the interpretation of the words "An offence punishable under Sub-section (2) of Section 5." Is their range limited to an offence prosecuted as "criminal misconduct" do they include the illegal acts or omissions defined and made punishable as "criminal misconduct", or if the legislature intended the first meaning, it could very easily have used the word 'prosecuted' in place of 'punishable'. The use of the word 'punishable' in my opinion extends their range and indicates that the second meaning was intended.

38. In Halsbury's Laws of England, under the heading 'Principles of Criminal Liability' "Crime" is defined as follows :

> "A crime is an unlawful act or default, which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment."

In Criminal Procedure Code 'Offence' is defined in Section 4(o) as follows :

> "Offence means any act or omission made punishable by any law for the time being in force ....."

From these definitions, it appears that an unlawful act or omission is 'per se' punishable under one or more laws and the subsequent prosecution is merely' a step to bring home this liability to the offender under any existing procedure. In other words, it is the illegal act or omission which is primarily punishable and the penal section of any particular statute is merely a name under which it is prosecuted before a court of law for that purpose, what is punishable is not the name given to it by any section of a penal statute, but the offence defined in that section.

The test that an offence is punishable under Section 5(2) is whether that act or omission has been made penal under any clause of Section 5(1) or not. Therefore, what is liable to be punished under it is the offence defined in any of the Clause (a), (b), (c) and (d) of Section 5(1). If an offender commits an illegal act or omission defined in Section 5(1) (c) he is liable to be punished under Section 5(2) and this liability cannot be affected merely because the State evades to prosecute him under that section.

39. I couldf find only one decision in which the word 'punishable' is defined. It is an old Bench decision of the Allahabad High Court --

(Queen Empress v. Kandhaia', 7 All 67 (K)).

Duthoit J. defined 'punishable' as follows :

> "Punishable must mean that the commission or omission of the act, the commission or omission of which is prohibited and renders the person who commit or omits it liable to the sanction of law, i.e. to punishment."

40. Applying this definition to the present case it would mean that any commission or omission of an act which renders the person who commits or omits it liable to the sanction of law as embodied in Section 5(2) is punishable under Section 5 (2), Prevention of Corruption Act.

41. It cannot be disputed that the moment a public servant commits criminal breach of trust in respect of property entrusted to him in that capacity, he is liable to be prosecuted under section 5(2), Prevention of Corruption Act. Does he also become liable to be punished under Section 5(2) at the same time? Two answers can be given to this question:

> 1. If he is liable to be prosecuted under Section 5 (2), it naturally follows that he is also liable to be punished under that section.
>
> 2. He is liable to be prosecuted under Section 5(2), but he would become liable to be punished under that section only if he is so prosecuted.

42. The first answer would be correct, if the two liabilities are really parts of the same liability and arise simultaneously. The second answer would be correct, if they are two different liabilities, which

follow each other and the second arises only after he first is incurred. I think that the first answer is correct, because in my opinion a liability to be prosecuted includes a liability to be punished. The two liabilities cannot be divorced and separated for the second liability is the necessary corollary of the first. One cannot exist without the other. It cannot be maintained that an offender is liable to be prosecuted for an offence but not liable to be punished for it. It is difficult for me to conceive that although the first liability arose immediately, the second would arise at a later stage. If a person wilfully kills another person, he immediately becomes liable to be prosecuted and punished under Section 302, I. P. C., even though the crime might not be traced and he may never be prosecuted. Similarly, where an act or omission falls under the definition of more than one offence, the offender is liable to be prosecuted and punished under any of those offences as soon as the crime is committed. The moment a public servant commits criminal breach of trust, he is liable to be prosecuted and punished both under Section 409, I. P. C. and Section 5(2), Prevention of Corruption Act. Merely because he is also liable to be punished under Section 409, I. P. C. his liability to be punished under Section 5(2) is not kept in abeyance. In my opinion the language of Section 26, General Clauses Act is clear on this point. It visualizes the possibility of a person incurring the liability of being prosecuted and punished for two or more offences at the same time even before it is determined as to which offence will be charged against him. Surely this liability of being prosecuted and punished under Section 5(2), Prevention of Corruption Act, which arose as soon as the offence was committed, will not disappear merely because subsequently a different label was given to that offence and the offender was tried under Section 409, I. P. C., for it is the offence which is punishable and not the label, which screens the offence.

The question which is to be answered is not whether an offence charged under Section 409, I. P. C. is punishable under Section 5(2), Prevention, of Corruption Act or nob. The question is whether the offence, which is denned in Section 5(1)(c), but for which the prosecution is launched under Section 409, I. P. C. is also punishable under Section 5(2) or not. In my opinion only one reply can be given to this question and that is in the affirmative. The same conclusion is reached if an answer is given to a question put from the opposite angle. The question is "Can it be said" that an offence denned in Section 5(1) (c) is not punishable under Section 5 (2)? I think that the correct answer to this question is that it is punishable.

