

2021 SCC OnLine Gau 2254 : (2022) 3 Gau LR 677 : (2022) 1 GLT
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In the High Court of Gauhati
(BEFORE RUMI KUMARI PHUKAN, J.)

Pankaj Das ... Petitioner;

Versus

State of Assam and Others ... Respondents.


CrI. Pet. No. 977 of 2019

Decided on November 29, 2021

Criminal Procedure Code, 1973, S. 197 — Scope of section 197 of the Cr. P.C. — Duty of the court to apply its mind to the fact situation before it — Protection is qualified and conditional — Protection is not available, if the act complained of has no nexus, reasonable connection or relevance to the official act or duty of the public servant and is otherwise illegal, unlawful

[Para 24].

Criminal Procedure Code, 1973, S. 319 — Degree of satisfaction required while invoking the provision of section 319, Cr. P.C. — Trial court did not discuss all other matters to record its satisfaction prior to exercising the provisions of section 319, Cr. P.C. — Petitioner was officer in-charge of the Police Station and was on duty at the relevant point of time and it was the other accused-persons who dragged the complainant to the police station, where the alleged incident stated to have taken place — Authenticity of the allegation is to be tested in the touchstone of other evidence on record — GD Entry made earlier, indicated the rivalry between the complainant and the other accused-persons — Petitioner's interference

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into such matter being a police official, even if he exceeded his power, will be the subject-matter of scrutiny by the sanctioning authority — Case of the petitioner not appearing to be a fanciful claim — Not the case that the petitioner himself went to the house of the complainant-along with. other accused-persons to commit the offence — Other witnesses of the complainant not examined by the court at the time of invoking section 319, Cr. P.C. — Taking cognizance under section 319, Cr. P.C. without inv. oking. the provision of section 197, Cr. P.C. held to be bad in law — Petitioner held to be entitled protection under section 197, Cr. P.C. — Proceeding against the petitioner for want of sanction held to be bad in law

[Para 27].

Advocates who appeared in the case:

Mr. N.N.B. Choudhury for the petitioner.

Ms. S. Jahan for the respondents.

Cases referred : Chronological

Bhabesh Ch. Biswas @ Bhupesh Biswas v. State of Assam, Crl. Pet. No. 107/2018.

Surinderjit Singh Mand v. State of Punjab, (2016) 8 SCC 722.

Prakash Singh Badal v. State of Punjab, (2015) 1 SCC 513:

Archana Varma @ Archana Barma v. State of Assam, (2015) 4 Gau LT 533.

Tarun Dev Sarma v. State of Assam, (2015) 4 Gau LT 413.

Rajib Kr. Bhuyan v. State of Assam, Criminal Petition No. 76/2014.

Hardeep Singh v. State of Punjab, (2014) 3 SCC 92.

Anil Kumar v. M.K. Aiyappa, (2013) 10 SCC 705.

Sankaran Moitra v. Sadhanan Das, (2006) 4 SCC 584.

Rakesh Kumar Mishra v. State of Bihar, (2006) 1 SCC 557.

P.P. Unnikrishnan v. Puttiyottil Alikutty, 2000 Cri LJ 4041.

Matajog Dubey v. H.C. Bhari, AIR 1956 SC 44.

JUDGMENT AND ORDER

1. Heard Mr. N.N.B. Choudhury, learned counsel appearing for the petitioner as well as Ms. S. Jahan, learned Addl. Public Prosecutor, Assam, appearing for the State/respondent No. 1.

2. The petitioner herein, is assailing the legality and validity of the order dated 17.6.2017, passed by the learned SDJM (Sadar), Barpeta, in G.R. Case No. 918/2018 (earlier CR Case No. 5631/2014), whereby cognizance has been taken against the petitioner under section 319, Cr. P.C., without obtaining sanction from the competent authority.

