(1960) 09 BOM CK 0029

Bombay High Court

Case No: Civil Revision Application No. 1205 of 1959

Parbat Gopal Walekar	APPELLANT
Vs	
Dinkar S. Shinde	RESPONDENT

Date of Decision: Sept. 20, 1960

Acts Referred:

- Bombay Police Act, 1951 - Section 159, 160, 161, 80
- Civil Procedure Code, 1908 (CPC) - Section 80
- Penal Code, 1860 (IPC) - Section 279, 337

Citation: (1961) 63 BOMLR 189

Hon'ble Judges: Gokhale, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

This Judgment has been overruled by **: Virupaxappa Veerappa Kadampur Vs. The State of Mysore, AIR 1963 SC 849 : (1963) 2 SCR 6 Supp**

Gokhale, J

1. This revision application raises an important question as to the interpretation of Section 161 of the Bombay Police Act, 1951, which shall hereafter be referred to as the Act. The point arises in these circumstances: The petitioner Parbat Gopal Walekar is a police constable who was at the relevant time attached to the Delisle Road Police Station. On October 18, 1953, the petitioner was driving Sub-Inspector Kedari in a police jeep No. 149 and at Fergusson Road, Worli, Bombay, the jeep knocked down the opponent in this application, Dinkar S. Shinde, a minor, who is a resident of Patel Building, Fergusson Road. It would appear that on that day at about 1.20 p.m. the opponent was walking on the foot-path at Fergusson Road, opposite his building, and while he was crossing the

main road he suddenly noticed the police jeep car driven by the petitioner coming from Delisle Road to Worli Naka and he was knocked down by the said jeep. The opponent suffered injuries and he was removed to the K. E. M. Hospital and it appears that he had to remain in the hospital for a number of days as an in-door patient. Thereafter his leg was kept in plaster of paris for about two months and he had to attend the hospital as an out-door patient for several months and as a result of the injuries there remained a permanent defect which has prevented him from sitting properly. It was also the case of the opponent that he was not able to attend school and render help to the other members of his family. On these facts, the opponent filed Pauper Suit No. 1913/9344 of 1955 in the Court of Small Causes at Bombay on December 17, 1954. It appears that to this suit were impleaded the State of Bombay as well as the present petitioner, and there is no dispute that plaintiff gave a statutory notice to the State of Bombay as required u/s 80 of the CPC on September 28, 1954. It seems, however, that at a subsequent stage of the suit, the State of Bombay was dropped and the suit proceeded against defendant No. 2 in his personal capacity, as he was the driver of the jeep on the day of the accident.

2. The suit was resisted by the petitioner on the ground that he had not driven the car in a rash and negligent manner and that he was not responsible for the accident which took place. It was his defence that about four or five boys came out from the lane opposite Patel Building and they were running after a kite and one of the boys crossed the road, but the plaintiff could not cross the road and dashed against the left mud-guard of the jeep and sustained injuries. In the subsequent defences filed by defendant No. 2, he raised the point of limitation. It is not necessary for the purpose of this revision to deal with the defences filed by defendant No. 1, the State of Bombay, as I have already indicated that the proceedings of the suit were dropped so far as the State was concerned.

3. The trial Court, after considering carefully the evidence in the case, came to the conclusion that the vehicle driven by the petitioner was driven in a rash and negligent manner and, therefore, the petitioner was liable to pay the medical expenses incurred by the opponent. As regards the contention raised by the petitioner that the suit would not be maintainable u/s 161 of the Bombay Police Act, which prescribes the period of six months for filing a civil suit against an officer for the acts committed by him in the discharge of his duty, the trial Court was of the view that that section was not applicable to the facts of the case. It also held that two months'' notice was necessary to be given to the State of Bombay and that would have to be added to the period allowed for filing such suits under Article 22 of the Limitation Act. It, therefore, held that the suit was properly filed and was not barred by the law of limitation. As regards the quantum of damages, the trial Court found that the plaintiff had exaggerated his claim to some extent; but taking into consideration the circumstances of the case, it thought that the plaintiff should be awarded an amount of Rs. 500 only in respect of medical expenses incurred by him and the mental and physical pain suffered by him. On these findings, the trial Court awarded a decree in favour of the plaintiff for Rs. 500. Defendant No. 2, the petitioner, was ordered

to pay costs in favour of the State of Bombay on Rs. 500 only. As regards the other parties, the Court ordered that there should be no order as to professional costs.

