

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.43668 of 2013

Arising Out of PS.Case No. -145 Year- 2005 Thana -SIRDALA District- NAWADA

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Kishore Kumar, S/O Late Siyaram, Resident of Village – Suhath, P.S. – Saur Bazar,
District – Saharsa.

.... Petitioner/s

Versus

The State of Bihar, Through The Secretary Govt. of Bihar,, Law Department Bihar,
Patna & Ors

.... Opposite Party/s

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Appearance :

For the Petitioner : Mr. Rajkumar Rajesh, Advocate.

Mr. Girish Chandra, Advocate.

For the Opposite Party : Mr. Ram Anurag Singh, APP.

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date: 23-01-2018

The petitioner has sought quashing of the order of sanction issued under the signature of the Secretary, State of Bihar vide Order dated 13.06.2012 (vide Memo No. 22/2012/4565/J) Patna, Department of Law as well as for stopping all further proceedings before the court below on the ground that the sanction to prosecute the petitioner at such a belated stage is unjustified and will cause serious miscarriage of justice vis a vis the petitioner.

2. The petitioner was made accused in a case vide Sirdala P.S. Case No. 145 of 2005 which was instituted for the offences under Sections 302/34 of the Indian Penal Code and Section 27 of the Arms Act, registered on 03.11.2005 for the death of one Pawan Kumar Mishra. In the aforesaid FIR, it has been alleged that the petitioner along with other police personnel had fired from his



weapon which hit the deceased in his forehead leading to his death. At the relevant time, the petitioner was the officer-in-charge of Meskaur Police Station.

3. It further appears from the records that prior to the lodging of the aforesaid case, the petitioner had lodged two other cases viz. Sirdala P.S. Case No. 143 of 2005 and Sirdala P.S. Case No. 144 of 2005.

4. In Sirdala P.S. Case No. 143 of 2005 referred to above, it was alleged that on telephonic information from the S.P. Nawada, the house of one Md. Ashraf of Village Paroria was raided and on search, a country made loaded rifle, a revolver, a pistol and cartridges of various bores were found. For no satisfactory explanation for the recovery of the aforesaid arms and ammunition, Md. Ashraf was arrested and a case vide Sirdala P.S. Case No. 143 of 2005 was instituted for the offences under Sections 25 (1-b)a, 26/35 of the Arms Act against Md. Ashraf, Yunus Khan and Md. Ibrar Khan.

5. While the accused of the aforementioned case viz. Md. Ashraf was being taken to police station, a crowd had collected and an attempt was made from amongst the crowd to set free aforesaid Md. Ashraf. Sensing trouble, the Superintendent of Police of the concerned district was intimated by the petitioner and a request was made for sending a reinforcement of the police force to meet the



exigencies of the situation. On the basis of the aforesaid information provided by the petitioner, Sirdala P.S. Case No. 144 of 2005 was also registered on 03.11.2005 for investigation for the offences under Sections 147, 148, 149, 186, 353, 332, 224, 225, 337, 336, 426, 323, 341 and 307 of the IPC as well as Section 27 of the Arms Act. It also appears from the records that some of the police personnel had received injuries pursuant to the pelting of stones by the violent mob which had collected at the place of occurrence for setting free Md. Ashraf from police custody.

6. Learned counsel for the petitioner has also drawn the attention of this Court to the post-mortem report of Pawan Kumar Mishra (deceased) of Sirdala P.S. Case No. 145 of 2005 which revealed that the injuries suffered by him were charred and there was blackening around the wound of entry over the forehead at the right eye brow with a big dimension/cavity, thereby suggesting firing from a very close range. It was also submitted on behalf of the petitioner that neither has he fired nor ordered anyone of his associates to fire at the deceased. After the occurrence, the arms and ammunition which was in custody of the petitioner were surrendered.

7. From a conspectus of all these facts, it has been argued on behalf of the petitioner that assuming but not admitting that one person had died, but it is clear that the police party was discharging its official duty and therefore sanction to prosecute the



petitioner was a must.

8. In the present case, cognizance was taken without the order of sanction but the challenge of the petitioner to the aforesaid taking of cognizance against him without the sanction to prosecute, failed. Thereafter an application for discharge was filed on behalf of the petitioner but the same was also dismissed by the court below and charges were framed.