43. Again, in my opinion if a distinct and significant meaning emerges from the language of a statute it' cannot be ignored. Section 6 directs that no court shall take cognizance of an offence punishable under Sub-section 2 of Section 5 Prevention of Corruption Act alleged to have been committed by a public servant. This sentence can be broken up in two parts:

No court shall take cognizance of

(a) An offence punishable under Sub-section 2 of Section 5,

(b) Alleged to have been committed by a public servant.

If these two parts are read together they give a distinct meaning. They lay down .an equitable principle to be followed in the trial of public servants. They cannot be read together if "an offence

punishable under Section 5(2)" means only an offence prosecuted under Section 5(2) for only a public servant can commit such an offence. The second part becomes unnecessary and meaning less.

But if an offence punishable under Section 5(2) means an offence defined in Section 5(1), the words of the second part become full of meaning. They lay down a rule that if an illegal act or omission has been made an offence under some other law which can be committed by others also but when committed by a public servant becomes punishable under Section 5(2) then the prosecution cannot be launched against him under the other penal statute unless the necessary sanction is obtained. I see no adequate reason why the two parts should not be read together and the second part should be read only with "an offence punishable under Section 161, I. P. C." and not with "an offence punishable under Section 5(2)." If that was the intention of the legislature, the second part would have found a place immediately after "An offence punishable under Section 161" in Section 6, Preven- tion of Corruption Act.

In my opinion if the words of a statute are capable of being interpreted in two ways, one of which creates an inequity and the other removes it; the interpretation which removes the inequity should be preferred. Of course if the words are incapable of giving that meaning it cannot be imported. I think the interpretation that I have given above is not an imposition on the words of Section 6.

44. I, therefore, hold that an offence defined under Section 409, I. P. C. when committed by a public servant being the same offence as criminal misconduct denned in Section 5(l)(c), Prevention of Corruption Act, is an offence which is also punishable under Section 5(2) of the said Act. It naturally follows that Section 6, Prevention of Corruption Act will be a bar to the prosecution of a public servant under Section 409, I. P. C., if the necessary sanction is not there.

45. The learned Additional Government Advocate contends that the language of Section 6, Prevention of Corruption Act clearly implies that it was not the intention of the legislature to insist on sanction in the case of a public servant under Section 409, I. P. C. He concedes that a prosecution cannot be launched against a public servant under Sections 161 and 165, I. P. C. without a previous sanction but the very fact that these two sections are specifically mentioned in Section 6, Prevention of Corruption . Act, while Section 409, I. P. C. is not mentioned, is according to him a conclusive proof that Section 6 wajj never meant to operate as a bar to the prosecution of a public servant under Section 409, I. P. C. without a previous sanction. He relies upon the observations of the learned Judges in two decisions -- (AIR 1952 All 35 (B) and AIR 1954 Raj 211 (G)).

In the Allahabad decision the learned Judges observed as follows :

> "We may also point out that Section 6, Prevention of Corruption Act provides that the rule as regards sanction shall apply to a case under Section 161 and 165, I. P. C. Neither Section 6 nor Sections 4 and 7 make any mention of any other sections of the Penal Code and if the accused is therefore, not charged under Section 161 and 165, Penal Code, but under certain other sections of the Penal Code, it cannot be said that to these sections also the provisions of the Prevention of Corruption Act were intended to apply."

Similarly, in the Rajasthan decision the learned Judges observed as follows :

> "Section 6, Prevention of Corruption Act which provides for sanction mentions Sections 161 and 165, Penal Code but does not mention Section 409 specifically which shows that it was not the intention of the Legislature to insist on sanction in cases against public servants under Section 409. It is true that sanction was required by this section for offences under Section 5(2) and that included the offence defined in Section 5(l)(c) which. is exactly the same as the offence under Section 409. Even so, if the option is in the prosecutor under Section 26, General Clauses Act to prosecute under either enactment, it is not open to the court to insist that the prosecution must be . under that enactment which requires sanction, and that it will not proceed to try the case under that enactment which does not require sanction."

It appears from the two extracts quoted above that the opinion of the learned Judges, who gave these decisions was mainly influenced by the fact that while Sections 161 and 165 are mentioned in S. 6, Prevention of Corruption Act, it does not specifically mention Section 409. They seem to be of the opinion that if the legislature intended to bring Section 409 within the orbit of Section 6, there seems to be no reason why it did not include it amongst the offences specifically mentioned in that section. It escaped their consideration that there can be a good reason why Sections 161 and 165 were mentioned and Section 409 was not mentioned. The offence of criminal misconduct as denned in Section 5(1), Prevention of Corruption Act does not include the offence defined in Section 161 and 165, I. P. C.. but it fully includes an offence under Section 409 when committed by a public servant. It was therefore, not necessary to mention Section 409 specifically as it would have amounted to a mere repetition. The legislature did not want to make any invidious distinction between members of the same class, i.e. the public servants and it wanted to extend the same treatment to all of them.