3. The respondent No. 3-Lok Narayan Giri, filed a complaint before the court of learned CJM, Barpeta, on 3.5.2014, against the present petitioner (as accused No. 4) and three others, namely, Kalidas, Ali Mia and Robin Das, alleging that on 28.4.2014, at about 03.30 p.m., accused Nos, 1,2 and 3,

entered into the courtyard of the complainant and by way of threatening, he was forcefully taken to the Labdanguri PP, wherein the

accused No. • 4 (petitioner, herein) slapped the complainant at his right ear and also assaulted him with a lathi, as a result of which, he sustained grievous injuries on his person and lost his hearing capacity. The accused-persons took the signature of the complainant in blank paper and also by way of threatening, had taken Rs. 1,000 from him and thereafter, he was released at about 12.30 a.m. The complainant was treated at Barpeta Civil Hospital for the injuries he sustained and on 3.5.2014, he filed the complaint. The above complaint was forwarded to the court of learned JMFC, Barpeta, for disposal and the learned Magistrate forwarded the same to the Gobardhana Police Station, which was registered as Gobardhana PS Case No. 179/2014 under section 447/120B/325/384/506/34, IPC. On completion of the investigation, the I/O submitted charge sheet against the accused Nos. 1, 2 and 3 and finding no evidence against the accused No. 4 (petitioner herein) he was not sent up for trial and prayed to discharge him from trial.

4. On the basis of the charge sheet, the learned Magistrate took cognizance of the offence against the said charge sheeted accused and during the trial, after examination of the complainant as PW-1, who implicated the accused-petitioner with the offence alleged, took cognizance under section 319, Cr. P.C. and issued summons to him to face the trial as accused, along with the other accused-persons. However, as the petitioner was transferred to other district, so, the summons of the case could not be served and after service of notice, he could not appear before the court and sought for time.

5. Challenging the aforesaid order of taking cognizance, the petitioner is before this court with the present petition under section 482, Cr. P.C., contending that the order of taking cognizance is bad in law, inasmuch, as the learned trial court, has not complied with the mandatory provision of section 197(3) of Cr. P.C. The petitioner contends that due to non-compliance of mandatory provision, the impugned order as well as the entire proceeding against the petitioner is liable to be quashed and set aside.

6. According to the petitioner, while he was posted as In-charge, Labdanguri PP, under Gobardhan Police Station, District Baksa, he received a written information from one Robin Rajbongshi, alleging that the complainant (respondent No. 3 of this case), who was the tenant under Robin Rajbongshi for 12 bighas of land in the name of Robin Rajbongshi's father, did not pay the rent in respect of said lease as well as mortgaged 2 bighas of land out of 12 bighas to one Ali Hussain. Robin Rajbongshi,

after taking back possession of 10 bighas of land from the respondent No. 3, leased out one Kali Das and then the said Robin Rajbongshi. went to the house of respondent No. 3 with four other persons in order to recover the 2 bighas of land mortgaged to Ali Hussain, but they were misbehaved.

Accordingly, the said information was entered vide Labdanguri PP GDE No. 241, dated 19.3.2014 (Annexure-1). The petitioner after receiving the said information, made a GD Entry vide Labdanguri PP GDE No. 241, dated 19.3.2014 and he along with two staffs moved to the place of occurrence at 1.45 O'clock on the same day by entering GD Entry vide Labdanguri PP GDE No. 242 dated 19.3.2014 (Annexure-2) and he incorporated the action taken by him in Labdanguri PP GDE No. 244 dated 19.3.2014 (Annexure-3) after returning to the Patrolling Post. Subsequently, a non-FIR case was registered as Gobardhana Police Station Non-FIR Case No. 19/2014, dated 22.3.2014, under section 107, Cr. P.C. in connection with the aforesaid incident and the said case was forwarded to the concerned authority. The petitioner also called both the parties to the Police Station and asked them to maintain law and order as they were involved in frequent clashes between them. But after 4 months of the aforesaid incident, the respondent No. 3 filed a complaint case in the court of learned CJM, Barpeta, on 3.5.2014, vide CR Case No. 1426/2014 (Annexure-4) against the petitioner without obtaining sanction from the State Government which is mandatory under section 197, Cr. P.C. and three other persons with false implication.

7. According to the petitioner, he was discharging his duty as a Police Officer, upon receipt of the complaint from said Robin Rajbongshi arid due to the land dispute between the parties, he asked them not to involve in any such clashes. The relevant GD Entry reflects the dispute between the parties, which was lodged prior to filing of the FIR and that being so, filing of the complaint itself is on personal vendetta, but not on the basis of authenticity.

8. Referring to the notification of the Assam Government vide No. HMA/280/80/88/41, dated 29.5.1990, under the signature to the Secretary to the Govt. of Assam, Home Department, it has been submitted that the provision of section 197(2), Cr. P.C. is applicable to all members of the Assam Police Force, when deployed in maintenance of law and order.