9. After the framing of charges, 10 out of 11 witnesses had been examined. In the meantime, the petition filed on behalf of the petitioner seeking quashing of the order refusing to discharge/framing of charges against the petitioner was heard by a Bench of this Court and by order dated 16.04.2010 passed in the aforesaid Cr. Misc. No. 10837 of 2009 it was held that the entire occurrence took place in discharge of the official duty of the petitioner and as such it attracted the provisions of Section 197(1) of the Code of Criminal Procedure. Thus, in the absence of any valid sanction, the Bench referred to above quashed the order dated 30.01.2009 by which the court below had framed charges against the petitioner in Sessions Trial No. 115/08/73/08 arising out of Sirdala (Meskaur) P.S. Case No. 145/05. However, before parting with the order, the Hon'ble Judge observed that the State will have the liberty to obtain sanction before proceeding in the matter.

10. It appears that thereafter by order dated 13th June,



2012 sanction to prosecute the petitioner was accorded, which order is under challenge in the present proceeding.

11. Learned counsel for the petitioner has submitted that once the charges framed against the petitioner were set aside, fresh sanction could not have been obtained and prosecution of the petitioner any further would offend the provisions of Section 300 of the Code of Criminal Procedure as well as Article 20 of the Constitution of India inasmuch as it would amount to trying the petitioner twice for the same offence.

12. The petitioner has not challenged the order of sanction on any other ground viz. the sanction being defective or non-speaking but only on the aforesaid ground of the same having been passed after a long lapse of time when 10 out of 11 witnesses had already been examined and the High Court in its wisdom had set aside the order of charge. In support of the aforesaid contention, the learned counsel for the petitioner has referred to a decision rendered by the High Court of Uttar Pradesh in case of *Prakash Chandra Jaiswal vs. State of Uttar Pradesh* wherein under similar circumstances the court was of the view that on the overall assessment of facts, it appeared that the proceedings against the applicant was nothing but an abuse of the process of the court and hence the proceedings were quashed. In the aforesaid case the prosecution of the applicant therein was under Section 5(2) of the Prevention of Corruption Act and any verdict in



the aforesaid case cannot have any parallel with the facts of the present case which is one under Section 302 of the Indian Penal Code.

13. In *Matajog Dobey v. H. C. Bhari*, AIR 1956 SC 44, the constitution Bench of the Supreme Court has observed that no question of sanction can arise under Section 197 of the Code of Criminal Procedure unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. On the question as to which act falls within the ambit of official duty, the Constitution Bench had held that there must be reasonable connection between the act and the discharge of the official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim that he did it in the course of performance of his duty.

14. The Constitution Bench referred to above, while dealing with the question whether the need for sanction has to be considered as soon as the complaint is lodged and on the allegations contained therein, referred to *Hori Ram Singh vs. Emperor*, AIR 1939 Federal Court 43. It was observed by the Constitution Bench that at the first sight, the judgment in *Hori Ram Singh* (supra) seemed to justify that the Federal Court was of the view that the applicability of Section 197 of the Code of Criminal Procedure would be at the initial stage but on a careful analysis of the Federal Court judgment (*Hori Ram Singh*, supra), the Constitution Bench found that the question



may arise at any stage of the proceedings. The complainant/informant may not disclose that the act was in discharge of official duty but other facts subsequently coming to light on a police or judicial enquiry or even in the course of the prosecution evidence at the trial, the necessity for sanction may be established.

15. Thus, whether sanction is necessary or not, may have to be determined from stage to stage and the necessity could reveal itself in the course of the progress of the case. If, at the outset, the defence establishes that the act purported to be done is in execution of the official duty, the complaint will have to be dismissed on that account.

16. In *Sankaran Moitra vs. Sadhna Das*, (2006) 4 SCC 584, the complainant had filed a case before the Deputy Commissioner of Police that she had come to know from the members of the public that her husband has been beaten to death by the police. She had made the Assistant Commissioner of Police and other police personnel as accused and had prayed for action against them. One of the accused persons preferred a petition under Section 482 of the Code of Criminal Procedure before the concerned High Court for quashing of the complaint on the ground that the complaint could not have been entertained for want of sanction under Section 197(1) of the Code. The High Court dismissed the petition. Before the Supreme Court, it was argued that want of sanction under Section 197 Cr.P.C.



did not affect the jurisdiction of the court to proceed, but it was only one of the defences available to the accused and the accused could raise the defence at the appropriate stage. In that case also, the Supreme Court considered Hori Ram Singh and Matajog Dobey (supra) and several other judgments on the point and rejected the submission. It was held that the prosecution hit by Section 197(1) Cr.P.C. cannot be launched without the sanction contemplated. It is a condition precedent, as it were, for a successful prosecution of public servant when the provision is attracted, though the question may not arise necessarily at the inception, but even at a subsequent stage. However the Supreme Court refused to accede to the request of one of the parties to postpone the decision on this question. It was held that postponing a decision on the applicability or otherwise of Section 197(1) of the Code can only lead to the proceeding being dragged on in the trial court and a decision by this Court, there and then, would be more appropriate in the circumstances of the case especially when the accused persons involved were police personnels and the nature of the complaint made was kept in mind.

