IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

MONDAY, THE 31ST DAY OF JULY 2017/9TH SRAVANA, 1939

Crl.MC.No. 4265 of 2017 ()

CRIME NO. 841/2013 OF BEKAL POLICE STATION, KASARGOD DISTRICT

PETITIONER/ACCUSED :

NOUFAL M.H.
S/O. KADAR MOUVAL HAMZA,
AGED 33 YEARS, SHAHANAZ VILLAG,
PANAYAL POST, BEKAL,
HOSDURG TALUK,KASARGOD DISTRICT 671318

BY ADV. SRI.P.K. RAVI SANKAR

RESPONDENT/STATE :

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.AMJAD ALI

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 14/7/2017, THE COURT ON 31-07-2017 PASSED THE FOLLOWING:

bp

Crl.MC.No. 4265 of 2017 ()

APPENDIX

PETITIONER(S)' EXHIBITS

ANNEXURE-A: **TRUE COPY OF THE F.I.R IN CRIME NO. 841 OF 2013 OF BEKAL POLICE STATION.**

RESPONDENT(S)' EXHIBITS : NIL.

//TRUE COPY//

P.A. TO JUDGE

bp

K.ABRAHAM MATHEW J.

Crl.M.C. No.4265 of 2017

Dated this the 31st day of July, 2017

ORDER

The accused in Crime No.841 of 2013 of Bekal Police Station which has been registered for the offences under Sections 419, 465, 468 and 471 IPC and Section 12(1)(b) of the Passports Act prays that the proceedings in the crime may be quashed on the ground that the case was registered and is being investigated without previous sanction of the Central Government. The facts of the case are not relevant for the present purpose.

2. Section 15 of the Passports Act runs as follows:

> No prosecution shall be instituted against any person in respect of any offence under this Act without the previous sanction of the Central Government or such officer or authority as may be authorised by that Government by order in writing in this behalf.

3. Before the registration of the case sanction of the Central government was not obtained. Learned counsel for the petitioner submits that with the registration of the case the prosecution was instituted and so the proceedings are invalid. The question is whether

sanction contemplated by Section 15 of the Passports Act is necessary before registration of case.

4. In ***S.A.Venkataraman Vs. Union of India and another (AIR 1954 SC 375)*** the Supreme Court has observed that the words 'prosecution' and 'punishment' have no fixed connotation and they are susceptible of both a wider and a narrow meaning.

5. Reliance is placed on the decision of this court in ***Shymesh v. State of Kerala (2014 KHC 3684)*** in support of the argument that previous sanction is necessary even for registration of case. In that case a learned single judge of this court held that unless sanction of the Central Government is obtained before registration of the case, the proceedings are illegal. But the court did not examine when is a prosecution said to be instituted in a criminal case.

6. The decision of the Supreme Court in ***Kamalapati Trivedi v. The State of West Bengal (AIR 1979 SC 777)*** is another decision relied on by Sri.Ravi Sankar, the learned counsel for the petitioner. The question that arose for consideration before the apex court was with regard to the meaning of the phrase 'in relation to any proceeding' used in Section 195(1)(b) Cr.P.C. This decision is not applicable to the facts of the case. Every proceedings in a court may not be the result of institution of a prosecution. A proceedings may arise in a court even

before institution of prosecution.

7. The decision of the Supreme Court in ***Ram Kumar v. State of Haryana (AIR 1987 SC 735)*** also was brought to my notice by the learned counsel. What was considered by the apex court in that decision is the differences between the provisions contained in Sections 132 and 197 Cr.P.C. The court did not examine the question when is a prosecution said to be instituted in a criminal case.