4. Against this decision, the petitioner went in revision, before the Full Court, where it appears, no submission was made on the point as to the applicability of Article 22 of the Limitation Act. It seems also that the learned Judges of the Full Court were of the view that since the incident occurred on October 18, 1953, and the suit was filed on December 17, 1954, if Article 22 of the Limitation Act alone was applicable, the suit would be time-barred. But they stated that no submission on that point was made on behalf of the petitioner. The principal point that was argued before the Full Court was as to the applicability of Section 161 of the Act, and, reading Sections 159 and 161 and Rule 361 of the rules contained in the Bombay Police Manual, Vol. III, the Full Court came to the conclusion that the act of driving a jeep on the part of the petitioner would be an act done in pursuance of a duty imposed on him, as required by Section 159. But relying on Rule 363, where drivers of police vehicles are enjoined not to drive rashly, the Full Court held that the act of the petitioner in driving the vehicle rashly, as found by the trial Court, was illegal, being in violation of the rule, and such an illegal act could not be deemed to be an act done either under colour or in excess of duty, u/s 161 of the Act. The Full Court, therefore, came to the conclusion that Section 161 could not apply and, therefore, the period of limitation provided in that section could not be availed of by the petitioner. That is why the Full Court confirmed the decree of the trial Court. It is against this decision of the Full Court that the present Civil Revision application has been filed.

5. Mr. Nadkarni, learned advocate appearing on behalf of the petitioner, fairly concedes that he would not be entitled to raise the question as to whether the petitioner was driving the jeep rashly and negligently as held by the trial Court, because that would mean a finding of fact which does not appear to have been challenged before the Full Court, As regards the applicability of Article 22 of the Limitation Act, Mr. Nadkarni contends that the State being no longer a party to the suit, the question as to the necessity of a notice u/s 80 of the CPC could be argued by him. But that point also was not raised before the Full Court. Mr. Nadkarni contends that the principal difficulty in his way is as regards the applicability of Section 161 of the Act. If that section did not apply to the present suit, then he would not be able to contend that the suit was barred by limitation.

6. The principal question, therefore, to be considered in this ease is, whether the present petitioner who, as it has now been found, was rashly and negligently driving a motor vehicle on the day of the accident, would be able to invoke the protection of a shorter period of limitation provided in Section 161 of the Act. But before we refer to Section 161, it is necessary also to refer to two previous sections, viz. Sections 159 and 160 of the Act. u/s 159, so far as it is material, no police officer shall be liable to any penalty or to payment of damages on account of an act clone in good faith in pursuance or intended pursuance of any duty imposed or any authority conferred on him by any provision of the Act or any other law for the time being in force or any rule, order or direction made or given therein. This section, it is clear, provides protection to a police officer against any

penalty or payment of damages on account of any act done by him in good faith, provided it is in pursuance or intended pursuance of any duty imposed upon him. u/s 160, no public servant or person duly appointed or authorised shall be liable to any penalty or to payment of any damages for giving effect in good faith to any such order or direction issued with apparent authority by the State Government or by a person empowered in that behalf under the Act or any rule, order or direction made or given therein. Then comes Section 161. Sub-section (1) of Section 161 runs as follows:-

S. 161. (1) In any case of alleged offence by the Commissioner, a magistrate, Police officer or other person, or of a wrong alleged to have been done by such Commissioner, magistrate, Police officer or other person, by any act done under colour or in excess of any such duty or authority as aforesaid, or wherein it shall appear to the Court that the offence or wrong, if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted, more than six months after the date of the act complained of.