9. The petitioner submits that for prosecution of Police personnel of Assam Police for any act alleged to have been committed while discharging duty for maintenance of law and order, sanction of Government under section 197, Cr. P.C. is a mandatory requirement

under the law : The following decisions have been referred in support of his contention:—

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- (1) *Matajog Dubey v. H.C. Bhari*, AIR 1956 SC 44;
- (2) *Rakesh Kumar Mishra v. State of Bihar*, (2006) 1 SCC 557;
- (3) *Sankaran Moitra v. Sadhanan Das*, (2006) 4 SCC 584; and
- (4) *Bhabesh Ch. Biswas & Bhupesh Biswas v. State of Assam*, Crl. Pet. No. 107/2018

10. Further, it contends that learned Magistrate acted beyond its jurisdiction for giving direction under section 156(3) of Cr. P.C., to register the case against the petitioner and others, without prior sanction from the competent authority. The learned trial court, without application of judicious mind and against the legal principles, has forwarded the complaint, which is bad in law. Following decisions have been relied support of the contention:—

- (1) *Anil Kumar v. M.K. Aiyappa*, (2013) 10 SCC 705;
- (2) *Rajib Kr. Bhuyan v. State of Assam*, Criminal Petition No. 76/2014;
- (3) *Archana Varma @ Archana Barma v. State of Assam*, (2015) 4 Gau LT 533; and
- (4) *Tarun Dev Sarma v. State of Assam*, (2015) 4 Gau LT 413.

11. So far as regards invoking section 319, Cr. P.C., the petitioner submits that the impugned order is without jurisdiction, illegal and will amount to abuse of process of law. The complaint was filed with absolute mala fide intention, after four months' delay of the occurrence with no explanation, only to harass the Police Officer while discharging the duties, as the GD Entry was made against the complainant much prior to the filing of the complaint. In support of his contention, the decision of this court in Criminal Petition No. 636 of 2013, dated 19.9.2017, has been relied.

12. The learned Additional Public Prosecutor, Ms. S. Jahan has raised objection against the contention made by the petitioner, and submitted that in view of the nature of accusations and the date of incident, it cannot be held that there is reasonable connection between the commission of the offence and the discharge of official duty. It contends that the GD Entry No. 241 was made much prior to the occurrence on 19.3.2014 and the complaint was filed by the respondent on 3.5.2014, referring to the incident of 28.4.2014. That being so,

there cannot be any connection to the occurrence on 28.4.2014 and 19.3.2014, that the petitioner was discharging duty at the time of incident on the day of occurrence. The petitioner cannot sought for protection under section 197, Cr. P.C. in the given facts and circumstances and has submitted that the learned trial court has rightly taken cognizance against the petitioner.



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13. Refuting the other leg of submission of the petitioner's side, learned counsel for the State Ms. Jahan has urged before the court that there is no inordinate delay in filing the complaint which has been explained by the complainant as the complaint itself and the facts narrated prima facie constitute a case against the petitioner. So far as regard the other contention about the error made by the learned Magistrate under section 156(3), Cr. P.C., it has been pointed out the complainant did not make any prayer to the court for direction under section 156(3), Cr. P.C. and it was the court itself has sent the complaint to police for investigation, which is within its jurisdiction. It has been submitted that the role of the learned Magistrate is mentioned under section 202, Cr. P.C. after receipt of a complaint. It provides that on receipt of a complaint the Magistrate can — (a) enquire into the case himself, (b) direct a police officer to investigate into the offence, or (c) direct any other officer as the Magistrate thinks fit to investigate. In the instant case, the learned Magistrate directed the police to investigate and accordingly they have duly investigated the matter and submitted charge sheet. None of the decisions relied upon by the petitioner's side including Sakriri Basu, Priyanka Srivastav could be of any help to the petitioner.

14. Regarding the other challenge about taking cognizance under section 319, Cr. P.C. without obtaining sanction under section 197, Cr. P.C., it is fairly submitted that it is mandatory prerequisite even where the cognizance is taken under section 319, Cr. P.C. but in the instant case the basic requirement of prosecution sanction that the “public servant was discharging official duty or purported official duty” is not fulfilled, but the conduct of the petitioner in the present case is not within the official duty. Decisions rendered in *Surinderjit Singh Mand v. State of Punjab*, (2016) 8 SCC 722 and *Matajog Dobey* (supra) have been relied in support of the contention. Further, it contends that in the present case the petitioner has no duty to investigate the offence himself and there is no connection between the act and the official

duty.

