

Criminal Case No. 6393/2020

ORDER BELOW EXH.1

(1) Heard, perused the record of this case. In this case investigating police officer filed charge sheet against accused under section 188 IPC and under section 131 of Gujrat Police act, on the basis of FIR lodged against the accused under the same section. On perusing the record police filed charge sheet on the ground that accused violated the terms of promulgation issued by Commissioner so he committed the crime under section 188 of IPC. In section 195 Cr.P.C. It is clearly written that no court shall take cognizance of offence punishable under sections 172 to 188 of Indian Penal Code except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate.

(2) In **Daulat Ram v/s. State of Punjab, 1962 AIR 1206**, Hon'ble Supreme Court described the scope of Section 195 Cr.P.C. and held that as per section 195 Cr.P.C. Complaint must be in writing by the public servant concerned and if there is no compliance of this section then the trial was without jurisdiction and the conviction can not be maintained.

(3) In **Gaurishanker Jha v/s. Chintanath Jha**, Hon'ble Patna High Court held that if it appears that when the cognizance has been taken and the defect of want of jurisdiction or absence of sanction crops up, then the court should not proceed with the trial. If witnesses have been produced by both sides when a court has no jurisdiction or there is inherent want of sanction, the prosecution

becomes bad, illegal and without jurisdiction.....All proceeding are to be dropped or complaint has to be dismissed but definitely no order of acquittal or discharge can be passed.

(4) In Kanjibhai v/s. State on 16 March, 2010. Criminal Misc. Application no.348 of 1995, Hon'ble Gujarat High Court held in para 7 that, in view of the provisions of sub-section(1) of section-195, which expressly bars taking of cognizance of an offence under section-188 except as provided thereunder, read with section-2(d) of the Code, it was not permissible for the learned Judicial Magistrate First Class to take cognizance of the offence in question on the basis of a charge-sheet filed pursuant to the first information report lodged by the respondent No.2. In the light of the provisions of section 195(1)(a), the Court could not have taken cognizance of the offence under section 188 IPC except on a complaint in writing by the public servant concerned or some other public servant to whom he is administratively subordinate.

(5) In Arvind Kejriwal & Ors. v/s. Amit Sibal & Anr., Cri.Misc.Application no.18920-21/2013. it was held by Hon'ble Delhi High Court that, If the trial court proceeds to drop the proceedings qua petitioners, then the Apex Court's decision in Adalat prasad v/s. Rooplal Jindal and Ors. (2004) 7 SCC 338 would not stand in the way of trial court to do so.

(6) As far as section 113,117 and section 131 is concernSection 113,117,131 of The Act does not specifically prescribe, whether the offence is cognizable or non-cognizable and therefore, in the absence of any such specific reference therein, in order to determine as to whether an offence under section 113,117,131 of The Act is

cognizable or non-cognizable, one has to fall back upon the definition contained under section 2(c) and 2(l) read with part II of the First Schedule of the Criminal Procedure Code. The maximum punishment provided for offence punishable under sec.113,117,131 is two years. Therefore conjoint reading of schedule-I part-II of the Code and section 113,117,131 of G.P. Act made the offence non cognizable and bailable. Now the question arises in non-cognizable offence which of the provision of the Criminal Procedure Code would govern the investigation in the cases like the present. When the offence is non cognizable then Police is required to investigate the offence with the permission of the court and as per section 155(2) of Cr.P.C. "(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial..”It is clear from this provision that, Non Cognizable offence is required to be investigated after the order of the Magistrate having power to try such case.

(7). In Keshav Lal Thakur v. State of Bihar, 1996(11) SCC 557Honourable Supreme Court of India held as under:-

We need not go into the question whether in the facts of the instant case the above view of the High Court is proper or not for the impugned proceeding has got to be quashed as neither the police was entitled to investigate into the offence in question nor the Chief Judicial Magistrate to take cognizance upon the report submitted on completion of such investigation. On the own showing of the police, the offence under Section 31 of the Act is non cognizable and therefore the police could not have registered a case for such an offence under Section 154 Cr. P.C. of course, the police is entitled to investigate into a non-cognizable offence pursuant to an order of a competent Magistrate under Section 155 (2) Cr. P.C. but, admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate into the offence in question nor submit a report on which the question of taking

cognizance could have arisen. While on this point, it may be mentioned that in view of the proviso to Section 2 (d) Cr. P.C., which defines 'complaint', the police is entitled to submit, after investigation, a report relating to a non-cognizable offence in which case such a report is to be treated as a 'complaint' of the police officer concerned, but that explanation will not be available to the prosecution here as that related to a case where the police initiates investigation into a cognizable offence - unlike the present one - but ultimately finds that only a non-cognizable offence has been made out. On the conclusions as above we allow this appeal and quash the impugned proceedings.

