(1970) 07 BOM CK 0001

Bombay High Court

Case No: Criminal Revision Application No. 123 of 1970

Narayanrao		APPELLANT
	Vs	
State of Maharashtra		RESPONDENT

Date of Decision: July 15, 1970

Acts Referred:

- Bombay Prohibition Act, 1949 - Section 129(A), 129(A)(3), 129(A)(5), 43, 75(a)
- Penal Code, 1860 (IPC) - Section 166, 186, 193, 211, 294

Citation: (1971) MhLj 512

Hon'ble Judges: R.R. Bhole, J

Bench: Single Bench

Advocate: M.M. Qazi, for the Appellant; S.M. Hajarnavis, Addl. Govt. Pleader, for the Respondent

Final Decision: Dismissed

Judgement

R.R. Bhole, J.

The applicant was drinking liquor on 2-10-1968 at a public place at Near in the District of Yeotmal. The P. S. I. who had seen him drinking in a public place, therefore wanted him to go with him for medical examination. The P. S. I., therefore, caught hold of the hand of the applicant and wanted him to accompany him but the applicant pulled out his hand and caught hold of the P. S. I.''s neck and started pulling and pushing him. He had as scuffle with him. He was, therefore, charge-sheeted for an offence punishable u/s 75(a) of the Bombay Prohibition Act as well as under sections 294 and 353 of the Indian Penal Code. When the case was fixed for hearing after the charges were framed against him, the applicant filed an application stating that u/s 129 (A)(5) of the Bombay Prohibition Act, the resistance to production is deemed to be an offence u/s 186, Indian Penal Code and not u/s 353, Indian Penal Code. It was, therefore, submitted that he should have been charge-sheeted for an offence u/s 186, Indian Penal Code, that in order to evade the provisions of section 186, Indian Penal Code, he had been charge-sheeted only u/s

353, Indian Penal Code. Accordingly to him, therefore, the charge for the offence punishable u/s 353, Indian Penal Code was illegal as it ought to have been u/s 186, Indian Penal Code, and that because no complaint was lodged by any public servant as required u/s 195 of the Criminal Procedure Code, therefore, the charge framed was illegal.

2. The learned Magistrate, after bearing the arguments, passed an order rejecting the application of the applicant. Being aggrieved by this order, the applicant filed a revision application in the Court of the Sessions Judge, Yeotmal. The learned Sessions Judge, dismissed the revision application. This order, therefore, is challenged here in this application.

3. Now the penalty for contravention of provisions of section 43 of the Bombay Prohibition Act is provided u/s 75(a) of the Bombay Prohibition Act. Section 43 of the Bombay Prohibition Act deals with the regulation of use or consumption of foreign liquor by certain permit holders. Although the applicant was a permit holder, he had contravened section 43 of the Bombay Prohibition Act by drinking at a public place. Therefore, he is alleged to have committed an offence punishable u/s 75(A) of the Bombay Prohibition Act. u/s 129 (A) of the Bombay Prohibition Act, where in the investigation of any offence under the Bombay Prohibition Act, any. prohibition Officer duly empowered in this behalf by the State Government or any Police Officer, has reasonable ground for believing that a person has consumed an intoxicant and that for the purpose of establishing that he has consumed an intoxicant or for the procuring of evidence thereof it is necessary that his body be medically examined, or that his blood be collected for being tested for determining the percentage of alcohol therein, such Police Officer may produce such person before a registered medical practitioner for the purpose of such medical examination or collection of blood, and request such registered medical practitioner or furnish a certificate on his finding whether such person has consumed any intoxicant.....
Under section 129 (A) (3)-

If any person offers resistance to his production before a registered medical practitioner it shall be lawful to use all means reasonably necessary to secure the production of such person or the examination of his body for the collection of blood necessary for the test.

Therefore, the Police Officer was acting u/s 129 (A) of the Bombay Prohibition Act and was trying to take the applicant so that he could be examined by the registered medical practitioner and collect his blood. The Police Officer, u/s 129 (A) (3) of the Bombay Prohibition Act, can use all means reasonally necessary to take him to the medical practitioner. In the case before us, the applicant is alleged to have offered resistance to his being produced before a registered medical practitioner. u/s 129 (A)(5) of the Bombay Prohibition Act, resistance to production before a registered medical practitioner shall be deemed to be an offence u/s 186, Indian Penal Code.

Therefore, the Bombay Prohibition Act also creates an offence when resistance to production is offered. Such a resistance is deemed to be an offence u/s 186, Indian Penal Code.