It may be pointed out that by a subsequent amendment by Act II of 1960 the words "the Revenue Commissioner" were added in the section; but that does not make any change in the operative part of the section itself. The expression "any such duty or authority as aforesaid" has reference to the provisions of Section 159 which, as already indicated, gives protection to a police officer against penalty or payment of damages on account of an act done in good faith, provided it was done in pursuance or intended pursuance of any duty imposed upon him; and such duty must have been imposed upon him by any provision of the Act or any other law for the time being in force or any rule, order or direction made or given therein, Mr. Nadkarni contends that his client was admittedly performing a duty imposed upon him by his appointment as a police constable driver by virtue of the rules contained in the Police Manual. "When this case was first heard by me, some doubt was expressed as to the applicability of the rules in the Police Manual, 1950, to the Police Force in Bombay City; and as the State of Bombay was not made a party to this application, I directed that a notice should issue to the State of Bombay. Mr. C. B. Dalvi, learned Assistant Government Pleader appearing on behalf of the State, has now stated that the rules in the Bombay Police Manual, 1950, would apply to the Bombay City Police also, and there is no dispute on that point raised to this statement on behalf of any of the parties.

7. Volume III of the Bombay Police Manual, 1950, deals with the subject of Powers and Duties, and Chapter VIII of this Volume refers to Special Organisations. We are concerned with Section II of Chapter VIII, which dealt with the subject of Police Motor Transport. Rule 359 deals with the object of the Police Motor Transport, which is stated to be to facilitate quick movements of the Police Force in the State and to make the force self-sufficient in the matter of transport required for the performance of duties, especially in times of emergencies, such as riots, communal or other disturbances, strikes, etc. Rule 360 refers to the Personnel of the Police Motor Transport. Rule 361 refers to the Appointment and Control "of the Police Motor Transport Staff. Rule 362 deals with the

subject of Driving Licence and Uniform. Rule 363, with which we are concerned, deals with the Duties of the Police Motor Transport Staff. Sub-rule (7) of Rule 363 sets out the main duties of the Superintendent of Police, Motor Transport; and Sub-rule (2) with the duties of the Police Inspector, Motor Transport, and it appears to be one of the duties of the Superintendent of Police to supervise the work of Police Inspectors, Motor Transport, and to test persons for appointment to the posts of Driver Mechanics, fitters, etc., while the Police Inspector has to test candidates for appointment as Driver Constables. Under Sub-rule (5), every Head Constable Driver Mechanic, etc. is responsible for keeping all the vehicles in his charge in sound mechanical condition and to carry out such duties as may from time to time be imposed on him by the standing orders of the Superintendent of Police Motor Transport. Under Sub-rule (4) (i), a Police Driver Constable, whenever he takes charge of any vehicle, has to inspect it carefully; and under Sub-rule (4) (iii), he is enjoined under no circumstances to drive rashly or at a speed faster than the limits mentioned in that sub-rule. It was contended before me by Mr. Dalvi that the rule as such does not impose any duty on the driver to drive, but that duty mainly arises from the fact that he is appointed as a Constable Driver. Mr. Dalvi also drew my attention to Chapter VI of the Act which deals with the subject of Executive powers and duties of the Police; and he contended that protection u/s 161 would only arise in respect of duties which are contemplated under Chapter VI of the Act and such other duties of like nature, which may be imposed upon a police officer under the rules. I do not think that that contention is sound. The duty which is contemplated u/s 159 is either a duty imposed by any of the provisions of the Act or any other law for the time being in force or any rule, order or direction made or given either under the Act or any other law for the time being in force. And if the rules impose a duty on the motor constable driver, that would also be covered by Section 159 and, therefore, by Section 161 of the Act. Under the rules, the motor constable driver is enjoined not to drive rashly or at a speed faster than the prescribed speed. No doubt, the duty to drive arises from his appointment as a constable driver, but the manner in which that duty has to be performed is also mentioned in Sub-rule (4) of Rule 363. In is not also in dispute that the petitioner was driving at the instance of Sub-Inspector Kedari who, it appears, was proceeding in the jeep for the purpose of an inquiry. The finding of the Full Court, therefore, that the act of driving the jeep on the part of the petitioner was an act done in pursuance of the duty imposed on him as contemplated by Section 159 of the Act appears to be correct.