It was, therefore, necessary to mention Sections 161 and 165 specifically, for an offence under these sections is not punishable under Section 5(2), Prevention of Corruption Act. The offences defined in Sections 5(1) (a) and 5(1) (b) are different from the offences defined in Sections 161 and 165, I. P. C. It is only a person who accepts or obtains illegal gratification habitually and not a first offender who commits the offence of criminal misconduct. It was, therefore, necessary to specifically mention Sections 161 and 165, I. P. C. in Section 6, Prevention of Corruption Act, if a uniform treatment was to be extended to all public servants. It is inconceivable that, while on the one hand the legislature was willing to extend the operation of Section 6, prevention of Corruption Act to the procedure laid down under the General Law for the trial of such offences which do not come under the definition of criminal misconduct in order to remove a dissimilarity of treatment, yet on the other hand it would voluntarily create a dissimilarity of treatment by excluding from its operation an offence which is completely included in the definition of criminal misconduct and which is punishable under Section 5(2), Prevention of Corruption Act.

I cannot treat the rule of sanction as a mere rule of procedure. I regard it as a valuable protection' given to a public servant against irresponsible prosecution. It is difficult for me to accept that the legislature intended that this rule should be broken with impunity and treated like a dead letter whenever the prosecuting authority elected to do so. I cannot believe that the legislature only

pretended to give this protection to a public servant who was accused of committing criminal breach of trust and its real intention was that it should take away with the left hand what it has given from the right. It cannot be said that the legislature had any warmer feeling or softer corner in its heart for those public servants who accepted illegal gratification as compared to their more unfortunate brothers who committed criminal breach of trust. An offence under Section 409, I. P. C. is a far graver offence than one under section 161, I. P. C. or 165, I. P. C. The former is punishable upto transportation for life, while the maximum sentence that can be awarded under the latter sections is only three years. The latter offences are also bailable, so that the accused can never be handicapped in his defence by being confined in jail.

It is, therefore, difficult to understand that the protection of the rule of sanction should be given to public servants when they have to meet only a minor charge but they should be deprived of it when a much graver charge is levelled against them. In my opinion this could not have been the intention of the legislature.

46. I am, therefore, of the opinion that because Section 409, I. P. C. is not mentioned in Section 6, Prevention of Corruption Act, it is not correct to infer that the legislature considered a previous sanction unnecessary if a public servant was to be prosecuted under Section 409, I. P. C. In fact the overall picture of the Prevention of Corruption Act shows that the legislature, while enacting the statute, had two clear objects in view. On the one hand it wanted that stronger measure should be adopted to check the growth of bribery. and corruption and those public servants who were found guilty should be more severely punished. On the other hand it was anxious that the public servants should not be readily exposed to vexatious and frivolous accusations prompted by personal venom, but should be protected from ill-considered and irresponsible prosecutions. I find nothing repugnant in this dual intention of the legislature. It wanted to make the rules of the game more strict so that those gamesters who were stacking jokers and aces in their sleeves might be caught more easily but at the same time it wanted to give them a fair deal. In my view the Prevention of Corruption Act by itself is not discriminatory but if a sanction would, be considered unnecessary under Section 409, I. P. C., this interpretation of Section 6 will give the prosecuting authorities a great latitude to evade and dodge the spirit of the enactment even though it may not make the statute itself discriminatory.

47. That the salutary provisions of Section 6, Prevention of Corruption Act, will be evaded by the prosecuting authorities if they fail to secure a sanction from the proper authority was visualised by the learned Judge in AIR 1953 Madh-B 139 (F). He observed:

> "It is evident from Section 6 of the Act that a prosecution under Section 5(2) of the Act depends on the previous sanction of the competent authority. Where on the circumstances of a particular case the sanctioning authority has in its discretion refused to sanction the prosecution, the liability of the public servant to punishment under Section 409, I. P. C., still remains."

The learned Judge, however, instead of deprecating it as a flagrant evasion of the provisions of Section 6, Prevention of Corruption Act, came to the conclusion that it was not objectionable and

that the prosecuting authorities can legally dodge this rule and prosecute a public servant under Section 409, I. P. C., if the sanctioning authority did not allow them to do so under Section 5(2), Prevention of Corruption Act. With great respect for the learned Judge, I think that it was to protect the public servants from this very danger that Section 6 was enacted.

