

16.05.2024

Sl. No.: 28

Court No.30
BM

CRR 4121 of 2022

Dr. Sudhansu Kumar Ghosh & Anr.

Vs.

The State of West Bengal & Anr.

Mr. Shibaji Kumar Das

... for the petitioners

Mr. Saibal Bapuli

Mr. Arani Bhattacharyya

... for the State

1. The instant application is filed under Section 401 read with Section 482 of the Code of Criminal Procedure, 1973 by Dr. Sudhansu Kumar Ghosh, Medical Officer & Gynecologist, Basirhat Sub Divisional Hospital against the State and others praying for quashing of the proceedings in connection with G.R No.864 of 2007 (State of West Bengal vs. Dr. Sudhansu Kumar Ghosh & Others) arising out of Basirhat P.S. Case No. 241/07 dated 30/05/2007, which culminated in Charge Sheet No.219 of 2009 dated 7th June, 2009 under Sections 304(A)/201/109 of the Indian Penal Code, 1860 presently pending in the court of the learned Additional Chief Judicial Magistrate, Basirhat, District-North 24 Parganas inclusive of all orders passed in connection thereto till date.

2. Allegations are that on 19/02/2007 the daughter of the de-facto complainant Suprava Das was admitted at Basirhat Sub Divisional Hospital and she gave birth to a female child under supervision of Dr. Sudhangshu Kumar Ghosh being Opposite Party No. 3. Allegedly some post-operative complications developed and the patient was referred to SSKM Hospital, Kolkata on 21/02/2007 where she was treated for more than two weeks.

Unfortunately on 06/03/2007 at 05:00 P.M., the patient expired. The allegation is that death of the patient occurred due to medical negligence of the present Petitioner and the Opposite Party Nos. 3 and 4, namely, Dr. Sudhangshu Kumar Ghosh and Dr. Partha Pratim Basu and Others.

3. A complaint was filed under Section 156 of the Code of Criminal Procedure in the Court of Additional Chief Judicial Magistrate, Basirhat. The Trial Court directed the Inspector-in-Charge of Basirhat Police Station to treat the complaint as First Information Report and to investigate into the case. Accordingly, Bashirhat Police Station Case No. 241 dated 30/05/2007 under Sections 34/35/304/304A/36/109 of the Indian Penal Code was registered and investigation began. On conclusion of investigation charge sheet was filed on 08/06/2009 against the present Petitioner as well as Opposite Party No. 3 – 6 under Sections 304A/201/109 of the Indian Penal Code. Subsequently, charges were framed against the Opposite Party No. 3 to 6 under Sections 304A/201/109 of the Indian Penal Code to which they pleaded not guilty for which the trial began.

4. It is the case of the Petitioner that the trial court took cognizance of the offences on 08/06/2009 without any sanction order as contemplated in Section 197 of the Code of Criminal Procedure, 1973 and proceeded with the trial. The Petitioner agitated the issue before the trial court. In terms of the order dated 28/01/2011 the trial court rejected the plea of the Petitioner against which the present Petitioner preferred a revision application under Sections 397/399 of the Code of Criminal Procedure, 1973 registered as Criminal Revision No. 30 of 2011 in

the Court of Additional Sessions Judge, Basirhat. The said Criminal Revision No.30 of 2011 was dismissed for default on 13/09/2012.

5. Mr. Datta appearing for the Petitioner has submitted that the alleged incident related to discharge of his official duty as a public officer. This is manifest from the written complaint itself. Therefore, prior sanction order, as contemplated in section 197 of the Code of Criminal Procedure, 1973 is mandatory for taking cognizance of the alleged offences. Absence of such sanction order vitiates the trial itself.

6. He further submitted that proceeding in the lower court is pending for long causing undue hardship and prejudice to the Petitioner. According to him, in absence of the sanction order under section 197 of the Code of Criminal Procedure, 1973, the prosecution is liable to be quashed against the present Petitioner.

7. Section 197 of Code of Criminal Procedure, 1973 provides:-

“197. Prosecution of Judges and public servants. (1) *When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction-* (a) *in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;* (b) *in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government: [Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression " State Government" occurring therein, the expression " Central Government" were substituted.]*

.....”