4. The learned advocate for the applicant contends here that the applicant is charged for an offence punishable under the Bombay Prohibition Act; that he is said to have offered resistance to his being produced before a registered medical practitioner; that therefore he should be deemed to have committed an offence punishable u/s 186, Indian Penal Code. According to him, he cannot be said to have committed an offence punishable u/s 358, Indian Penal Code at all because of this provision, viz., section 129 (A)(5). If that is so, then, according to him, u/s 195 of the Criminal Procedure Code, no Court shall take cognizance of this offence punishable u/s 186, Indian Penal Code except on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate. The learned advocate for the applicant, therefore argues that the Court, by taking cognizance of the offence, alleged to have been committed by the applicant, has committed an illegality because there was no complaint in writing of the public servant concerned. It is further argued by the learned advocate for the applicant that the facts and circumstances as-alleged by the prosecution in this case clearly show that a primary offence u/s 186, Indian Penal Code was committed, that it could not be said that a distinct offence like the one u/s 353, Indian Penal Code, was committed. If that is so, then, according to the learned advocate the charge u/s 353, Indian Penal Code is nothing but a kind of camouflage for avoiding the conditions u/s 195 of the Criminal Procedure Code. He relies on a number of cases for this proposition.
5. The learned advocate relies on Makaradhwaj Sahu and Another Vs. The State, as well as on Basir-ul-huq and Others Vs. The State of West Bengal, . In the Orissa case, a Forester reported the incident to the Divisional Forest Officer, who in his turn, reported to the Police and the Police in their turn, after investigation charge-sheeted the accused persons u/s 186, Indian Penal Code without any complaint in writing of the Officer. Because of these circumstances, it was observed by the Chief Justice Panigrahi, who alone was hearing this matter that-

Where the accused was prosecuted under sections 186 and 353, Indian Penal Code and the Prosecution u/s 186, Indian Penal Code failed for non-compliance with section 195, Criminal Procedure Code, the offence u/s 353, Penal Code was so connected with the primary offence u/s 186 that it could not be said to have constituted a separate and individual offence; that consequently prosecution u/s 353 also failed.

That was a case where two Forest Guards went to the house of one Kalandi for making a search of his house, armed with a search warrant from the Divisional Forest Officer. It was said that the two petitioners did not allow them to enter into the courtyard saying that they would not allow any search. One of the petitioners was alleged to have asked them to get away and pushed back the two forest guards.

On these facts the petitioners were charged and convicted of having committed an offence under sections 186 and 353, Indian Penal Code. It is for these reasons that that High Court observed as above. It is, therefore, contended that in so far as the facts and circumstances of our case are concerned, the applicant appears to have committed only the primary offence u/s 186 and that he could not be said to have committed an offence punishable u/s 353, Indian Penal Code, which is an offence quite distinct. But the facts as disclosed in the challan submitted by the P. S. I. are that when the P. S. I. wanted to produce the applicant before the registered medical practitioner for the purposes of collecting his blood, the applicant resisted and pulled out his hand from the hand of the P. S. I. He not only pulled out his hand from the P. S. I.''s hand but also caught hold of the neck of the P.S.I., and started a scuffle with him by pushing and pulling him. The P. S. I., therefore, had to manage and then bring him out of the Hotel. After he was brought out of the hotel, the applicant again began to pull out his hand from the P. S. I''s hand. The point, therefore, that arises here for consideration is to see whether these facts, as disclosed by the P. S. I. in his challan show only a primary offence u/s 136 or shows a distinct offence u/s 353, Indian Penal Code.

6. The learned advocate for the applicant also relies on (Sindhi) Nathuram Atmaram Vs. State and Another, , Radhey Shyam Gupta Vs. The State, Ram Harsh Tewari and Another Vs. Rex, through Rang Ramanuj Prasad Narain Singh, and also in Re Chinnayya Goundan and others AIR 1948 Mad. 474. Mr. Justice D. P. Uniyal, who heard the matter in the Radhey Shyam v. The State (supra), relying on the judgments of other Courts observed that-

If in truth and substance on offence falls in the category of sections mentioned in section 195, it is not open to the Court to convict an accused without complying with the provisions of that section.

In the Rajasthan-case, it was observed that-

Where the charge under a section of penal Code arises out of the same facts it is improper that the complaint should proceed under that section when the Magistrate has no jurisdiction over the main offence that has been committed, for want of complaint.

