

Order below Exhibit :- 1

1) Perused the record. This case came to be registered on the basis of charge-sheet filed by the I.O. after completion of investigation for an offence **u/s. 188, 269 of I.P.C. & u/s. 131 of the GP Act.** On perusing the record, it transpires that the charge-sheet has been filed on the ground that the accused violated the terms of Section 188, 269 of I.P.C. & u/s. 131 of the GP Act. It transpired that the I.O. has not filed a private complaint in this case within the meaning of Section 2(d) of the Cr.P.C., but instead has filed a police report u/s 173 of the Cr.P.C. (in short charge-sheet).

2) Now the question before me is whether it is permissible for a Court to take cognizance of an offence u/s 188 of I.P.C. in light of the bar imposed by Section 195 of Cr.P.C. is a mandatory provision and therefore, the Magistrate can take cognizance only upon the private complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Section 195 being imperative in nature, cognizance of any offence referred to therein without a proper complaint by the concerned public servant is an illegally not curable by Section 465 (**Janki prasad Vs. Emperor, (1926) 27 Cri LJ 901: AIR 1926 ALL 700**). Thus, it is clear from the above discussion that cognizance of an offence u/s 188 of I.P.C. is barred, unless it is on the basis of a complaint filed by the public servant concerned.

3) Coming over to another offence alleged against the accused i.e. Section 269 of the I.P.C. In this case also it is imperative to discuss the observation made in

Durgacharan Naik Vs. State of Orissa, 1966 Cri LJ 1491: AIR 1966SC 1775; Basir-Ul-haq Vs. State of W.B., 1953 Cri LJ 1232: AIR1953 SC 293; Oduvil Devaki Amma Vs. State of Kerala, 1981 KLT 475: 1982 Cri LJ 9NOC)II 9Ker); Ashok Vs. State, 1987 Cri LJ 1750 (Bom); N.H. Nanjegowda Vs. State of Karnataka, 1988 Cri LJ 807 (Kant). It has been observed in the above cases that the provision of Section 195 cannot be evaded by resorting to device of camouflage. For instance, the provision 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.

However, when a single act of the accused is of such a character as to amount to two distinct offences, one which is covered by Section 195 (1) (a) and the other which is not, it is open to the person aggrieved thereby to lodge a private complaint of the latter offence, and cognizance of that offence u/s 190 is not barred by the operation of Section 15 (1) (a). To hold otherwise would amount to legislating and adding very materially to the language of that Section, which it is submitted, would not be permissible while interpreting the provision. It may, however, be noted that where offences are so intermingled with each other that it is impossible to separate them for trial in respect of any particular offence which does not attract the provisions of Section 195(1), it is not open to a Court to proceed with the trial of some offences only by dropping charges for other offences attracting that Section [Basappa Ninquangowda, 1978 Cri LJ 460, 469 (kant); see also, Chandra Kishore Jha Vs. State of Bihar, 1975 Cri LJ 1939 (Pat)].

After perusing the above mentioned position of law, it transpired that the addition of Section 269 of the I.P.C. & Section 131 of GP Act along with Section 188 of the I.P.C., in the present case by the concerned police official is nothing but an attempt

to evade the provision of Section 195 of Cr.P.C. by restoring to devices of camouflage. Therefore, to take a roundabout route, Section 269 of the I.P.C. & Section 131 of GP Act prima facie seems to have been added in the case, it is not open to this Court to proceed with the trial of this offence. In the latest judgment of Purushottambhai Odhavjibhai Solanki Vs. State of Gujarat in Cr.M.A. No. 31264/2016 dtd. 04.11.2020 it has been laid down by the Hon'ble Gujarat High Court that "A plain reading of the above provision makes it clear that it bars the Court from taking cognizance of any offence punishable under section 188 IPC or abetment or attempt to commit the same, unless there is a written complaint by the public servant for contempt of his lawful order. The object of this provision is to provide for a particular procedure in a case of contempt of the lawful authority of the public servant. In the instant case, it appears that the Court below has not looked into the provision of section 195 of Cr. P. C. before passing the impugned orders, it does not enable the Police Officer to register any FIR for an offence under section 188 of IPC along with other sections. The reason being, such registration of an FIR has to necessarily end with a Police Report under 173(2) of Cr. P. C., which is specifically barred under section 195 of Cr. P. C."