15. Even as per the G.D. Entry, no any cognizable offence was reflected and as such petitioner cannot investigate into a non-cognizable offence in terms of sub-section (2) of section 155, Cr. P.C. Reliance has been placed upon the decision of *Prakash Singh Badal v. State of Punjab*, (2015) 1 SCC 513, where it was categorically held that police cannot enter into investigation of non-cognizable offence unless an order is obtained from the Magistrate. Further, if a public servant acts illegally, not authorized by law, the sanction for prosecution is not required as held by the hon'ble Supreme Court in *P.P. Unnikrishnan v. Puttiyottli Alikutty*, 2000 Cri LJ 4041.



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16. Submissions of the learned counsel for both the parties are considered and decisions referred to, by both the parties have been gone through.

17. Let us look at the complaint that was filed by the respondent/complainant, for proper appreciation of the matter. As per complaint petition, three accused-persons (private persons) suddenly entered into the courtyard of the complainant and he was dragged to the Labdanguri Police Station, wherein, the accused No. 4 (i.e., the petitioner) suddenly slapped him as well as also assaulted on different parts of the body, and with threatening took Rs. 1,000 from him as well as obtained signature on blank paper. The complaint was filed on 3.5.2014 and Police registered the same on 18.8.2014. The LCR that has been forwarded contains only the file after receipt of the charge sheet on 7.2.2015. Initial file at the time of filing complaint is not on record. However, it reveals that the charge sheet has been filed only against three accused-persons (named in the FIR) and the present accused-petitioner was not sent for trial and discharged, finding no any evidence against him.

18. The learned trial court took cognizance of the offence against three charge sheeted persons under section 447/343/294/506/34, IPC and after explaining the charge to them, proceeded for evidence. On the day when the complainant was examined as PW-1, the court, on the basis of his evidence, took cognizance under section 319, Cr. P.C. and summoned the petitioner to face the trial. On examination of the testimony of the complainant as PW-1, it reveals that his testimony is quite silent as about the serious allegations raised in the complaint petition, regarding extorting money by the present accused-person. In

cross-examination, he has stated that although he is in possession of the land since days of his father about 50 years, but he does not know, who paid the land revenue and the accused-persons are disturbing him since 2014.

19. His evidence is also not in conformity to the complaint petition that he sustained grievous injury and he lost his hearing capacity of one ear and as per the medical report, the injury sustained by him is simple, may be caused by blunt object.

20. Now, the facts to be noted that while passing the aforesaid order, the learned trial court has not taken note of two serious aspects that the charge sheet was not laid against the petitioner, finding no complicity against him as well as the discrepancy in the complaint and in the evidence. Moreover, other witnesses were also not examined in support of the evidence of PW-1. The evidence of the PW-1 indicates about the land dispute over the possession of the land. In that view of the matter, invoking the provision under section 319, Cr. P.C., only on the basis of



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statement of the complainant has been taken at the very initial stage of the trial.

21. Section 319(1), Cr. P.C. says that wherein the course of any inquiry into, or trial of, an offence, it appears from the evidence that a person not being the accused has committed any offence for which such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed.

22. In *Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92, various aspects of the power under section 319, Cr. P.C. has been discussed as to when the court can invoke such provisions. As regards the degree of satisfaction while invoking such provision by the court it has been held as below: —

“Thus, we hold that though only a prima facie case is to be established from evidence led before the court not necessary tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than a prima facie case as exercised at the time of framing charge, but short of satisfaction to an extent that the evidence, if, goes unrebutted would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising the power under section 319, Cr. P.C. Section 319, Cr.

P.C., the purpose of providing if it appears from the evidence that any person not being the accused has committed any offence, is clear from the words for which such person could be tried together with the accused. The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under section 319 to form an opinion as to the guilt of the accused."

23. The scope of section 197, Cr. P.C. has been discussed by the Constitution Bench in *Matajog Dobay* (supra) in the following way:—

"Public servants have to be protected from harassment in discharge of official duties while ordinary citizens not so engaged do not require such safeguard. It was argued section 197 of the Code of Criminal Procedure, vested an absolutely arbitrary power in the Government to grant or withhold sanction at their sweet will and pleasure and the Legislature do not lay down or even indicate any guiding principles to control the exercise of the discretion. There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for one act done or purporting to be done by a public servant in the discharge of his official duties. No one can take such proceedings without such sanction. It was further held that there must be reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for discharge of the official duty, as this question will arise only at a later stage, when trial proceeds

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on merits. What we must find out, whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of official duty, though possibly in excess of the needs and requirements of the situation."

