

(1969) 05 CAL CK 0004

Calcutta High Court

Case No: C. R. No. 1305 (W) of 1965

Sunil Kumar Ghosh

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: May 29, 1969

Acts Referred:

- Constitution of India, 1950 - Article 311, 311(2)
- Police Act, 1861 - Section 29, 34

Citation: 73 CWN 627

Hon'ble Judges: D. Basu, J

Bench: Single Bench

Advocate: N.C. Chakravarti, C. Mukherjee and J.K. Banerjee, for the Appellant; B.C. Dutta and M.M. Dutta, for the Respondent

Final Decision: Dismissed

Judgement

D. Basu, J.

This Rule raises a short but nice question of law.

That question, apart from others raised in the petition (which will be dealt with hereafter) is -

Whether "conviction on a criminal charge", in proviso (a) to article 311 (2) of the Constitution includes conviction of a statutory offence.

The petitioner, a Sub-Inspector of Police, was, at the material time, serving as a District Enforcement Officer of 24-Parganas.

By an order of December 19, 1959, passed by the Supdt. of Police, he was transferred to Nadia with effect from January 2, 1960 and directed to under go training in Fingerprint (Annexure A to the petition) from there. The petitioner made representations during the pendency of which another order was issued by the

Addl. Supdt. of Police (Enforcement) of 24-Parganas on March 22, 1960, by which he was asked not to discharge any duties as a Police Officer in the Dt. of 24-Parganas as he had been transferred away from the district with effect from January 8, 1960. As he did not still comply with the said order of transfer, a complaint was lodged against him, under orders of the Superintendent of Police, 24-Parganas, for alleged offence u/s 29 of the Police Act, for violation of the order of transfer. This ended in the conviction of the petitioner by the Magistrate, 1st Class, Alipore on November 25, 1961, and the petitioner was sentenced to pay a fine of Rs. 100/-, or, in default, to undergo simple imprisonment for one week. His appeal against this sentence was dismissed (Annexure F) and so was his application for revision to this Court, where it has been held that he was clearly guilty of violating the order of transfer to Nadia (Annexure E).

2. Thereupon on December 28, 1963, he was served with the charge-sheet at Annexure I. The petitioner pleaded not guilty of the charge. There was a proceeding held upon the charge by the Superintendent of Police, 24-Parganas and on May 30, 1964, he recommended (Annexure N/1) that-

(a) the petitioner be dismissed from service;

(b) his period of absence from duty from January 8, 1960 till the date of dismissal be treated as extraordinary leave without pay.

3. The Deputy Inspector-General of Police approved of the order proposed (Annexure O) and, in pursuance thereof, the order at Annexure P, dated July 2, 1964 was passed, dismissing the petitioner with effect from that date on which a copy of the Deputy Inspector-General's order had also been served upon him. Annexure Q is an order of the Superintendent, asking for a return of the uniforms and appointment certificate in view of the foregoing order of dismissal.

4. The petitioner challenges the orders at N/1 to Q on the ground, inter alia, that the requirements of article 311(2) of the Constitution have been violated in making the aforesaid orders inasmuch as the petitioner was denied the opportunity of cross-examining witnesses at the inquiry held on the charge and his service records were taken into consideration to award the extreme penalty of dismissal, without giving him notice that they would be considered at the inquiry.

5. But, even assuming that the complaint of the petitioner was true on facts, he cannot get any relief on the present ground if proviso (a) is attracted, to exclude the operation of the cl. (2) of art. 311 altogether. That clause provides for an inquiry on the charges at which the delinquent shall have an opportunity of being heard and thereafter to make a representation against the penalty proposed, where that penalty is dismissal, removal or reduction in rank of a person holding a civil post under the Government. There is no dispute as to a Police Officer holding a civil post under the State Government, so as to be entitled to the protection of clause (2) of article 311.

6. But the application of the entire clause (2) of article 311 is excluded by proviso (a) which says-

Provided that this clause shall not apply-

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge.