That was a case where one Sindhi Nathuram Atmaram had gone to the office of the Administrator of the Abu Road Municipality and obstructed the Administrator in the discharge of his official duties and threatened him. Similarly, in the Ram Harsh v. Rex case, it was observed that-

Where the facts stated in the complaint amount to an offence-under section 193, Penal Code, in the absence of a complaint by the Court u/s 195 (b), it is not open to the complainant to say that he would confine his case to an offence u/s 465, Penal Code, for which no complaint by the Court is needed, though the nature of the offence is the same

In the Madras case also, it was observed that-

When a complaint is made to a Court the facts should be considered as a whole and there should be no splitting up of the facts. Therefore, the Court is not entitled to disregard some of the facts and try an accused person for an offence which the remaining facts disclose. Considering the facts as a whole, if they disclose an offence for which a special complaint is necessary under the provisions of section 195, Criminal Procedure Code, a Court cannot take cognisance of the case at all unless that special complaint has been filed.

Therefore, all these cases show that all the facts in the complaint, have to be considered as a whole. We should see what in truth and substance the offence is on the basis of the material on record. Therefore, we have to see in our case whether the charge framed, arises out of all the facts taken as a whole or taken only as piece-meal.

7. Now, it is also true that section 195 cannot be evaded by resorting to devices as observed in Basirul Huq and other v. The State of West Bengal,-

Though, 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 ambit 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 in 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 at being one punishable under some other section of the Indian Penal Code, though in truth and substance the offence fells In the category of section mentioned in section 195, Criminal Procedure Code.

Therefore, it is not that section 195, Criminal Procedure Code bars the trial of the applicant for a distinct offence if that offence is disclosed by the fact mentioned in the complaint as a whole. If the facts as a whole discloses an offence distinct to the offences mentioned in section 195, Criminal Procedure Code, then surely the applicant could be charged with such a distinct offence.

8. Durgacharan Naik and Others Vs. State of Orissa, the Supreme Court was considering section 186 as well as section 353 of the Indian Penal Code. It was contended before the Supreme Court on behalf of the appellants that the conviction of the appellants u/s 353, Indian Penal Code is illegal because there is a contravention of section 195 (1) of the Criminal Procedure Code which requires a complaint in writing by the process server. It was submitted that the charge u/s 353, Indian Penal Code is based upon the same facts as the charge u/s 186, Indian Penal

Code and no cognizance could be taken of the offence u/s 186, Indian Penal Code unless there was a complaint in writing as required by section 195 (1) of the Criminal Procedure Code. The same contention is raised here by the learned advocate for the applicant. It was argued before the Supreme Court that the conviction u/s 353, Indian Penal Code is a circumvention of the requirement of section 195 (1) of the Criminal Procedure Code and the conviction of the appellants u/s 353, Indian Penal Code by the High Court was, therefore, vitiated- in law. This contention was repelled by the Supreme Court. The Supreme Court while repelling this contention observed as follows:

It ii true that most of the allegations in this case upon which the charge under. section 353, Indian Penal Code is based are the same as those constituting the charge u/s 166, Indian Penal Code but it cannot be ignored that section 186 and 353, Indian Penal Code relate to two distinct offences and while the offence under the latter section is a cognizable offence the one under the former section is not so. The ingredients of the two offences are also distinct. Section 186, Indian Penal Code is applicable to a case where the accused voluntarily obstructs a public servant in the discharge of his public functions but u/s 353, Indian Penal Code, the ingredient of assault or use of criminal force while the public servant is doing his duty as such is necessary. The quality of the two offences is also different. Section 186 occurs in Chapter X of the Indian Penal Code dealing with contempts of the lawful authority of public servants, while section 353 occurs in Chapter XVI regarding the offences affecting the human body. It is well established that section 195 of the Criminal procedure Code does not bar the trial of an accused person for a distinct offence disclosed by the same set of facts but which is hot within the ambit of that section; In Satis Chandra Ckakrabarti Vs. Ram Dayal De, , it was held by Full Bench of the Calcutta High Court that where the maker of a singer statement is guilty of two distinct offences, one u/s 211, Indian Penal Code, which is an offence against public justice, and the other an offence u/s 499, wherein the personal element largely predominates the offence under the latter section can be taken cognisance of without the sanction of the Court concerned, as the Criminal Procedure Code has not provided for sanction of Court for taking cognizance of that offence. It was said that the two offences being fundamentally distinct in nature, could be separately taken cognizance of. That they are distinct in character is patent from the fact that the former is made non compoundable, while the latter remains compoundable; in one for the initiation of the proceedings the legislature requires the sanction of the Court u/s 195, Criminal Procedure Code while in the other, cognizance can be taken of the offence on the complaint of the person defamed. It is pointed in the Full Bench case, that where upon the facts the commission of several offences is disclosed some of which require sanction and others do not, it is open to the complainant to proceed in respect of those only which do not require sanction; because to hold otherwise would amount to legislating and adding very materially to the provisions of sections 195 to 199 of the Criminal Procedure Code. The

decision of the Calcutta case has been quoted with approval by this Court in Basirul-Huq v. State of West Bengal (supra), in which it was held that if the allegations made in a false report disclose two distinct offences, one against a public servant and the other against a private individual, the latter is not debarred by the provisions of section 195, Criminal Procedure Code from seeking redress for the offence committed against him.