17. In *Om Prakash vs. State of Jharkhand* 2012 SCC 72, the Supreme Court, on an analysis of the aforesaid two judgments (Hori Ram Singh and Sankaran Moitra) held as follows:

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. At this point, in order to exclude the possibility of any misunderstanding, we make it clear that the legal discussion on the requirement of sanction at the very threshold is based on the finding in the earlier part of the judgment that the present is not a case where the police may be held guilty for killing Munna Singh in cold blood in a fake encounter. In a case where on facts it may appear to the court that a person was killed by the police in a stage-managed encounter, the position may be completely different.

42. *It is not the duty of the police*



officers to kill the accused merely because he is a dreaded criminal. Undoubtedly, the police have to arrest the accused and put them up for trial. This Court has repeatedly admonished trigger-happy police personnel, who liquidate criminals and project the incident as an encounter. Such killings must be deprecated. They are not recognized as legal by our criminal justice administration system. They amount to State-sponsored terrorism. But, one cannot be oblivious of the fact that there are cases where the police, who are performing their duty, are attacked and killed. There is a rise in such incidents and judicial notice must be taken of this fact. In such circumstances, while the police have to do their legal duty of arresting the criminals, they have also to protect themselves. The requirement of sanction to prosecute affords protection to the policemen, who are sometimes required to take drastic action against criminals to protect life and property of the people and to protect themselves against attack. Unless unimpeachable evidence is on record to establish that their action is indefensible, mala fide and vindictive, they cannot be subjected to prosecution. Sanction must be a precondition to their prosecution. It affords necessary protection to such police personnel. The plea regarding sanction can be raised at the inception.



18. Thus, now the controversy is no longer *cadit quaestio* that in a given facts of the case, there could be an applicability of Section 197(1) of the Code of Criminal Procedure at the initial stage i.e. at the inception of the case and its application could also be determined at a later stage when materials are collected to suggest/indicate that the offence alleged was committed in discharge of the official duty of the accused. If it is found that the act complained of is in discharge of the official duty, no prosecution can continue without the valid sanction of the government.

19. From the perusal of the order passed by a Bench of this Court whereby the charges against the petitioner were quashed, it would appear that from the facts alleged in the three FIRs referred to above viz. Sirdala P.S. Case No. 143 of 2005, Sirdala P.S. Case No. 144 of 2005 and Sirdala P.S. Case No. 145 of 2005, the act complained of looked like it was in discharge of the official duty of the petitioner; thus necessarily attracting the provisions of Section 197(1) of the Code of Criminal Procedure. It was observed by the court that in its opinion, the trial court ought to have considered this question before framing of the charges. Thereafter, as has been referred to earlier in this order, the Bench gave an observation that the State has the liberty to obtain sanction before proceeding in the matter.

20. Hence the order granting sanction.



21. The protection given under Section 197 of the Code of Criminal Procedure is to save responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servant. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the government, if they chose to exercise it, complete control of the prosecution. Therefore, the protection which is afforded to a government servant is that he cannot be prosecuted without a valid sanction in case the offence charged is in due discharge of his official duty.

22. In the present, case no doubt it was held that sanction is required and therefore, the order framing charge was set aside. Nonetheless the protection is only to the extent that prosecution cannot be continued or launched without the sanction. Now when the sanction to prosecute has been accorded and there is no allegation/contention that sanction so granted is invalid for want of any requirement, the petitioner ought to be proceeded against.

23. The trial court shall, while trying the petitioner take into account that the act of the petitioner for which he has been charged was in discharge of his official duty and that the occurrence



took place sometimes in the year 2005 and with respect to the same occurrence there are two other versions on record. Since 10 out of 11 witnesses have already been examined, it would not be in the interest of anybody if a fresh trial is directed.

24. The trial court therefore, is directed to continue with the trial from the stage from where it had stopped and conclude the same expeditiously without being prejudiced on any score by the fact that the present petition seeking stoppage of proceedings has not been entertained by this Court.

25. The petition is dismissed with the aforesaid observation.

(Ashutosh Kumar, J)

KKSINHA/-

AFR/NAFR	AFR
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