(2001) 09 KL CK 0038

High Court Of Kerala

Case No: Criminal M.C. No''s. 4270/97 and 2510/98

Thankamani		APPELLANT
	Vs	
Inspector General of Police		RESPONDENT

Date of Decision: Sept. 5, 2001

Acts Referred:

- Constitution of India, 1950 - Article 32
- Criminal Procedure Code, 1973 (CrPC) - Section 156(3), 161, 190, 193, 194
- Penal Code, 1860 (IPC) - Section 109, 120(B), 182, 193, 195

Citation: (2002) 1 ALT(Cri) 254 : (2002) CriLJ 1093 : (2002) 1 ILR (Ker) 200 : (2002) 2 RCR(Criminal) 470

Hon'ble Judges: K.A. Mohamed Shafi, J; J.B. Koshy, J

Bench: Division Bench

Advocate: T.G. Rajendran, K. Praveen Kumar and S. Vijayakumar, for the Appellant; K.G. Bhaskaran, Public Prosecutor, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

J.B. Koshy, J.
While disposing of an anticipatory bail application. Court of Sessions, Kozhikode doubting the genuineness of the affidavit filed in support of the bail application, directed the Chief Judicial Magistrate and Inspector General of Police to conduct investigation/enquiry and to take appropriate action. When the above order was challenged, in view of the importance of the questions regarding the extent and scope of the inherent powers of the Court of Sessions in ordering such investigation, the matter was referred by the learned single Judge (Justice P.V. Narayanan Nambiar) to the Division Bench. Thereafter, when final report was filed after conducting the investigation as directed by the Court of Sessions, it was also challenged before this Court by the first accused. Apart from the correctness of the order passed by the Court of Sessions, prohibition u/s 195(1)(b) of the Code of

Criminal Procedure from taking cognizance of offences punishable under Sections 193 and 199 of the Indian Penal Code and conflicting findings recorded in the final report etc. were also argued.

2. Facts of the case are very clearly state in paragraph 1 and 2 of the reference order which read as follows:

"One Bindu filed an application, Crl. M.P. No. 161/97 before the Court of Session, Kozhikode Division u/s 438 Cr.P.C. seeking anticipatory bail in Crime No. 282 of 1997 of Nadakkavu Police Station registered under Sections 361, 366, 366A, 377 and 109 read with Section 34 of the Indian Penal Code and also u/s 5(1) (a), (c) and (d) of Immoral Traffic (Prevention) Act. She has alleged in the petition that she was questioned twice by the police and that she apprehends arrest and ill-treatment at the hands of the police. Alongwith the petition, she filed two affidavits, one in Malayalam attested by a Notary Public and the other in English attested by Advocate K. Thankamani. The application for anticipatory bail was filed through Advocate George Antony. The Public Prosecutor submitted that the petitioner Bindu is not an accused in Crime No. 282/97, she is only a witness in the crime and that the police has not intention to arrest her. Normally, in the light of the submission made by the Public Prosecutor, the petition should be closed, but the Court of Session, Kozhikode before which the petition was pending, further considered the matter and chose to take a decision on the following points which according to the court arose for consideration:
(i) Whether the petitioner is entitled to get anticipatory bail?

(ii) Whether the petitioner is liable to be prosecuted for any offence punishable under the Indian Penal Code? and

(iii) Whether any direction is to be issued in the case?''

All the points were considered together and the Court below held that the petitioner is not entitled to be released on anticipatory bail. The petition was dismissed, but with the following directions:

(i) The office is directed to forward the original affidavit filed by the petitioner before this Court alongwith a copy of this order to the Chief Judicial Magistrate, Kozhikode, so as to consider whether it disclose offences under Sections 182, 211 or any other section of the Indian Penal Code and in case it prima facie disclose any such offence to take further action against the petitioner in accordance with law.

(ii) The petitioner shall make herself available for interrogation by the police in accordance with law.

(iii) The photostat copy of the affidavit and the photostat copy of the petition alongwith the copy of this order will be forward to the Inspector General of Police, North Zone, with a direction to constitute a special team with a senior police officer

who is not below the rank of the respondent in this case to conduct a thorough investigation or enquiry into the matters especially the facts stated in para 18 and 19 of this order and take appropriate action in accordance with law''

The learned Sessions Judge issued such directions on the basis of the prima facie conclusion that the affidavits filed in support of the petition for anticipatory bail contain false averments and that the affidavits came into existence due to forgery. Comparison of the signature contained in the affidavits was also made by the court which came to the conclusion that there is material difference between the signatures contained in the two affidavits. The court also ventured to compare the contents of the affidavits with the statement of Bindu recorded u/s 161 Cr.P.C. and found that there is material difference between the two. According to the court below, there is every reason to think that the affidavits came into existence on suspicious circumstances. Other reasons as well have also been pointed by the Court of Sessions in paragraph 18 and 19 its order.