7. The petitioner has been convicted of the offence u/s 29 of the Police Act for violating the order of transfer to Nadia. But it is contended on behalf of the petitioner by Mr. Chakravarty, that the expression "criminal charge" refers to charge of an offence under the general law of crimes and not of an offence which is commonly known as a "statutory offence."

Section 29 of the Police Act, 1861 provides-

Every police officer who shall be guilty of any violation of duty or willful breach or neglect of any * * * lawful order made by competent authority * * * shall be liable, on conviction before a Magistrate to a penalty not exceeding three months' pay, or to imprisonment, with or without hard labour, for a period exceeding three months, or to both.

8. Obviously, this is not a charge of an offence included in the Indian Penal Code, which constitutes the general law of crimes in this country, but an offence created by a special statute, namely, the Police Act, to be met with by a statutory penalty. The question is whether this constitutes a "criminal charge", which expression is not defined in the Constitution or in the General Clauses Act.

9. The question has, therefore, to be answered with reference to general principles.

10. The Dictionary meaning of the word "charge" in the legal sense, is "accusation". "Criminal charge", therefore, would mean accusation of a "crime".

11. The Dictionary meaning of the word "crime", again, is an "act punishable by law" (Shorter Oxford Dictionary). To punish means to "inflict penalty on an offender". If these Dictionary meanings prevail, any offence which is created by any statute and is punishable by any penalty imposed thereby would be included within the concept of a "criminal charge".

12. The most common way adopted by leading treatises is to define crimes by distinguishing it from civil wrongs. In Salmond on Torts (10th Ed., p. 7), the distinction is drawn as follows :

The distinction between civil and criminal wrongs depends on the nature of the appropriate remedy provided by law. A civil wrong is one which gives rise to civil proceedings - proceedings, that is to say, which have as their purpose the enforcement of some right claimed by the plaintiff as against the defendant : for example, an action for the recovery of a debt * * *. Criminal proceedings, on the

other hand, are those which have for their object the punishment of the defendant for some act of which he is accused. He who proceeds civilly is a claimant, demanding the enforcement of some right vested in himself, he who proceeds criminally is an accuser, demanding nothing for himself, but merely the punishment of the defendant for a wrong committed by him.

13. The element of punishment as the differentia of a crime is also emphasised by Winfield (Torts, 7th Ed., pp. 10-11) and Kenny [Outline of Criminal Law (16th Ed., p. 539)]. In some cases, of course, criminal law provides for payment of monetary compensation by the convicted person to the person injured, but even in those cases, such compensation is awarded in addition to some punishment.

14. Quoting observations in decisions, Wilshire (Criminal Law, 17th Ed., pp. 1-2) explains the essential characteristics of a crime as follows:

The essential characteristic of a criminal offence is that it entails a liability to punishment : the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common feature that they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

15. The old distinction between mala prohibita and mala in se has broken down because many acts which have been made punishable as an offence by statutes do not involve any moral turpitude:

In particular, nothing in the moral character of an act or omission can distinguish it from a civil wrong or make it a criminal offence. There are, for example, many breaches of statutory regulations and bye-laws which, because they are punishable in criminal proceedings, must be classed as criminal offences though they do not involve the slightest moral blame, as, for example, "the failure to have a proper light on a bicycle * * * (Salmond, *ibid*).

16. But a statutory offence should not be a criminal offence "unless the punishment is inflicted as a result of a criminal proceedings" (p. 2, *ibid*.), i.e. in a proceeding before a criminal court.

17. Judged by the foregoing tests, the offence u/s 29 of the Police Act is a criminal offence and the charge of such an offence is a criminal charge because-

(a) By the statute, violation of duty or willful breach of any order made by a competent authority has been prohibited and made punishable by fine or imprisonment or both.

(b) The offence is triable before a Magistrate, i.e., a criminal court.