9. Therefore, the Supreme Court also took a view that section 195, Criminal Procedure Code did not bar the trial of persons for the distinct offence u/s 353, Indian Penal Code though it is practically based on the same facts as those u/s 186, Indian Penal Code, But the learned advocate for the applicant relying on AIR 1928 827 (Lahore) contends that obstruction implies the use of Criminal force and that even if the applicant assaults, he can be said to have committed the offence only u/s 186 and not u/s 353, Indian Penal Code. That Court took a view that the word "obstruction" in section 186 means "physical obstruction", i.e., actual resistance or obstacle put in the way of a public servant and also the use of criminal force, and that mere threats or threatening language is insufficient. But this Court has taken a contrary view. In The State of Bombay v. Babulal Gauriskankar Misar AIR 1957 Bom. 10, this Court at that time was considering the meaning of the word "obstruction" in section 186 of the Indian Penal Cede and what it constituted. This Court held that-

To constitute "obstruction" within section 186 of the Indian Penal Code, 1860, it is not necessary that there should be actual criminal force. It is sufficient if there is either a show of force or a threat or any act preventing the execution of the process of the civil Court.

Now, therefore, let us look at the allegations in this case upon which a charge under sections 353 and 294 of the Indian Penal Code is framed. The allegation is that when the P. S. I. was persuading the applicant to go to the medical officer for examination, the applicant pulled out his hand from the P. S. I. and caught hold of the neck of the P. S. I. Then he started a snuffle with him by pushing and pulling him. After the applicant was brought outside the hotel where he was found to be drinking liquor, he again pulled out his hand from the P. S. I. If the allegations disclose that the person obstructed was a public servant; that at the time of obstruction he was discharging his public functions; that the applicant obstructed him in the same; that he did so voluntarily, then the applicant could be said to have committed an offence u/s 186, Indian Penal Code. But if the allegations disclose that the person assaulted was a public servant; that the accused-applicant assaulted or used criminal force to such public servant; that when the applicant assaulted him he was acting in the execution of his duties as such public servant or that such an assault was committed with intent to prevent or deter as such public servant from discharging his duties, then, the offence would come within the framework of section 353, Indian Penal Code. Do the facts disclose obstruction simpliciter as contemplated u/s 186 or do they disclose an assault on the public servant? u/s 349, Indian Penal Code.

A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other''s body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other''s since of feeling :

Provided that the person causing the motion.....causes that motion.....in one of the three ways, viz. by his own bodily power, by disposing any substance in such a manner that the motion

takes place without any further act on his part, or on the part of any other person, or. by inducing any animal to move, to change its motion, or to cease to move "

"Criminal Force" is also described u/s 350 of the Indian Penal Code. It shows several ingredients. That consists of the intentional use of force to any person. Such force must have been used without that person''s Consent. It must have been used in order to commit any offence or with the intention to cause or knowing it to be likely that he will cause injury, fear or annoyance to the person to whom the force is used. Now, so far, as the facts of our case are concerned, the applicant, after pulling out his hand from the hand of the P. S. I., caught hold of the throat of the P. S. I. and had a scuffle with him. This was certainly the use of force to the P. S. I. and of course such force was used without the P. S. I.''s consent. It was also certainly with the intention to cause annoyance to the P. S. I. who was discharging his duties of trying to take him and produce him before the medical officer. The applicant could not but be said to have assaulted the P. S. I. when he caught bold of the throat of the P. S. I. and had a scuffle with him. Moreover the definition of ''assault'' u/s 351, Indian Penal Code, is also very wide.

Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Even if a person shakes his fist intending or knowing it to be likely that he may thereby cause to believe that he is about to strike, he has committed an assault. In this case he has actually caught hold of the neck of the P. S. I. and had a scuffle with him. I have, therefore, no doubt that the facts as disclosed by the allegations bring the offence of the applicant within the framework of section 353, Indian Penal Code and not u/s 351, Indian Penal Code. The facts have to be taken as a whole and some facts cannot be left out and the remaining facts only considered. It appears to me, therefore, that the charge framed by the trial Court is quite legal and proper Even if, as observed by the Supreme Court in Durgacharan Naik v. State of Orissa, whereupon facts the commission of offences under sections 353 and u/s 186 is disclosed it is open to the complainant to proceed u/s 353, Indian Penal Code only

which does not require the sanction. Therefore, the charge framed on the facts on record is quite proper,

10. This application, therefore, will have to be dismissed. The application is dismissed.