2. On receipt of the copy of the order from the Court of Session, the Inspector General of Police, North Zone, Kozhikode directed the Sub Inspector of Police, Nadakkavu Police Station to register a crime under Sections 193, 199, 201, 571 and 511 read with Section 363 IPC and such other sections as may be applicable and constituted a special team for investigation of the offence alleged. Pursuant to the direction of the Inspector General of Police, Crime No. 368/97 was registered by the nadakkavu Police under the above mentioned sections. Though no persons were shown as accused at the time of registration of the crime, the Circle Inspector of Police, Koduvally filed a report on 23.10.1997 before the Judicial First Class Magistrate''s Court-IV, Kozhikode on the basis of which the name of four persons shown therein were arrayed as accused 1 to 4 in the crime. Section 120B and 365 read with Section 34 of the Indian Penal Code were also incorporated to the original FIR as per the report. A further report was filed on 14.11.1997 by the Circle Inspector of Police, Koduvally before the Court by which accused 5 and 6 were included in the array of accused. Section 468 IPC was also included among the sections under which the offence was committed. The 5th accused Advocate George Antony was included in the crime as he is the lawyer who filed the application for bail on behalf of Bindu. The 6th accused Advocate K. Thankamani was arrayed as an accused as she was the person who attested the affidavit of Bindu".

3. Three cases were referred to the Division Bench out of which two were dismissed as infructuous. Crl.R.P. No. 874/97 was filed by Bindu challenging the order of Court of Sessions. But, it became infructuous as she was not made an accused in the final report after investigation and the above case was dismissed accordingly. Crl.M.C. No. 4198/97 was filed by the fifth accused challenging the F.I.R. and consequent investigations in the above case. It was dismissed as infructuous without prejudice as by the time it came up for hearing, investigation was completed and final report was filed. Crl.M.C. No. 4270/97 was filed by the sixth respondent challenging the

order of the Court of Sessions. The above case has to be disposed of answering the questions referred to the Division Bench by the learned Single Judge. Crl.M.C. No. 2510/98 was filed by the first accused in the case after filing the final report challenging the same.

4. The questions referred by the learned Single Judge and reasons for reference was contained in paragraphs 6 and 7 of the reference order. They are as follows:

"6. Important questions regarding the jurisdiction of the Court of Sessions and its power to issue direction to the Chief Judicial Magistrate and the Inspector General of Police to conduct an enquiry/investigation are involved in these petitions. Whether the direction could be saved by ''inherent'' powers of the court which every court has (though it will not come u/s 482 Cr.P.C.) is the matter for consideration. It is also a matter for consideration that in view of the decision reported in State of Kerala v. Moosa Haji (1993 (2) KLT 609), the direction issued by the Court of Session is legal or justifiable on the facts and circumstances of the case.

7. To have an authoritative pronouncement on the points raised in the petitions and considering the importance of the questions involved, it is advisable that the petitions are heard and disposed of by a Bench of two Judges".

5. On the basis of the directions contained in the order of the Court of Sessions, (Annexure I in Cr.M.C. No. 4270/97), Inspector General of Police, Kozhikode lodged a complaint before the Sub Inspector of Police, Nadakkavu with a direction to register and complaint and entrusted the investigation with a Special Team. In the F.I.R. registered at Nadakkavu Police Station on 17.10.1997 (Annexure II in Crl.M.C. No. 4270/97), the offences alleged were under Sections 356, 193, 199, 201 read with Section 120B of the Indian Penal Code. In the original FIR, there were four accused. Thereafter, the Advocate who filed anticipatory bail application as well as the Advocate who attested the affidavit were made as accused Nos. 5 and 6 (See Annexure III in Crl.M.C. 4270/97). After investigation by the Special Team, final report was filed before the Court framing charges for offences punishable u/s 193, 199, 201, 468, 471, 109, 120B and Section 365 read with Section 34 of the Indian Penal Code. (Annexure A in Crl.M.C. No. 2510/98). Before answering the questions referred, we may first refer to the offences charged. Section 193 deals with punishment for intentionally giving false evidence in any stage of the judicial proceeding or fabricating false evidence for the purpose of being used in such proceedings whereas Section 199 deals with punishment for false statement made in declaration which is by law receivable as evidence. Section 201 is concerned about causing of disappearance of evidence of offence or giving false information to screen offender. Section 468 provides punishment for forgery for the purpose of cheating whereas Section 472 is regarding punishment for making or possessing counterfeit seal etc. with intent to commit forgery punishable u/s 467 (Forgery of valuable security, will etc.). Section 109 deals with abetting and Section 120B deals with criminal conspiracy. Section 365 is concerned with kidnapping or abducting