8. But Mr. Nadkarni contends that the mere fact that his client drove rashly or at a speed faster than the limits prescribed, in Rule 363(4) would not deprive his client of the benefit of Section 161, because his act would be an act done under colour or in excess of such duty and, therefore, six months'' period of limitation provided u/s 161 would apply to his case; and he argues that the view of the Full Court that merely because his act was in violation of the rule and, therefore, illegal would deprive the petitioner of that protection is erroneous. He further urges that Section 161, in order to come into operation, itself contemplates an offence by a police officer or of a wrong alleged to have been done by the police officer. Therefore, the mere fact that his client contravened Rule 363 cannot

make Section 161 inapplicable, There is undoubtedly some force in this contention.

9. As against this, it is urged by Mr. Parikh on behalf of the opponent that the act of the petitioner, which is now found to be rash and negligent, was so grossly in excess of such duty imposed on the petitioner that it would cease to be an act done under colour or in excess of such duty. In this connection, my attention has been invited to the Full Bench case of Narayan Hari Tarkhande Vs. Yeshwant Raoji Naik, , which was a case u/s 80 of the Bombay District Police Act. Sub-section (5) of Section 80 of that Act gave similar protection to certain officers including the police officers in respect of any act done under colour or in excess of their duty. The Full Bench had to deal with two cases. In the first case, an investigating police officer had reduced the statement of a witness to writing and it appears that in doing so, the record of his statements was found to be inaccurate; and it was held by the Full Bench that what the Sub-Inspector did could not have been performed except under colour of his duty or authority, and the question whether the record of these statements was accurate or inaccurate and, in the latter case, whether the inaccuracy was in advertant or deliberate, and in the last case whether there was in fact mala-fides in law are all questions which are irrelevant to the question of limitation of six months, so long as the act itself was an act done under colour of his duty. In the second case which the Full Bench had to deal with, an Inspector of Police was investigating into a cognizable offence and he called the plaintiff in that case and questioned him about the offence and it was alleged that he abused the plaintiff and pulled him up by holding his moustache and that, at the instance of the Inspector of Police, another Sub-Inspector, who was defendant No. 2 in the case, assaulted the plaintiff. When the plaintiff sued to recover damages from the defendants for their alleged wrongful acts, without giving a notice either u/s 80, Sub-section (4), of the Bombay District Police Act or u/s 80 of the Civil Procedure Code, it was held by the Full Bench that the defendants were acting in the discharge of the duty imposed and the authority conferred by Section 51(1), Clause (b), of the Bombay District Police Act, when they summoned the plaintiff and questioned him in regard to the alleged offence. But the alleged assault or battery could not be said to have been committed under colour or excess of such duty of authority, and that the action was maintainable in absence of notice either u/s 80(4) of the Bombay District Police Act or u/s 80 of the Civil Procedure Code. Mr. Justice Madgavkar, in considering this second case, observed as follows at pages 1044-1045 of the report:-

Hypothetical cases are better perhaps avoided. But in a case where a prisoner is being arrested or while under arrest is being taken to the lock-up and offers resistence, such acts of battery and assault, even if they are in excess of the force necessary to prevent escape, would probably require notice under Sub-section (4) of Section 80. There is no such allegation here. Even if the alleged acts of battery and assault took place, the simple fact that they were committed while the witness was being questioned or during the investigation of the cognizable offence, cannot, by mere proximity of time, make the act done under colour or in excess of the duty or authority of the police-officer.

In the present case also, the mere fact that the petitioner was driving Sub-Inspector Kedari, who was proceeding in the jeep for an inquiry at Worli, would, not afford any protection to the petitioner. Mr. Justice Mirza"s observation at pages 1049-1050 in the Full Bench case are equally relevant:-

...For a thing to be the "colour" of another there must be some likeness or semblance between the two. There is no likeness or semblance between committing assault and battery on the one hand and obtaining intelligence on the other. When the Act authorizes the police-officer to "obtain" intelligence the "obtaining" it contemplates is by means which are lawful and not those which in the absence of a provision to the contrary in this or any other Act are forbidden by the general law of the country. Apart from a special provision to the contrary a police-officer is as much governed by the general law as any private citizen.