8. The underlying principle of Section 197 is that public servants are treated as special class of person enjoying the protection that they can perform their duties without fear and favour and threats of malicious prosecution. **(Manorama Tiwari and Ors. Vs. Surendra Nath Rai [(2016) 1 SCC 594].**

9. In **Matajog Dobey vs. H. C. Bhari, [AIR 1956 SC 44]**, the Supreme Court held:-

“..... The minor contentions may be disposed of at the outset. Even if there was anything sound and substantial in the constitutional point about the vires of section 5(1) of the Act, we declined to go into it as it was not raised before the High Court or in the grounds of the petition for special leave to appeal. Article 14 does not render section 197, Criminal Procedure Code ultra vires as the discrimination is based upon a rational classification. Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. It was argued that section 197, Criminal Procedure Code vested an absolutely arbitrary power in the government to grant or withhold sanction at their sweet will and pleasure, and the legislature did not lay down or even indicate any guiding principles to control the exercise of the discretion. There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for an act done or purporting to be done by the public servant in the discharge of his official duties. No one can take such proceedings without such sanction. If the government gives sanction against one public servant but declines to do so against another, then the government servant against whom sanction is given may possibly complain, of discrimination. But the petitioners who are complainants cannot be heard to say so for there is no discrimination as against any complainant. It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the government and not in a minor official. Further, we are not now concerned with any such question. We have merely to see whether the court could take cognisance of the case without previous sanction and for this purpose the court has to find out if the act complained against was committed by the accused while acting or purporting to act in the discharge of official duty. Once this is settled, the case proceeds or is thrown out. Whether sanction is to be accorded or not is a matter for the government to consider. The absolute power to accord or withhold sanction conferred on the government is irrelevant and foreign to

the duty cast on the court, which is the ascertainment of the true nature of the act.

*Slightly differing tests have been laid down in the decided cases to ascertain the scope and the meaning of the relevant words occurring in section 197 of the Code; "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". But the difference is only in language and not in substance. The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection' between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation. In *Hori Ram Singh v. The Crown*(1), Sulaiman, J. observes:*

"The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction".

The interpretation that found favour with Varadachariar, J. in the same case is stated by him in these terms at page 187: "There must be something in the nature of the act complained of that attaches it to the official character of the person doing it". In affirming this view, the Judicial Committee of the Privy Council observe in Gill's case(1) "A public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to (1) [1939] F.C.R. 159,178.

(2) [1948] L.R. 75 I.A. 41.

lie within the scope of his official duty The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office". Hori Ram's case(1) is referred to with approval in the later case of Lieutenant Hector Thomas Huntley v. The King-Emperor(1) but the test laid down that it must be established that the act complained of was an official act appears to us unduly to narrow down the scope of the protection afforded by section 197 of the Criminal

Procedure Code as defined and understood in the earlier case. The decision in Meads v. The King(1) does not carry us any further; it adopts the reasoning in Gill's case(1). There are two cases of this Court to which reference may be made here. In Shreekantiah Ramayya Munipalli v. The State of Bombay(1), Bose, J. observes as follows: "Now it is obvious that if section 197 of the Code of Criminal Procedure is construed too narrowly, it can never be applied, for of course, it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning". The question of previous sanction also arose in Amrik Singh v. The State of PEPSU(6). A fairly lengthy discussion of the authorities is followed up with this summary: "If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under section 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required".

The result of the foregoing discussion is this: There must be a reasonable connection between the act and the discharge of official duty; the act must bear such (1) [1939] F.C.R. 159,178, (2) [1944] F.C.R. 262.

(3) [1948] L.R. 75 I.A. 185.

(4) [1948] L.R. 75 I.A. 41.

(5) [1955] 1 S.C.R 1177, 1186.

(6) [1955] 1 S.C.R. 1302, 1307, 1308.

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 the performance of his duty. Is the need for sanction to be considered as soon as the complaint is lodged and on the allegations therein contained? At first sight, it seems as though there is some support for this view in Hori Ram's case and also in Sarjoo Prasad v. The King-Emperor(1). Sulaiman, J. says that as the prohibition is against the institution itself, its applicability must be judged in the first instance at the earliest stage of institution. Varadachariar, J. also states that the question must be determined with reference to the nature of the allegations made against the public servant in the criminal proceeding. But a careful perusal of the later parts of their judgments shows that they did not intend to lay down any such proposition. Sulaiman, J. refers (at page 179) to the prosecution case as disclosed by the complaint or the police report and he winds up the

discussion in these words: "Of course, if the case as put forward fails or the defence establishes that the act purported to be done is in execution of duty, the proceedings will have to be dropped and the complaint dismissed on that ground". The other learned Judge also states at page 185, "At this stage we have only to see whether the case alleged against the appellant or sought to be proved against him relates to acts done or purporting to be done by him in the execution of his duty". It must be so. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction. Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case.