(8). That The Honorable High Court of Gujarat in the case of Waghari Vs State of Gujarat on 14th December, 2009 in Criminal Misc. Application No. 15226 of 2007 observed that even if the section 79 and 80 of The Act empower the police officer to cause arrest of the petitioner, there is no provision pointed out either in the The Act or under the Criminal Procedure Code to show as to how the entire incident was investigated without permission of the Magistrate. Admittedly, the offence alleged was non-cognizable offence. Under section 155(2) of The Criminal Procedure Code, therefore no police officer could have investigated such an offence without order of Magistrate having power to try such a case.

(9). In MOIN BASHA KURNOOLI S/O LATE HAJI ABDUL GAFOOR V/S STATE OF KARNATAKA, 2014 Law Suit(Kar) 2048, Hon'ble Karnatka High observed in para 39 to 41 that Power to arrest with out warrant in the offences where punishment prescribed is less than three years in Karnatka Police Act under different circumstances does not confer the power to investigate the offence to police with out prior permission of the Magistrate. Further Honourable Kerla High Court in Kunhumammed Vs. State of Kerala in Cri.M.C. No. 702 of 2011 held, that as per explanation to section 2(d) of the Criminal Procedure Code the report of the police officer cannot be deemed as a complaint and police officer can not be deemed as a complainant because said explanation has no application to the case where non-cognizable offence alone is alleged at the ab initio of Investigation.

(10). Gujarat Police Act is made for maintaining public peace and order and power to arrest is given to police for urgent action so that

for every breach of order police has not to rush to concerned Magistrate for taking permission to arrest. It is the principle of interpretation of Statute that when the Statute it self expressly provides express provisions then it is to be read as it is. In G.P. Act, only three offences are made cognizable. **Therefore, except Section 90(A),118 and 143(B), the other offenes are deemed to be non cognizable.**

(11). It is established that in cognizable case police has power to arrest and investigate with out the permission of concerned magistrate and subsequently police files charge-sheet under section 173 of Cr.P.C. but if power to arrest under different circumstances is given under any law then as per above discussion it does not mean that police automatically get the power to investigate the offence with out prior permission of the concerned Magistrate. In the present case that there is no confusion in the mind of a Investigation Officer that he is going to investigate only offence of section 113,117,131 G.P. Act and such investigation is carried out by the police in respect of Non-cognizable offence without the prior permission of concerned Magistrate under section 155(2) of Criminal Procedure code, which is illegal and bad in law.

(12). In the present case also, police has investigated the offence without the permission of this court. It is clear from record that no permission is sought for by the police for the investigation. Therefore, chargesheet filed by the police against accused is illegal in the eye of law. Considering the above situation, when the chargesheet is illegal in the eye of law, in that circumstances “principle of nullity” will apply and all the subsequent proceedings are also become illegal. Upon discussion of aforesaid provision of law and Judgment Pronounced by the Hon'ble Supreme Court in Keshav Lal (Supra) and various Honorable High Courts, it is clear that if police investigated the non cognizable offence without the prior permission of the concerned Magistrate and subsequently filed the charge sheet then as per law it is not proper for the Court to take cognizance or to conduct the trial on that charge-sheet or to treat that charge sheet as complaint.

(13) As per the above discussion if as per law if court has no power to take cognizance and cognizance if taken then to proceed

with the matter and to convict or acquit the accused in spite of lack of jurisdiction is bad in law. In the similar way if accused is acquitted or discharged on the basis of the ground that court has no jurisdiction to take cognizance then this will curtail the right of prosecution to file fresh proceedings as per procedure prescribed by law. In view of this to proceed with this matter is not justified by law. **Hence the following order is passed in The Special Magistratirial Sitting which is organised today by Hon'ble Chairman & Chief Metropolitan Magistrate Ahmedabad.**

Final Order

The Proceeding against the accused person is hereby dropped with liberty to prosecution to take such steps as deems fit in accordance with law.

Place: Ahmedabad.

Date:08/02/2020

(Dilipsinh Bhavsinhji Gohil)
Additional Chief Metropolitan
Magistrate, Court No.19
Ahmedabad GJ00757