8. Strong reliance is placed on the two bench decision of the Supreme Court in ***State, CBI v. Sashi Balasubramanian and Another (2006) 13 SCC 252)*** in support of the argument that prosecution includes registration of a case. The Supreme Court observed: “The term prosecution would include institution or commencement of a criminal proceedings. It may include also an enquiry or investigation. The terms prosecution and cognizance are not interchangeable. They carry different meanings. Different statutes provide for grant of sanction at different stages.” The court further observed: “ The term 'prosecution has been instituted' would not mean when charge sheet has been filed and cognizance has been taken. It must be given its ordinary meaning.” It may be noticed that the term institution of prosecution is different in ordinary parlance and legal parlance. Its meaning may be different in different cases. In fact, in the above decision the Supreme

Court has observed that the meaning of the word prosecution may vary from case to case. The case involved interpretation and / or application of the Kar Vivad Samadhan Scheme 1998 framed under the Finance Act, 1998. It appears that certain persons were granted exemption from the operation of the Act provided that no prosecution was instituted against them for the offences punishable under certain sections of the Indian Penal Code, the Foreign Exchange Regulation Act, the Narcotic Drugs and Psychotropic Substances Act, the Terrorists and Disruptive Activities (Prevention) Act and Prevention of Corruption Act before the filing of the declaration contemplated by the Act. It was in that context the Supreme Court gave wider meaning to the words 'institution of prosecution'.

9. A three judge bench of the Supreme Court had occasion to examine the meaning of the phrase 'institution of case'. In ***Jamuna Singh and others v. Bhadai Shah (AIR 1964 SC 1541)*** the court held: " The Code does not contain any definition of the words 'institution of a case'. It is clear, however, and indeed not disputed, that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein." This has been explained by the court in the following words:

"An examination of these provisions makes it clear

> that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence, a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such facts made by any police officer it is a case instituted in the Magistrate's Court on a police report."

10. After referring to the decision in Jamuna Singh's case (supra) another 3 Judge bench of the apex court in ***Devarapalli Lakshminarayana Reddy & Others vs. V.Narayana Reddy & Others (AIR 1976 SC 1672)*** observed: "But from the scheme of Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein." ***Ramesh Kumar Soni v. State of Madhya Pradesh (AIR 2013 SC 1896)*** is another decision of the Supreme Court in which the term institution of a case was examined. The court held:

> "The Code of Criminal Procedure does not,

however, provide any definition of institution of a case. It is, however, trite that a case must be deemed to be instituted only when the court competent to take cognizance of the offence alleged therein does so. The cognizance can, in turn, be taken by a Magistrate on a complaint of facts filed before him which constitute such an offence. It may also be taken if a police report is filed before the Magistrate in writing of such facts as would constitute an offence. The Magistrate may also take cognizance of an offence on the basis of his knowledge or suspicion upon receipt of the information from any person other than a police officer. In the case of the Sessions Court, such cognizance is taken on commitment to it by a Magistrate duly empowered in that behalf. All this implies that the case is instituted in the Magistrate's court when the Magistrate takes cognizance of an offence, in which event the case is one instituted on a complaint or a police report."

11. It may be noted that the expression which came up for

consideration by the Supreme Court in the above three cases was 'institution of case' and not 'institution of prosecution'. One may doubt whether these two expressions carry the same meaning. To prosecute means to institute and pursue a criminal action against a person (Black's Law Dictionary 8th edition). It follows that it is not necessary to say 'to institute a prosecution', but sufficient to say 'to prosecute'. The expression to institute prosecution appears to be a tautology. A person can be prosecuted in a court only by instituting a case.

12. Section 132 (1) Cr.P.C also creates a bar for institution of prosecution. It reads thus:

> (1) No prosecution against any person for any act purporting to be done under Section 129, section 130 or section 131 shall be instituted in any Criminal Court except-
>
> (a) with the sanction of the Central Government where such person is an officer or member of the armed forces;
>
> (b) with the sanction of the State Government in any other case.
>
> (2) Omitted
>
> (3) Omitted