(c) The proceeding is a criminal proceeding because the object of the proceeding is not the enforcement of some right belonging to any complainant or person injured by such act but the punishment of the delinquent Police Officer, and it started with a

prosecution (Annexure D/1).

18. Consequently, the instant case would fall under the purview of proviso (a) to article 311(2) of the Constitution. The conclusion arrived at by me is also supported by the interpretation so far given by the High Courts to that clause :

It has been held that -

Conviction on a criminal charge in this clause includes conviction under any law which provides for punishment for an offence, whether by fine or imprisonment [(1) [In Re: B. Nagabhushanam](#),] and that no distinction is made by this clause between crimes involving moral turpitude and other crimes [(2) [V. Venkatarama Nayudu Vs. The Province of Madras](#), ; (3) [Durga Singh Vs. The State of Punjab](#), ; (4) Jagadindra v. I. G., AIR 1959 Ass 134.] Durga Singh v. State of Punjab, *ibid*, was a case of conviction of the offences specified in section 34 of the Police Act, and is thus directly to the point.

19. I have no doubt, therefore, that clause (2) of article 311 was not attracted to the present case and that, accordingly, no opportunity to be heard or inquiry was to be held before dismissing the petitioner on the ground that he had been convicted u/s 29 of the Police Act.

20. II. In view of the foregoing finding, it is not necessary to go into question whether an opportunity was actually given to the petitioner. Nevertheless, I may observe that a proceeding was actually held by the Superintendent of Police before proposing to dismiss the petitioner, but that the petitioner could not avail of the opportunity to make his submissions against the punishment proposed, owing to his recalcitrant attitude and misconception about his legal position.

21. III. It was contended that after proceeding to hold an inquiry, respondents cannot fall back upon the proviso (a) to article 311(2) and in this connection reliance is placed upon the Supreme Court decision in (5) [Dr. Akshaibar Lal and Others Vs. The Vice-chancellor, Banaras Hindu University and Others](#), . But that was a case where two alternative procedures were provided for by the relevant statutory provisions and it was held that after resorting to a general provision, the authority could not be allowed to take resort to the more stringent provisions of the special procedure. That principle cannot apply to a case like the instant one where the constitutional provision itself says that no inquiry need not be held and no opportunity need not be given. This exemption is for the benefit of the administration and conducive to public interests, which cannot be forfeited by the administration by estoppel. This contention must therefore be rejected.

22. IV. It was next contended that the impugned order is bad because it does not give the reasons, as required by reg. 864(b) of the Police Regulations as to why some punishment other than dismissal could not be awarded because the conviction did not involve moral turpitude. But reasons have in fact been given, namely, the service

career of the petitioner, having 22 punishments as against 5 rewards. Hence, this contention must be rejected.

23. The incidental argument that the service records were referred to without giving notice to that effect to the petitioner would also not succeed because article 311(2) is not applicable, as held by me.

24. V. We now come to the claim for salary from January 2, 1960 to July 2, 1964, i.e. up to the date of dismissal. On this point, the petitioner is entitled to succeed because there was admittedly no order of suspension passed against him at any time.

25. It is true that he absented himself from duty, but even then there was no notice given to him that his absence would be treated as leave without pay if he did not join at once. Even when his prayer for casual leave was rejected, no such order was communicated to him (Annexure G/1). In (6) [M. Gopala Krishna Naidu Vs. State of Madhya Pradesh](#), the Supreme Court has held that no order under FR 54 of the Fundamental Rules could be made without affording an opportunity to the person to be affected of being heard on this matter specifically. The same principle should be applicable to the grant of leave without pay when the petitioner did not ask for extraordinary leave and earned leave for some period was actually due to him (vide para. 24 of the petition), which was not rebutted. In this view, the Rule will be made absolute in part, to this extent only that respondents shall be commanded to pay to the petitioner his full emoluments for the period from January 2, 1960 to July 2, 1964, as if he were on duty. There will be no order as to costs.