48. Dealing with this aspect, a learned Judge of the Allahabad High Court made the following observations in an unreported case -- 'Kirpa Shankar Mathur v. State', Cri, Misc. No. 508 of 1851 (All) (L):

> "(a) The learned counsel for the State contends that the applicant is not being prosecuted for the offence of criminal misconduct punishable under Section 5(2), Prevention of Corruption Act, but he is being prosecuted under Section 409, I. P. C., for which no sanction is needed. In other words he contends that where an offence falls under two different laws and sanction is necessary for prosecution in respect of one such offence but not in respect of the other, prosecution can be had in respect of the offence for which no sanction is necessary. In other words the prosecution can circumvent the law which requires the taking of previous permission by adopting the device of charging the accused with the oflence for which sanction is not needed. In my opinion it is not open to the prosecution to adopt any such device."

(b) The applicant is guilty of an offence punishable under Section 409 and also of that punishable under Section 5(2), Prevention of Corruption Act. Since sanction was necessary in respect of the latter offence, but not in respect of the former one, the prosecution could not avoid taking the sanction by launching the prosecution under 3. 409, I. P, C. The result, therefore, is that the prosecution under Section 409 also cannot be permitted to go on unless previous sanction is proved."

This decision was overruled by a Bench decision of the Allahabad High Court in AIR 1952 All 35 (B). With respect for the learned Judges who overruled this decision I find myself in complete agreement with the view expressed in Kirpa Shankar's case (L). This view finds strong support from the observations of the Chief Justice of India in --'Basir-ul-Huq v. State of West Bengal', AIR 1953 SC 293 (M) ; Mahajan C. J. observed:

> "Though in our judgment Section 195 does not bar the trial of. an accused person for a distinct offence disclosed by the same facts and which is not included within the orbit of that section it has also to be borne in mind that the provisions' of that section cannot be evaded by resorting to devices or camouflages. The test whether there is evasion of the section or not Is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of the public servant is required.
>
> In other words the provisions of the section cannot be evaded by the device of charging a person with an offence to which that section does not apply and then convicting him of an offence to which it does upon the ground that such latter offence is a minor offence of the same character or by describing the offence as being one

> punishable under some other section of the Indian Penal Code though in truth and substance the offence falls in the category of sections mentioned in Section 195, Cr. P. C. Merely by changing the garb or label of an oflence which is essentially an offence covered by the provisions of Section 195, prosecution for such an offence cannot be taken cognizance of by mis-describing it or by putting a wrong label on It."

These observations apply as much to S. 6, Prevention of Corruption Act, as to Section 195, Cr. P. C.

49. In the light of these observations, it cannot be doubted that the prosecution of a public servant under Section 409, I. P. C., without obtaining the necessary sanction amounts to a clear attempt at evading the rule of law laid down in Section 6, Prevention of Corruption Act and this cannot be permitted. The same view was taken by a Bench of the Bombay High Court in -- 'Yashwant Dhondba Rao Chavan v. State', 7 A I Cr'D (Bom) 555. The learned Judges observed:

> "Where the facts contended by the prosecution fairly fell under a section which constituted an offence for which a person could not be pro-. secuted without a proper sanction, it would be the evasion of the salutary provision of the law to proceed under a section, the charge under which did not require a sanction."
>
> "In our view the facts alleged against the petitioner by the prosecution can be said to fall fairly within the definition of the offence under Section 5(2), Prevention of Corruption Act, which charge would require a prior sanction. Therefore, we are of the view that the commitment of the petitioner is so far as it relates to the charge under Section 409, I. P. C., would be bad."

50. I agree with this view and from this approach to the question also I reach the same conclusion that cognizance of an oflence under Section 409, I. P. C., when committed by a public servant cannot be taken by any Court except with the previous sanction of a competent authority.

51. My answer to the third question also is in the negative, as in my opinion the prosecution of a public servant under Section 409, I. P. C., without the necessary sanction is barred by Section 6, Prevention of Corruption Act.

52. In view of the answers given by me to the three questions discussed above, I hold- that the Magistrate was right in not taking cognizance of an offence under Section 409, I. P. C., against the applicant without a proper sanction. I uphold his order of discharge in respect of an offence under Section 409, I. P. C., but from the order of the Magistrate it appears that the prosecution has also led evidence to prove that the applicant committed an offence under Section 477A, I. P. C. also. The Magistrate has not considered this aspect of the case at all. An offence under Section 477A, I. P, C., does not require any sanction. If the evidence warrants that a charge should be framed against the applicant under Section 477A, I. P. C., the Magistrate should proceed to do so. If he frames the charge and in his discretion feels that he can award an adequate punishment, he should try it himself. If, on the other hand, he comes to the opinion that he cannot award an adequate sen-tence, he should commit the case to the Court of Session.

53. BY COURT: In view of the opinion of the majority the revision is dismissed. Leave to appeal is granted.