with intent secretly and wrongfully to confine person. it is the allegation that all the offences were done by accused six in number in furtherance of their common intention attracting Section 34 of the Indian Penal Code.

6. We may first examine the contention regarding lack of jurisdiction of the Court of Session in ordering investigation and taking appropriate action by the Chief Judicial Magistrate or Inspector General of Police. The learned Public Prosecutor was not able to show any provision in the Code of Criminal Procedure or in any other statute giving specific powers to the Court of Session to order such investigation. Then, the question to be considered is as put by the learned Single Judge in the reference order, whether there is any inherent power vested with the Court of Session to order such investigation? Section 156(3) of the Code of Criminal Procedure gives power to any Magistrate to order an investigation. Section 156 Cr.P.C. is as follows:

"156. Police Officer''s power to investigate cognizable case:-

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this Section to investigate.

(3) Any Magistrate empowered u/s 190 may order such an investigation as abovementioned."

Section 190 empowers the Magistrate of the first class etc. to take cognizance of the offence. Court of Session is not a Magistrate empowered u/s 190. Court of Session comes to the picture, generally, after committing of the cases unless specifically provided. Therefore, investigation can ordinarily be ordered by the Magistrate only u/s 156(3) of Cr.P.C.

7. Admittedly, inherent powers u/s 482 of Cr.P.C. is not available to the Court of Sessions. Inherent powers of the High Court is only saved by Section 482. Even the High Court can use such inherent powers specifically protected in Section 482 only sparingly with circumspection in rare cases as held by the Apex Court in Kurukshetra University and Another Vs. State of Haryana and Another, and in Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors. (1983 Cri.L.J. 150).

8. Next question to be considered is whether, in the absence of power u/s 482, a Court Sessions has got any inherent power to order such investigation? It was argued by the learned Public Prosecutor that all courts can exercise such inherent powers to do justice as are preserved expressly or are not taken away by a Statute as observed by the Supreme Court in Dr. Raghubir Sharan Vs. The State of Bihar, (see para 17). But, the Supreme Court in Bindeshwari Prasad Singh Vs. Kali Singh,

held that inherent powers of the High court is only protected and in the absence of a power u/s 151 of the CPC to civil courts, subordinate Criminal Court have no inherent powers. Despite the decision of the Supreme Court in the above case, divergent views are expressed by certain High Courts regarding the powers of the Subordinate Criminal Courts in exercising inherent powers without an enabling section like Section 482 (previous Section 561A). But, it is settled law that such inherent powers cannot be exercised by any criminal court if there is an express or implied bar in the Code of Criminal Procedure itself or in any other Statute. The Supreme Court considered the matter with regard to the power of review in criminal matters. Section 362 of the Code mandates that no court, when it has signed its judgment or final order disposing of a criminal case, shall alter or review the same except to correct a clerical or arithmetical error. The Supreme Court in Hari Singh Mann v. Harbhajan Singh Bajwa and Ors. (AIR 2000 SCW 3848) held that even the High Court cannot invoke Section 561A (present Section 482) for exercise of inherent powers to correct a mistake which is specifically prohibited by the Code.

9. Sections 193 to 199 regulates the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. Now, we will examine the provision in Section 195(1)(b) of Cr.P.C. which is as follows:

"195. Prosecution for contempt of lawful authority or public servants, for offences against public justice and for offences relating to documents given in evidence:-

(1) No court shall take cognizance-

(b)(i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, Sections 193 to 199 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in Section 463, or punishable under Sections 471, Section 475 or Section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in Sub-clause (i) of Sub-clause (ii), except on the complaint in writing of that Court, or of some other court to which that Court is subordinate."