In ***State of Kerala Vs. T.T.Antony (2000 (2) KLT 90)*** a division bench of this court considered the question when a party can raise the defence of want of sanction contemplated by Section 132 Cr.P.C. The division bench held: "According to us, the benefit of S.132 can be availed of only during the trial of the proceedings, if the charge is filed". A learned single judge of this court also took the same view in ***M.K.Musthafa Haji vs. Director, Central Bureau of Investigation, New Delhi (2011 Crl.L.J. 3968)***. It was observed:

> "Thus, under Section 132(1) Cr.P.C there is a total embargo against the institution of a prosecution against any person for any act purporting to be done inter alia under Sec.129 Cr.P.C except with the sanction of the appropriate Government. (In this case, it is the State Government which has to accord the sanction). Such sanction must precede the institution of the prosecution. Institution of a prosecution can ordinarily be either in the form of a complaint made to a Magistrate or in the form of a police report filed before the Magistrate".

13. Take a case where some entries in the passport of a passenger who arrives at an airport in India are seen altered

unauthorisedly. This is an offence under Section 12(1)(b) of the Passports Act. If the argument of the petitioner is accepted, a case cannot be registered or he cannot be arrested or his passport cannot be seized before registration of case for want of sanction. The officer will be compelled to allow him to take back the passport and go out of the airport. An interpretation which results in absurdity is only to be rejected.

14. In view of the authoritative pronouncement of the three judge bench of the Supreme court in ***Jamuna Singh and others v. Bhadai Shah (AIR 1964 SC 1541)*** that institution of a case takes place only when cognizance is taken, which was followed by another three Judge bench in ***Devarapalli Lakshminarayana Reddy vs. V.Narayana Reddy (AIR 1976 SC 1672)*** and two judge bench in ***Ramesh Kumar Soni vs. State of Madhya Pradesh (AIR 2013 SC 1896)*** and the two judgment of this court referred to above, the decision in ***Shymesh v. State of Kerala (2014 KHC 3684)*** cannot be held to be good law.

15. Learned Public Prosecutor would submit that even if it is assumed that for registration of a case under Section 12(1)(b) of the Passports Act previous sanction of the Central Government is necessary, the proceedings against the petitioner may not be quashed since the facts of the case disclose commission of the offences under

Section 419, 465, 468 and 471 IPC. In response to this argument Sri. Ravi Sankar, learned counsel for the petitioner, submitted that the ingredients of the above offence under the Penal Code are present in the offence under Section12(1)(b) of the Passports Act and in such cases the accused cannot be prosecuted for those offences under the Penal Code. According to him the investigating officer has showed in the FIR the offences under the Indian Penal Code, which are cognizable offences, because the offence under Section 12(1)(b) is a non cognizable offence.

16. In the Passports Act there is no provision declaring the offences under Section 12 of the Act cognizable.

17. In ***Muhammed Hussain Panangadan vs. State of Kerala (2015 (4) KHC 141)*** a learned judge of this court held that the offence under Section 12(1)(b) of the Passports Act is a non cognizable offence and the police cannot investigate into it except on the orders of the Magistrate having jurisdiction in view of Section 155(2) Cr.P.C. It was not disputed that the offence under Section 12(1)(b) of the Passports Act is a non cognizable offence "as envisaged in the Code of Criminal Procedure Code." The learned Judge also took the same view, the reason for which is given in paragraph 7 of the judgment:

"So going by Part II Classification of Offences

> Against Other Laws of 1st Schedule of the Cr.P.C, as the offence under Section12(1)(b) of the Passports Act, 1967 is a non-cognizable offence, as it is an offence of punishment with imprisonment for less than three years etc".