4) APP in this case has stated that Section 188 of I.P.C. is cognizable in Gujarat. So that there will not be any bar to take cognizance. And has presented the letter issued by the office of Director of Prosecution dtd. 09.09.2020 in which it has been stated that Hon'ble Supreme Court has given consent for the charge-sheet filed u/s. 188 of the I.P.C. and it has also been stated that if any case is completed by way of discharge then to file revision in those cases. First of all, Director of Prosecution is not a legislated institution. Their duty is to represent the state.

Moreover, in Section 195 of Cr.P.C. it has been clearly mentioned that cognizance in offences u/s. 188 of I.P.C. cannot be taken until and unless there is a written complaint filed before the Court as per Section 2(d) of Cr.P.C. Thereafter, Ld. Counsel for the State has drawn the attention of the Court on the judgment passed by Hon'ble Supreme Court in case of Dr. Vikram Singh Vs. UOI writ petition (Criminal) No. 10953 of 2020. But, the said petition has been dismissed due to technical reasons and not on the merits of the case. In the said case, nowhere it has been laid down by the Hon'ble Supreme Court that if police has filed report u/s. 173 in the cases of Section 188 I.P.C. then it will not be barred by Section 195 of Cr.P.C.. So the authority relied upon does not support the prosecutions case. Thereafter, APP has stated that 188 of I.P.C. is a cognizable offence in Gujarat. Looking into the provisions of the Cr.P.C. there is a difference between cognizable offence and taking cognizance of the offence. The difference between these two terms has been clearly explained by the Hon'ble Madras High Court Jeevandham Vs. State on 20th September, 2018, CrI. OP (MD) No.s 1356 of 2018 etc. in Section 188 of I.P.C. the following guidelines has to be followed:

- a) A Police Officer cannot register an FIR for any of the offences falling under Section 172 to 188 of IPC.
- b) A Police Officer by virtue of the powers conferred under Section 41 of Cr.P.C. will have the authority to take action under Section 41 of Cr.P.C., When a cognizable offence under Section 188 IPC is committed in his presence or where such action is required, to prevent such person from committing an offence under section 188 of IPC.
- c) The role of the Police Officer will be confined only to the preventive action as stipulated under Section 41 of Cr.P.C. and immediately thereafter,

he has to inform about the same to the public servant concerned/authorised, to enable such public servant to give a complaint in writing before the jurisdictional Magistrate, who shall take cognizance of such complaint on being prima facie satisfied with the requirement of Section 188 of IPC. Therefore, it becomes clear that as per the provisions of Section 41 of Cr.P.C., in Gujarat police can arrest the person committing offence u/s. 188 of I.P.C. But, F.I.R. cannot be laid down against such person.

5) In the end, Court is of the view that the I.O. should have filed a private complaint instead of Police report u/s 173 of Cr.P.C. in light of the aforesaid decisions and as per the ratio laid down in the case of K. Prabhakar Rao Vs. State of A.P., decided on 25/11/2014 by the Hon'ble Apex Court the proceeding of the present Criminal Case should be stopped as this Court is lacking the jurisdiction. Hence, the final order is made as under:

::ORDER::

1. The present Criminal Case is hereby disposed off by way of stop proceeding u/s 258 of Cr.P.C. and the accused is hereby discharged.
2. It is clarified that the complainant side is hereby permitted u/s 300(5) of the Cr.P.C. to file fresh proceedings against the accused by following the procedure prescribed by law (i.e. by way of filing a private complaint).
3. The Muddamal if any seized by the authorities in this case, is hereby ordered to disposed of as per the provisions of criminal manual.

Signed and pronounced today on this **10th day of July, 2021.**

Date: 10.07.2021

Place: Ahmedabad

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Prithu Sharma

UIC: GJ01564

7th Addl. Civil Judge &
JMFC,

Ahmedabad (Rural)

N.B.Bhavsar