Here, main offences charged are punishable under Sections 193, 199 and 471 and criminal conspiracy to commit the above offences punishable u/s 120B and abetment of the above crime u/s 109. It is settled law that provisions of Section 195 is imperative and mandatory in character. The filing of a complaint in respect of the offence detailed for cognizance of offence mentioned is mandatory. Power of the police to investigate offences in respect of a document produced in a Court can start only after lifting the ban u/s 195. That can be done only hen the procedure u/s 340 is

complied with. Section 340 of Cr.P.C. provides as follows:

"340. Procedure in cases mentioned in Section 195.

(1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in Clause (b) of Sub-section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such court may, after such preliminary inquiry, if any as it thinks necessary,-

(a) record a finding of that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by Sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under Sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the court to which such former court is subordinate within the meaning of Sub-section (4) of Section 195.

(3) A complaint made under this section shall be signed,-

(a) where the court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section, ''Court'' has the same meaning as in S. 195".

10. In view of Section 156(3) read with Section 193 of Cr.P.C., as already held, ordinarily, only a Magistrate can order investigation and not a Court of Session. However, if the Court of Session, in preliminary enquiry, finds, prima facie, that an offence u/s 195(1)(b) is committed, it has to make a complaint in writing and send it to a Magistrate of the first class having jurisdiction. it cannot direct enquiry/investigation by Chief Judicial Magistrate or Police and in particular by a specific police officer like Inspector General of Police as done in this case. If prima facie case is made out in a preliminary enquiry, Court of Session could have made a complaint to the Magistrate of the first class. Court need not express any final opinion as to the guilt of the accused abut there should be prima facie material

before the Court. But, the direction for investigation and for taking appropriate action by the Chief Judicial magistrate or Inspector General of Police is without jurisdiction. In this connection, I may refer to an interesting finding rendered by a three member bench of the Supreme Court. In Randhir Singh Vs. State of Haryana and Another, , the Supreme Court considered the provisions of Section 195 IPC read with Section 340 Cr.P.C. and Section 193 IPC. In that case, the Supreme Court while disposing of a case, held that a person has committed offences u/s 193 and he has sentenced to undergo imprisonment for a period of three months. Later, when he filed a Writ Petition (Criminal) under Article 32 of the Constitution of India challenging the conviction u/s 193 of IPC, the Supreme Court held that even the Supreme Court has no original jurisdiction for convicting a person without following the procedure u/s 195 IPC read with Section 340 Cr.P.C. The Supreme Court in the connected petition in M.S. Ahlawat Vs. State of Haryana and Another, , held as follows:-

"5. ... Provisions of Section 195 Cr.P.C. are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that section. It is settled law that every incorrect or false statement does not make it incumbent upon the court to order prosecution, but (sic) to exercise judicial discretion to order prosecution only in the larger interest of the administration of justice.

6. Section 340 Cr.P.C. prescribes the procedure as to how a complaint may be preferred u/s 195 Cr.P.C. While u/s 195 Cr.P.C. it is open to the Court before which the offence was committed to prefer a complaint for the prosecution of the offender, Section 340 Cr.P.C. prescribes the procedure as to how that complaint may be preferred. Provisions u/s 195 Cr.P.C. are mandatory and no Court can take cognizance of offences referred to therein(sic). It is in respect of such offences the Court has jurisdiction to proceed u/s 340 Cr.P.C. and a complaint outside the provisions of Section 340 Cr.P.C. cannot be filed by any civil, revenue or criminal court under it inherent jurisdiction."

In view of the above decision, the matter is settled and direction of the Sessions Court directing the Inspector General of Police to conduct investigation and take appropriate action and final report field as per the above direction is clearly illegal as provisions of Sections 193 and 195 read with Section 340 of Cr.P.C. were not complied with for the offence specifically mentioned in Section 195(1)(b).

11. Another incidental question to be considered is whether for offences not covered u/s 195 of Cr.P.C. can be accepted in the final report. In other words, if there are offences which are not covered by Section 195 can be separated and proceedings can be continued. In State of U.P. Vs. Suresh Chandra Srivastava and Others, it was held that where an accused commits some offences which are separate and distinct from those contained in Section 195, it can be proceeded as Section 195 will affect only the offences mentioned therein, unless such offences

form an integral part so as to amount offences committed as a part of the same transaction, in which case the other offences also will fall within the ambit of Section 195 Cr.P.C. In that case, the Registrar of the High Court filed a complaint alleging offences under Sections 262, 263, 467, 380, 420, 471 and 120B of IPC (not u/s 195(2) or 340 of Cr.P.C.). The High Court quashed the offence u/s 467, 471 and 120B not because it was hit by Section 195 but because no prima facie case was made out. It was also held that other offences can continue. The above view was upheld and Supreme Court held as follows:

"...The law is now well settled that where an accused commits some offences which are separate and distinct from those contained in Section 195, Section 195 will affect only of the offences mentioned therein unless such offences form an integral part so as to amount to offences committed as a part of the same transaction, in which case the other offences also would fall within the ambit of Section 195 of the Code."

