

Moideen Vs Varkey and Others

Court: High Court Of Kerala

Date of Decision: July 27, 1962

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€” Section 197, 197(1), 417(3)

Citation: (1962) KLJ 1150

Hon'ble Judges: P. Govinda Menon, J

Bench: Single Bench

Advocate: Thomas P. Mathekkal, P.V. Paul and M. Kamala Devi, for the Appellant; K.M. Joseph for Respondents 1 to 12 and State Prosecutor for Respondent 13, for the Respondent

Judgement

P. Govinda Menon, J.

The complainant in Calendar case 473 of 1961 on the file of the Sub-Magistrate of Thodupuzha has filed this

appeal u/s 417(3) Cr. P.C., after obtaining special leave. The appellant is said to be the owner of 2 acres of garden land comprised in S. No.

165/1/8 of the Udumbanoor Village and the adjoining wet land 2 acres 57 cents in extent comprised in S. No. 166/1, 2, 3 & 4. There is a canal

separating the two properties. The case for the prosecution is that on 23-6-1961 at about 5 p.m. all the accused with some others unknown

formed themselves into an unlawful assembly and committed trespass upon the appellant's property, put up a log bridge across the canal and

constructed a public pathway through the property. The first accused is the President of the local panchayat, the second accused is a member of

the panchayat and the third accused is the Executive Officer (Panchayat Officer) of the panchayat. The other accused are either servants or coolies

who worked under the direction of accused 1 to 3. Accused 1 to 3 raised a preliminary objection that u/s 90 of the Travancore-Cochin

Panchayats Act--hereinafter referred to as the Act--they cannot be prosecuted without the previous sanction of the Government as the offence

alleged to have been committed by them was done while they were acting in the discharge of their official duties.

2. The complainant was examined, certain documents were marked and after hearing arguments of either side the learned Sub-Magistrate

acquitted the accused. In paragraph 5 of the judgment it is stated that the panchayat has no right to put up a bridge and construct a public pathway

through the land of the appellant, that the construction of the pathway would clearly be an encroachment upon the complainant's private rights and

that it could have been constructed by the panchayat only with the consent of the owner or after taking acquisition proceedings. But the learned

Magistrate proceeded to say that their act would be protected u/s 90 of the Act.

3. Section 90 is in the following terms :

When the President, Executive Authority or any member 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 of

Government.

The question is whether it could be said on the evidence adduced that the offence was committed by them while acting or purporting to act in the

discharge of their official duty. It is only then that they can claim the protection afforded by the section.

4. The content of the expression ""an act done or purporting to be done in the discharge of official duty"" has been the subject of detailed and

elaborate consideration in various decisions of the Privy Council, the Federal Court and the Supreme Court.

In AIR 1948 128 (Privy Council) the question arose directly with reference to Section 197(1) Cr. P.C., and approving the statement of the law by

Varadachariar J., in AIR 1939 43 (Federal Court) , Lord Simonds observed :

A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to 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.

5. The view was affirmed by the Privy Council in AIR 1948 156 (Privy Council); AIR 1949 117 (Privy Council) and Lumbhardar Zutshi v. The

King (AIR 1950 P.C. 26).

6. In Amrik Singh Vs. The State of Pepsu, His Lordship Venkatarama Ayyar J., discussed the earlier cases of the Federal Court and the Privy

Council and summed up the position as follows :

It is not every offence committed by a public servant that requires sanction for prosecution u/s 197(1), Criminal Procedure Code; nor even every

act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his

official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would

be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which

would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the

prosecution.

7. This case was followed by the case in *Matajog Dobey Vs. H.C. Bhari*, where, Chandrasekhara Aiyar J. observed:

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 S. 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.

It was further observed:

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 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.

8. The question whether sanction is required would therefore depend upon the facts of each case. If the acts complained of are so integrally

connected with the duties attaching to the office as to be inseparable from them, then sanction would be necessary, but if there was no necessary

connection between them and the performance of these duties, the official status furnishing only the occasion or opportunity for the acts, then no

sanction would be required.

9. We have, therefore, to see whether in the light of the principles held down in these cases we can safely postulate that the act was done by the

accused in the performance of their official duty, though possibly in excess of the needs and requirements of the situation. Reference was made to

Section 43 of the Panchayat Act where the functions and powers of the Panchayat are mentioned. Section 43 clause (a) deals with the

construction, repair and maintenance of all roads, all bridges, culverts etc., on such road; and clause (b) refers to the preservation intact of all

poramboke paths, lanes etc. The evidence so far recorded do not show that there was any pathway belonging to the panchayat and so no question

of maintenance arises. The panchayat has no right to open a new road in another man's property and if they do so, the act of the panchayat would

clearly be illegal and ultra vires the powers of the panchayat. It has come out in evidence that in the year 1955 some of the local residents started

construction of a similar pathway across the appellant's land. A suit was filed and an order of injunction was obtained and ultimately the suit was

decreed in his favour. It is after the disposal of the civil suit that again the matter has been taken up by the panchayat and resolution is said to have

been passed. A resolution of the panchayat would not make an otherwise illegal act, a legal one. The question whether the panchayat has a right to

do the thing alleged would therefore be a relevant circumstance to be decided on the evidence. The test would be whether the act is in derogation

of the official duties. Then alone could it be said that the act had been done when they were purporting to discharge their official duties. Merely

because an accused person proposes to raise a defence that the act has been done or purported to have been done in the execution of their official

duties would not by itself be sufficient to justify the case being thrown out at this stage without taking all the evidence.

In the result, the order of acquittal is set aside and the learned Magistrate is directed to take the complaint on file and proceed with the trial of the

case in accordance with law.