18. In the second list in the first schedule to the Code of Criminal Procedure an offence against any law other than the Penal Code is shown as a non cognizable offence if it is punishable with imprisonment for less than three years or with fine only. Section 2(c) of the Code defines cognizable offence as an offence for which a police officer may in accordance with the first schedule of the Code or under any other law for the time being in force arrest an accused without warrant. Even if an offence is not shown as cognizable offence or a police officer is not empowered to arrest without a warrant for an offence in a statute other than the Indian Penal Code, it is a cognizable offence if it is punishable with imprisonment for three years. From the definition of cognizable offence given in the Code it should be understood that if an offence is punishable with imprisonment for less than three years under any law other than the Indian Penal Code, it is a cognizable offence if the police is empowered to arrest the accused without warrant. This question was considered by the Nagpur High

Court in ***Maganlal Bagti and Others vs. Emperor (AIR 1934 Nag. 71)***. The court observed :

> "The words "or under any law for the time being in force" in Section 4(e), Criminal Procedure Code, (of 1898) have reference to such offences which are punishable with imprisonment for less than three years, but are specified as offences for which the police may arrest without a warrant, that is offences which but for the special provision would not under the Criminal Procedure Code be cognizable offences."

So if the Passports Act provides that for the offence under Section 12(1)(b) of the Act police may arrest the accused without warrant, it is a cognizable offence.

19. The punishment provided for the offence under Section 12 (1)(b) of the Passports Act is imprisonment for a term which may extend to two years or with fine which may extend to Rs.5,000/- or with both. Unless it is provided in the Act that the police may without warrant arrest the person who commits the offence under Section 12(1)(b) of the Act, it is not a cognizable offence.

20. Section 13 of the Passports Act reads:

> (1) Any officer of customs empowered by a general or special order of the Central Government in this behalf and any [officer of police or emigration officer] not below the rank of a sub-inspector may arrest without warrant any person against whom a reasonable suspicion exists that he has committed any offence punishable under Section 12 and shall, as soon as may be, inform him of the grounds for such arrest.
>
> (2) Every officer making an arrest under this section shall, without unnecessary delay, take or send the person arrested before a magistrate having jurisdiction in the case or to the officer in charge of the nearest police station and the provisions of [section 57 of the Code of Criminal Procedure, 1973 (2) of 1974)], shall, so far as may be, apply in case of any such arrest.

21. Sri.Ravi Sankar submits that merely because a police officer has been empowered to arrest without warrant for the offence under Section 12 of the Passports Act they do not become cognizable offences since the Act does not declare them cognizable offences. My

attention is drawn to Section 42 Cr.P.C.

22. Arrest is a step in investigation into a cognizable offence, ordinarily. But the law permits arrest of a person in non cognizable offences and for purposes other than investigation also.

Section 41 (a)(b) and (ba) Cr.P.C – arrest for cognizable offences.

Section 42(1) Cr.P.C – arrest in non cognizable offences.

Section 151 Cr.P.C – arrest on knowing about a design to commit cognizable offence.

(Clauses (c) to (i) in Section 41(1) also may be noticed).

The arrest under Clauses(a),(b) and (ba) Cr.P.C is part of investigation. The arrest under Section 42(1) Cr.P.C is for the specific purpose of ascertaining the name or address of the accused. The arrest under Section 151 Cr.P.C is to prevent commission of cognizable offences.

The provision in Section 202 Motor Vehicles Act is another example.

For the purpose of this case arrest in connection with commission of offences alone is relevant. In the case cognizable offences arrest is not for any specified purpose, but in the case of non cognizable offence it is for some specified purpose. The arrest authorised by Section 13 of the Passports Act is not for any specified purpose.

23. Under Section 13 only a police officer not below the rank of a Sub Inspector can arrest the accused without warrant. It means that any and every police officer cannot effect arrest without a warrant. When only a certain class of police officers are empowered to arrest, is the offence a cognizable offence. This was considered by the Supreme Court in ***State of Gujarat and another vs. Lal Singh Kishan Singh (AIR 1981 SC 368).*** The provision which came up for interpretation in that case was Section 6 of the Bombay Prevention of Gambling Act (4 of 1887). Under the Act a person who commits an offence under Section 4 of the Act is punishable with imprisonment which may extend to two years and with fine. Section 6 of the Act runs as follows:

> [(I)] It shall be lawful for a police officer -
>
> (i) [in any area for which a Commissioner of Police has been appointed] not below the rank of a * * Sub Inspector and either empowered by general order in writing or authorised in each case by special warrant issued by the Commissioner of Police, and
>
> (ii) elsewhere not below the rank of Sub-Inspector of Police authorised by special warrant issued in each case [by a District Magistrate or Sub-Divisional Magistrate or by Taluka Magistrate

specially empowered by the State Government in this behalf or by] a [Superintendent of Police] of by an Assistant or Deputy Superintendent of Police especially empowered by [the [State Government] in this behalf, [and]

(iii) without prejudice to the provision in clause (ii) above, in such other area as the State Government may, by notification in the Official Gazette, specify in this behalf, not below the rank of a Sub-Inspector and empowered by general order in writing issued by the District Magistrate]

(a) to enter, with the assistance of such persons as may be found necessary, by night or by day, and by force, if necessary, any house, room or place which he has reason to suspect is used as a common gaming-house,

(b) to search all parts of the house, room or place which he shall have so entered when he shall have reason to suspect that any instruments of gaming are concealed therein, and also the persons whom he shall find therein whether such persons

are then actually gaming or not,

(c) to take into custody and bring before a Magistrate all such persons,

(d) to seize all things which are reasonably suspected to have been used or intended to be used for the purpose of gaming, and which are found therein:

Provided that no officer shall be authorised by special warrant unless the Commissioner of Police, the Magistrate, [the Superintendent of Police] or Assistant or Deputy Superintendent of Police concerned is satisfied, * * * * upon making such inquiry as he may think necessary, that there are good grounds to suspect the said house, room or place to be used as a common gaming house]

[(2) Notwithstanding anything in any law for the time being in force, no search made under this section shall be deemed illegal by reason only of the fact that the witnesses (if any) of the search were not inhabitants of the locality in which the house, room or place searched is situate.]

24. The Supreme Court in Lal Singh Kishan Singh's case (supra) reiterated the dictum laid down in its earlier decision in ***Union of India vs. IC Lala (AIR 1973 SC 2204)*** that the words a police officer appearing in the definition of cognizable offence in the Code does not mean any and every police officer. Even if only a certain class of police officers are empowered to arrest without warrant, the offence is a cognizable offence.

25. Under 6 of the Bombay Prevention of Gambling Act though a police officer of and above the rank of a Sub Inspector may arrest an accused, it may be done only under a warrant issued by the superior police officers mentioned in the Section. In other words, without a warrant the former cannot arrest; a warrant is necessary. The Supreme Court held that if a superior officer is empowered to authorise a subordinate officer to arrest a person, the former officer himself can do it. That is sufficient to satisfy the requirements of the definition of cognizable offence. The apex court held that the offence under Section 4 of the Bombay Prevention of Gambling Act is a cognizable offence. The decision in ***Muhammed Hussain Panangadan vs. State of Kerala*** (supra) is per incuriam.

26. To recapitulate, mere absence of declaration in a statute that an offence under it is cognizable is no reason to hold that that offence

is non cognizable. The phrase 'or under any law for the time being in force' used in Section 2(c) Cr.P.C refers to offences which are punishable with imprisonment for less than three years, but for which police have been empowered to arrest without warrant because all offences punishable with imprisonment for three years and above are cognizable offences as specified in list 2 in Schedule 1 Cr.P.C. Even if only a class of police officers has been empowered to arrest without warrant for an offence under an Act which is punishable with imprisonment for less than three years, it is a cognizable offence. The offence under Section 12(1)(b) of the Passports Act, or for that matter any offence under Section 12, is a cognizable offence because Section 13 of the Act empowers police officers of and above the rank of Sub Inspectors to arrest without warrant. For the purpose of Section 15 of the Act institution of prosecution takes place only when cognizance is taken by the court having jurisdiction. Sanction of the Central Government contemplated by the Section is necessary only at the time cognizance is taken. For registration of case or investigation sanction is not required.

In the result, this Crl.M.C is dismissed.

K.ABRAHAM MATHEW
JUDGE

pm