12. Another recent decision in this regard is the decision reported in Sachida Nand Singh and Another Vs. State of Bihar and Another, . There, the Court was considered the bar contained in Section 195(1)(b)(ii) of the Indian Penal Code and it was held that the bar contained in Section 195(1)(b)(ii) of IPC is not applicable to the case where forgery of the document was committed before the document was produced in court. The Supreme Court held as follows:

"12. The scope of the preliminary enquiry envisaged in Section 340(1) of the Code is to ascertain whether any offence affecting administration of justice has been committed in respect of a document produced in Court or given in evidence in a proceeding in that Court. In other words, the offence should have been committed during the time when the document was in custodia legis."

The Supreme Court has considered the effect of Section 195(1)(b)(ii). Here, main offences referred are Section 193 and 199 of the Indian Penal Code covered u/s 195(1)(b)(i). Further, the above case considered by the Supreme Court was a private complaint filed by a complainant and not as ordered by the Court. Here, the main offences are Sections 193 and 199 of the IPC and even for other offences, direction cannot be given by the Court of Sessions for investigation by the Police as they are cognizable by the Magistrate only as held by the Allahabad High Court in Anisa v. State of UP (2001 (1) KLJ 35).

Here, the main offences are under Sections 193 and 199 and other offences are alleged as part of the same transaction. Even otherwise, for conducting investigation and taking cognizance, even if they are independent offences, only Magistrate can pass order u/s 156(3) of Cr.P.C. Otherwise, it will be hit by the provisions of Section 193 of Cr.P.C. Section 193 of Cr.P.C. reads as follows:

"193. Cognizance of offences by Courts of Session;- Except as otherwise expressly provided by this Court or by any other law for the time being in force no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless

the case has been committed to it by a Magistrate under this Code."

13. We are of the view that the order of the Court of Session challenged is illegal and no actin can be taken on the basis of the final report field consequent to such an order. Therefore, we set aside the same as the Court of Session has no inherent power to order such investigation especially in view of the bar under Sections 156(3), 190, 193, 195 and 340 of Cr.P.C. This will not prejudice the Sessions Court to file a formal complaint in respect of offence covered u/s 195(2) by following the procedure u/s 340 of Cr.P.C. after conducting preliminary enquiry provided it is satisfied in the enquiry that there is prima facie case. The Supreme Court in State of Punjab Vs. Raj Singh and Another, held that even when court cannot take cognizance of the offence in view of the embargo of Section 195 materials collected by the police in the investigation also can be looked by the Court informing the requisite opinion to file complaint following the procedure set out in Section 340 of Cr.P.C.

14. Second question referred to us is regarding the power of the Court in directing a particular officer to conduct investigation. In view of the answer to the first question, this question is mere academic. Since the question is referred, we are answering the question. In the decision reported in State of Kerala v. Moosa Haji (1993 (2) KLT 609) it was held that even u/s 156(3) the Magistrate cannot order any particular offer to conduct the investigation. Therefore, it was held that there is no provision in the Code or in any other Statute which confers power on a Magistrate to direct any officer other than an officer in charge of a police station to conduct investigation. This view is supported by the decision of the Supreme Court in Central Bureau of Investigation Vs. State of Rajasthan and Another, . In appropriate circumstances, for example, in a situation when police officers are accused , the Magistrate may be free to direct that investigation shall be conducted by officers higher rank than the persons accused etc. In any event, Sessions Court cannot direct the Inspector General of Police or a particular officer to conduct the investigation. In this connection, we also refer to the recent judgment of the Supreme Court reported in Hemant Dhasmana v. C.B.I and Anr. (2001 (3) KLT 24 :AIR 2001 SCW 3064).

15. Next point argued was that the final report contained contradictory findings and no prima facie case is made out. In the first part of the finding, it is stated that the accused induced Bindu and kept under custody and forcibly compelled her to sign the affidavit. In the latter part, it is stated that Bindu''s signature was forged and attested in her absence.

Since we have already quashed the order of the Court of Session and consequent final report and answered the reference against the prosecution, we are not considering the question of prima facie case based on the present argument.

16. Both Criminal M.C. Nos. 4270/97 and 2510/98 are disposed of accordingly.