24. In *Sankaran Moitra* (supra), it has been held that if the accused charged has the connection with discharge of his duty, then it must be held to be official, to which the applicability of section 197 cannot be disputed and trial cannot proceed without sanction. In the aforesaid case, a Police Officer detained a person, who died and the trial which was started without sanction, was struck down by the hon'ble Supreme Court, observing that on applicability of section 197, Cr. P.C., it is the duty of the court to apply its mind to the fact situation before it. The said protection is qualified and conditional and protection is not available, if the act complained of has no nexus, reasonable connection or relevance to the official act or duty of the public servant and is

otherwise illegal, unlawful or in the nature of offence, he cannot get shelter under section 197, Cr. P.C.

25. In *Rakesh Kumar Mishra* (supra), hon'ble Supreme Court discussed the object behind enacting section 197, Cr. P.C. and also about the pre-requisite for application thereof. The court observed as follows:—

“6. The protection given under section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the Legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if it chooses to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The

act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the

omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty : if the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of section 197 does not get immediately attracted on institution of the complaint case."

26. Turning to the case in hand, it would reveal that there is a background that the complainant in the case is possessing the land of the co-accused No. 3 (Robin Das) and due to such land dispute said accused No. 3 lodged the complaint before the O/C, Pankaj Das (the present petitioner) which was registered as G.D. Entry on 19.3.2014 and after preliminary investigation into the matter, a case under section 107/145, Cr. P.C. was registered against the complainant. After the said incident, a complaint was lodged after one month and in that view of the matter, the complainant appears to have grievances against said Robin Das and others who went to his house as well as also against the O/C concerned (present petitioner) who investigated the matter. It is to be noted that the complainant has not mentioned any reason as to the assault made to him by the accused- petitioner. In view of such rivalry between the parties on the land dispute filing of a case without mentioning the reasons of assault, etc., assumes much importance, inasmuch as, there is scope to hold that pendency of a criminal case will be a clog to recover the land by the accused-persons.

Moreover, the challenge to the complaint that case is bad for non-compliance of section 156(3), IPC is not well founded as the case was originated from a complaint and the learned court has option to forward the same to police for investigation. There is no averment in the complaint that the complainant approached to the police to register a case and it was refused, rather, the learned trial court on its own notion directed as stated above.

27. The degree of satisfaction as discussed above indicates the amount of evidence required to arrive at a decision as about the complicity of an accused, but in the given case, evidence falls short of the parameter, while tested as mentioned above. The learned court has not discussed

all other matters on record to record its satisfaction prior to exercising

the provision of section 319, Cr. P.C. The petitioner herein, is O/C of Labdanguri Police Station and was on duty at the relevant point of time and it was the other accused-persons who dragged the complainant to the Police Station, where the alleged incident stated to have taken place. The authenticity of the allegation is to be tested in the touchstone of other evidence on record. GD Entry that has been made earlier, indicates the rivalry between the complainant and the other accused-persons and in that view of the matter, being a Police official, petitioner's interference into such matter even if he exceeded his power, will be the subject-matter of scrutiny by the sanctioning authority and the case of the petitioner does not appear to be a fanciful claim. It is not the case that the petitioner himself went to the house of the complainant along with other accused-persons to commit the offence. The other witnesses of the complainant is not yet examined by the court at the time of invoking section 319, Cr. P.C. and in the given facts and circumstances, taking cognizance under section 319, Cr. P.C. without invoking the provision of section 197, Cr. P.C. is bad in law in terms of the decision in *Hardeep Singh* (supra). In the given backdrop, while one of accused lodged a complaint against the complainant of this case, wherein the present petitioner investigated the matter, so in given circumstances possibility of vexatious criminal proceeding cannot denuded. Petitioner was on duty at the time of occurrence and he is entitled to protection under section 197, Cr. P.C., and for want of sanction, proceeding against the petitioner is bad in law.

28. Resultantly, the proceeding of G.R. Case No. 918/2018 pertaining to present accused-petitioner Pankaj Das is quashed and set aside.

Petition stands allowed and disposed of.

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