We are not prepared to concede in favour of the (1) [1945] F.C.R. 227, appellants the correctness of the extreme proportion advanced by Mr. Isaacs on their behalf that when obstruction is laid or resistance offered against an authorised and therefore lawful search, the officials conducting the - search have no right to remove or cause to be removed the obstruction or resistance by the employment of reasonable force, and their remedy is only to resort to the police or the magistracy with a complaint. Such a view would frustrate the due discharge of the official duty and defeat the very object of the search, as the books, etc.. might be secreted or destroyed in the interval; and it would encourage obstruction or resistance even to lawful acts. It may be that more than reasonable force is used to clear the obstruction or remove the resistance, but that would be a fit subject-matter for inquiry during the proceedings; it would not make the act of removal improper or unlawful. It is a matter for doubt if Chapters V and VII of the Criminal Procedure Code can be read as an exhaustive enumeration of all the powers of a search party. Anyhow, section 6, sub- section (9) of the Investigation Commission Act makes the provisions relating to searches applicable only "go far as they can be made applicable".

The two English cases relied on are scarcely of any help. In Jones v. Owen"), a rather startling view was taken that a power to apprehend a person for a statutory offence did not include a power to move that person gently aside. Hatton v. Treeby(2) was a case where the Act of Parliament which created a new offence did not in itself provide for a power of detention of the offender.

Where a power is conferred or a duty imposed by statute or otherwise' and there is nothing said expressly inhibiting

the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution. If in the exercise of the power or the performance (1) [1823] L.J. Reports (K.B.) 139; 2 D. & R. 600. (2) [1897] L.R.2 Q.B.D. 452.

of the official duty, improper or unlawful obstruction or resistance is encountered, there must be the right to use reasonable means to remove the obstruction or overcome the resistance. This accords with commonsense and does not seem contrary to any principle -of law. The true position is neatly stated thus in Broom's Legal Maxims, 10th Ed., at page 312: "It is a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command".

Let us however assume that Mr. Isaacs is right in his contention. Still, it can be urged that the accused could claim that what they did was in the discharge of their official duty. The belief that they had a right to get rid of the obstruction then and there by binding down the complainants or removing them from the place might be mistaken, but, surely, it could not be said that their act was necessarily mala fide and entirely divorced from or unconnected with the dig' charge of their duty that it was an independent act maliciously done or perpetrated., They. could reasonably claim that what they did was in virtue of their official duty, whether the claim is found ultimately to be well-founded or not.....”

10. In *Amod Kumar Kanth vs Association of Victim of Uphaar Tragedy and Anr.*, 2023 SCC OnLine SC 578, decided on April 20, 2023, the Supreme Court held:-

“32. *Here we may notice one aspect. When the question arises as to whether an act or omission which constitutes an offence in law has been done in the discharge of official functions by a public servant and the matter is under a mist and it is not clear whether the act is traceable to the discharge of his official functions, the Court may in a given case tarry and allow the proceedings to go on. Materials will be placed before the Court which will make the position clear and a delayed decision on the question may be justified. However, in a case where the act or the omission is indisputably traceable to the discharge of the official duty by the public servant, then for the Court to not accept the objection against cognizance being taken would clearly defeat the salutary purpose which underlies Section 197 of the Cr. P.C. It all depends on the facts and*

therefore, would have to be decided on a case to case basis.”

11. In the instant case, it is not in dispute that the Petitioner was discharging his public duty in a government hospital. Therefore, taking cognizance of the offences as alleged against the Petitioner without sanction order is barred. Therefore, prosecution against the present Petitioner is liable to be quashed.

12. The instant revisional application is thus allowed.

13. The proceedings in connection with G.R No.864 of 2007 (State of West Bengal vs. Dr. Sudhansu Kumar Ghosh & Others) arising out of Basirhat P.S. Case No. 241/07 dated 30/05/2007, which culminated in Charge Sheet No.219 of 2009 dated 7th June, 2009 under Sections 304(A)/201/109 of the Indian Penal Code, 1860 presently pending in the court of the learned Additional Chief Judicial Magistrate, Basirhat, District- North 24 Parganas inclusive of all orders passed in connection thereto till date, **is hereby quashed.**

14. All applications connected thereto stand disposed of.

15. Interim order, if any, stands vacated.

16. Let a copy of the order be sent to the learned trial court for compliance.

17. Urgent Xerox certified copies of this order, if applied for, shall be supplied to the learned counsel for the parties as expeditiously as possible, in compliance of usual formalities.

(Shampa Dutt (Paul), J.)