10. In Emperor Vs. Amimiya Imammiya, , a Division Bench of this Court was considering a case in connection with some incidents at Kaira which took place after the passing of the "Quit India" resolution by the Congress on August 8, 1942. The District Magistrate of Kaira issued an order on the next day u/s 56(1) of the Defence of India Rules, 1939, prohibiting formation of processions within the limits of his district. A batch of students, in disobedience of the order, took out a procession within the prohibited area on August 18, 1942, shouting slogans and distributing pamphlets embodying the "Quit India" resolution. The accused, led by a Head Constable, forming a party of 8 policemen, 5 of whom were armed with rifles and the remaining 8 carrying lathis, set out in search of the students and found them in a field near Adas railway station. The police detrained themselves from the railway train in which they were travelling, and a lathi charge was made on the students; and when they sat on the ground in a group, on the order of the head constable accused No. 1, the police party fired seven rounds of ball ammunition killing, four and wounding ten of the students. More than six months after the incident, the accused were charged with the offence of rioting, unlawful assembly and causing hurt and murder in respect of the acts done by them. On these facts, it was held by a Bench consisting of Sir Leonard Stone, Chief Justice, and Mr. Justice Lokur that regarding accused No. 1 there was no use of force so unjustified or excessive as to amount to his ceasing to act in the discharge of his duty and under colour of his office and he was protected by Section 80(5) of the Bombay District Police Act, 1890. As regards the remaining accused, who were under the command of accused No. 1 and were executing the orders of their superior officer which were per se lawful and which they were bound to obey, it was hold that they were entitled to the protection of Section 80(2) and (3) of the Bombay District Police Act and Section 17 of the Defence of India Act, 1939. Stone C.J. in his judgment referred (p. 836) to the Full Bench case of Narayan v. Yeshwant as illustrative of a case where "the excess may be blatant, so prolonged or so great as to lose the colour of office altogether." Mr. Justice Lokur was of the opinion that the expression "under colour of" does not mean the same thing as by virtue of, and according to him, any rightful act in office would be "by virtue of office, while a wrongful act in office may be "under colour of office, and he approved of

the distinction brought out in the Pull Bench case of Narayan v. Yeshwant between an act done under colour of or in excess of duty and an act not so done and proceeded to observe (p. 847) :-

In the case of an assault for the purpose of eliciting information from a witness, the investigating officer is not empowered to use force for that purpose, and hence if he commits an assault for that purpose, he cannot be said to have done so under colour of or in excess of his duty or authority. Whereas in the case of dealing with an unlawful assembly, he is specially empowered to use force, though that force must be reasonable. If it is unreasonable, he would be liable, but any action in respect of such use of unreasonable force must be brought within six months as required by Sub-section (3) of Section 80 of the Bombay District Police Act, 1890.

11. Mr. Parikh cited the case of Abdullahkhan v. Emperor A.I.R.[1932] Sind 28, where it was held that the object of Section 80(3) of the Bombay District Police Act was to protect Magistrates, police officers and others from State prosecutions based on the fact, that some duty imposed or authority conferred by a provision of the Act or by some rule or order or direction lawfully made or given thereunder had been neglected or misused, whether such neglect or misuse was bona fide or mala fide; and the section provides that the offence or wrong must be under colour or in excess of a duty imposed or authority conferred by the Act, but that would not include acts which are obviously offences and in no manner reconcilable with the duties or functions of a Magistrate or police officer. Two other decisions were also cited before me by Mr. Parikh, One was Municipal Borough of Ahmedabad Vs. Jayantilal Chhotalal Patel, , where the Full Bench had to construe the expression ''anything done or purporting to have been done in pursuance of this Act'' in Section 20(5 of the Bombay Municipal Boroughs Act. The second decision was Jalgaon Mun. v. Khandesh Spg. etc. Co. (1952) 55 Bom. L.R. 65, where also the Court was concerned with the interpretation of the same expression in Section 206 of the Bombay Municipal Boroughs Act. It is not necessary to deal with those decisions because they were concerned with the interpretation of an expression in a different Act altogether. In my view, the principle laid down in the Full Bench case of Narayan v. Yeshwant, which, was a case u/s 80(5) of the Bombay Disstrict Police Act, the wording of which is in pari materia with Section 161 of the Bombay Police Act, would be applicable to the facts of the present case.

