

In the Court of 14th. Add. Chief Judicial Magistrate, Rajkot

CC/ 9136/2020

Order Below Exhibit-1

(1). In this case police filed charge sheet under Section 185 of Motor Vehicle Act against the accused by alleging that the accused was found in drunken state while driving vehicle and the quantity of alcohol found exceeding 30 mg. per 100 ml. in his blood. As there is no specific provision is provided for the trial in The Motor Vehicle Act. Therefore, in that circumstances, sec.4 of the Code of Criminal Procedure,1973 is applicable and it is clear from Section 4 of the code, when ever no specific provision is provided in special or local act, the investigation, trial and inquiry will be conducted according to provisions of Cr.P.C. In Motor Vehicle Act, there are certain provisions for instance Section 202 and 203, where in a police officer has been given the power to arrest but no where in MV Act, it is written that any of the offence is made cognizable.

(2). In Section 202(1) of MV Act, a police officer in uniform may arrest without warrant any person who in his presence commits an offence punishable under Section 184 or 185 or Section 197. Similarly in Section 202(2), a police officer in uniform may arrest without warrant any person, who has committed an offence under this Act, if such person refuses to give his name and address. Under section 203(1), a police officer in uniform or an officer of the Motor Vehicles Department are made authorised for taking specimens of breath for breath test. Section 203(3) empowers a police officer in uniform to arrest a person if the consequence of the breath test results the presence of alcohol in that person's blood and section 203(4) empowers a police officer in uniform to arrest a person, if that person refuses or fails to provide specimen of breath for a breath test with out warrant. Therefore, the power to arrest seems to be given to the police officer to meet emergent circumstances. In this Act no general power of arrest is given to police but a qualified limited power of arrest under different circumstances is given. On conjoint reading of section 202 and 203 of MV Act, if offence is not committed in the presence of police then police has no power to arrest with out warrant. Similar if police officer is not in uniform then also he has no power to arrest. Similarly if accused does not provide the specimen of breath for a breath test, then only the police officer in uniform may arrest. Similarly power of arrest in section 42 Cr.P.C. is given to police if non cognizable offence is committed in the presence of police. If we correlate power of police to arrest without warrant as cognizable offence then it means if non cognizable offence is committed in the presence of police then the offence becomes cognizable one and police get the power to investigate the non cognizable offence with out the permission of concerned magistrate. Legislation specifically in schedule -I part I make the offences in IPC as cognizable or non-cognizable, bailable or non-bailable and for other laws clearly made the provision in schedule-I part II that if punishment prescribed by law is for less than three years or fine or with both then the offence is non-cognizable one.

(3). Section 185 of the MV 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 185 of the MV 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.185 is two years or fine of Rs.15000/- or both. Therefore conjoint reading of schedule-I part-II of the Code and section 185 of M.V. Act made the offence non cognizable and bailable.

(4). Hon'ble Bombay High Court in Rani Shashank Doshi v. State of Maharashtra and others, (2014) 1 BomCR(Cri) 339 has held that if there is a reasonable cause to suspect a person having committed an offence punishable under Section 185, that he can be subjected to a Breath Test and by calling upon him or requiring him subject himself to such test, is not necessarily arrest. He could be arrested provided a Breath Test carried out on him indicating presence of alcohol in his blood. He cannot be arrested if he is at a hospital as an indoor patient. If the person concerned refuses to provide a specimen of breath for a Breath Test or fails to do so and a police officer has a reasonable cause to suspect him of having alcohol in his blood that he may arrest that person except while that person is in hospital as an indoor patient. Even after his arrest he shall while at police station be given an opportunity to provide a specimen of breath for a Breath Test. Therefore, with all this it is not as if the offence can be said to be cognizable. Additionally also because of the extent of punishment, namely, imprisonment for less than two years that a conclusion can safely be reached that an offence punishable under Section 185 of the MV Act is not cognizable.

(5). The power to arrest given to a police officer under Section 202 of MV Act is not an unqualified power. That power can be exercised only if the offence is committed in the presence of a police officer and when such police officer is in uniform. Merely because power to arrest without warrant is conferred in police officer in uniform would not mean that the offence is cognizable. 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.

(6). 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.

(7). In *Moin Basha Kurnooli s/o Late Haji Abdul Gafoor v. State of Karnataka*, 2014 Law Suit(Kar) 2048, Hon'ble Karnataka High observed in para 39 to 41 that Power to arrest with out warrant in the offences where punishment prescribed is less then three years in Karnataka 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 Kerala 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.

(8). 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 185 of M.V.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. Police officer is only required to file complaint with relevant documents in Court and If he wants to investigate and afterwards wants to submit chargesheet then he is required to take prior permission from concerned Magistrate.

(9). 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. So, this Court passes the following final order in the interest of Justice.

Final Order

The Proceeding against the accused person u/s 185 of M.V. Act is hereby dropped with liberty to prosecution to take such steps as he deems fit in accordance with law and investigating officer is ordered to release the vehicle, if detained, to true owner or person entitled according to law.

Place : Rajkot
Dated: 12-03-2022

Sd/-
(Prabhakar Krishnakant Rai)
14th A.C.J.M., Rajkot,
Judge Code: GJ01112