12. The question is whether the act of the petitioner is in such excess of his duty as to deprive him of the benefit of Section 161 of the Act. The finding of the lower Courts is that the petitioner drove the jeep in a rash and negligent manner. Such an act of his would have exposed him to a prosecution u/s 279 read with Section 337 of the Indian Penal Code. It also exposed him to civil proceedings for damages. Rule 363 contained in Vol. III of the Bombay Police Manual casts on him a duty under no circumstances to drive rashly or at a speed faster than the limits mentioned in that rule. It is stated before me that in the departmental proceedings against the petitioner, the authorities found in his favour and, therefore, no prosecution was launched against the petitioner under the provisions of the

Indian Penal Code. But that obviously has no relevance in the present case where, as I have already stated, the lower Courts have found as a fact that the petitioner was driving rashly and negligently. The act of the petitioner in driving rashly and negligently, being in total disregard of the manner in which he was expected to do his duty under the Police Manual, cannot be regarded as an act done under colour or in excess of duty imposed upon him as a police constable driver.

13. It appears that in England the police have been given some protection in the matter of exceeding the speed limit. In this connection, the position about police vehicles, as stated in Halsbury''s Laws of England (3rd edition), Volume 30, at page 133, is:-

The provisions of any enactment, or of any statutory rule or order, imposing a speed limit on motor vehicles does not apply to any vehicle on an occasion when it is being used for police purposes, if the observance of those provisions would be likely to hinder the use of the vehicle for those purposes. This exemption does not, however, affect the liability of the police for dangerous or careless driving of their civil liability in the event of an accident.

In Gaynor v. Alien [1959] 2 All E. R. 644, a police constable was driving a motor cycle at a speed of some 60 m.p.h. The plaintiff, a state registered nurse, while crossing the northern carriageway of the Great West Road at Hammersmith was knocked down and injured by this police constable. It appears that the police constable was himself killed in the accident. But the plaintiff claimed from the administratrix of the deceased damages for personal injuries sustained by her. It was contended that Section 3 of the Road Traffic Act, 1934, would protect the defendant against any liability because it provided that the speed limit on motor vehicles should not apply to any vehicle when used for police purposes. It was, however, held by Mr. Justice Me. Nair in the Queen''s Bench Division that the exempting provision of Section 3 of the Road Traffic Act, 1934, did not qualify a police driver''s criminal liability for dangerous driving or, indeed driving without due care and attention. The following observations of the learned Judge in this connection are relevant (p. 646) :-

In my judgment, the deceased, the driver of the police motor cycle, on this occasion as regards civil liability must be judged in exactly the same way as any other driver of a motor cycle on that occasion. He, like any other driver of a motor vehicle, on that occasion owed a duty to the public to drive with due care and attention and without exposing the members of the public to unnecessary danger.

In my judgment, Section 161 of the Bombay Police Act has to be strictly construed since it cuts down the period of limitation available to a litigant. If the police are entitled to have the benefit of a shorter period of limitation when they are acting in pursuance of a duty imposed on them by the Police Act or any other law in force or any rule thereunder, and if the act is alleged to amount to an offence or a wrong, then if it is found to have been done in gross violation of their duty or in contravention of the limits placed upon the

performance of such duty by the law itself or any rules framed thereunder, the act would cease to be an act done under colour or in excess of their duty. In the instant case, the act of the petitioner is also in disregard of the duty that he owed as the driver of a motor vehicle to the public to drive with due care and attention. In my view, therefore, the benefit of the shorter period of limitation provided u/s 161 of the Act would not be available to the petitioner.

14. The result is that the decision of the trial Court in awarding an amount of Rs. 500 as damages to the opponent-plaintiff will have to be confirmed. The rule will, therefore, be discharged with costs in favour of opponent No. 1, original plaintiff. There will be no order as to costs so far as the State is concerned, but I must express my thanks to Mr. Dalvi for the assistance rendered by him.