1955

October 31

MATAJOG DOBEY

v.

H. C. BHARI

(WITH CONNECTED APPEAL)

[S. R. DAS, ACTING C.J., VIVIAN BOSE, JAGANNADHADAS, JAFER IMAM and CHANDRASEKHARA AIYAR JJ.]

Constitution of India, Art. 14—Criminal Procedure Code (Act V of 1898), s. 197—Whether ultra vires *the Constitution—Sanction under s. 197—Reasonable connection between the act and discharge of Official duty—Need for sanction—When to be considered—Power conferred or duty imposed—Implies power of employing all means for execution thereof.*

In pursuance of a search warrant issued under s. 6 of the Taxation on Income (Investigation Commission) Act, 1947 authorising four Officials to search two premises in Calcutta, they went there and forcibly broke open the entrance door of a flat in one case and the lock of the door of a room in the other case. On being challenged by the darwan and the proprietor of the respective premises they were alleged to have tied the darwan with a rope, causing him injuries and to have assaulted the proprietor mercilessly with the help of two policemen and kept him in a lock up for some hours. Two separate complaints—one by the darwan and the other by the proprietor—under ss. 323, 342, etc., of the Indian Penal Code were instituted before two different Magistrates. The common question for determination in both the complaints was whether under the circumstances sanction was necessary under s. 197 of the Code of Criminal Procedure.

Held that sanction was necessary as the assault and the use of criminal force related to the performance of the official duties of the accused within the meaning of s. 197 of the Code of Criminal Procedure.

Art. 14 does not render s. 197 of the Code of Criminal Procedure *ultra vires* as the discrimination on the part of the Government to grant sanction against one public servant and not against another is based on a rational classification.

A discretionary power is not necessarily a discriminatory power and abuse of power is not easily to be assumed where the discretion is vested in the Government and not in a minor official.

In the matter of grant of sanction under s. 197 of the Code of Criminal Procedure, the offence alleged to have been committed by the accused must have something to do, or must be related in some manner, with the discharge of official duty. In other words there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the

1955

Matajog Dobey v. *H. C. Bhari*

accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

The need for sanction under s. 197 of the Code of Criminal Procedure is not necessarily to be considered as soon as the complaint is lodged and on the allegations therein contained. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry, or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction. Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case.

Where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution, because it is a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command.

Gill and another v. *The King,* (1948) L.R. 75 I.A. 41, *Hori Ram Singh* v. *The Crown,* (1939) F.C.R. 159, 178, *Albert West Meads* v. *The King,* (1948) L.R. 75 I.A. 185, *Lieutenant Hector Thomas Huntley* v. *The King-Emperor,* (1944) F.C.R. 262, *Shreekantiah Ramayya Munipalli* v. *The State of Bombay,* (1955) 1 S.C.R. 1177, *Amrik Singh* v. *The State of PEPSU,* (1955) 1 S.C.R. 1302, *Sarjoo Prasad* v. *The King-Emperor,* (1945) F.C.R. 227, *Jones* v. *Owen,* (1823) L.J. Reports (K.B.) 139 and *Hatton* v. *Treeby,* (1897) L.R. 2 Q.B.D. 452, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 67 and 68 of 1954.

Appeal by Special Leave from the Judgment and Order dated the 4th July 1952 of the Calcutta High Court in Criminal Revision No. 312 of 1952 arising out of the Order dated the 12th March 1952 of the Court of Presidency Magistrate at Calcutta in Case No. C/2867 of 1950.

S. C. Isaacs (*C. P. Lal* with him) for the appellant in both appeals.

C. K. Daphtary, Solicitor-General of India (*Porus A. Mehta* and *P. G. Gokhale* with him) for the respondents in both appeals.

1955

Matajog Dobey
v.
H. C. Bhari

1955. October 31. The Judgment of the Court was delivered by

CHANDRASEKHARA AIYAR J.—These appeals come before us on special leave to appeal granted under article 136 of the Constitution against two orders of the Calcutta High Court dismissing Criminal Revision Petitions Nos. 559 of 1951 and 312 of 1952 preferred by the appellants respectively.

In Criminal Revision Petition No. 559 of 1951, the High Court (Harries, C.J. and Banerjee, J.) confirmed an order made by a Presidency Magistrate discharging the accused on the ground of want of sanction under section 197, Criminal Procedure Code.

In Criminal Revision Petition No. 312 of 1952, Lahiri and Guha, JJ. set aside an order made by another Presidency Magistrate that no sanction was required and they quashed the proceedings against the accused.

The incidents which gave rise to the two complaints are closely inter-related and can be set out briefly. In connection with certain proceedings pending before the Income Tax Investigation Commission it was found necessary to search two premises—17, Kalakar Street and 36, Armenian Street to inspect, take copies and secure possession of certain books, papers and documents believed to be in them. A warrant was issued by the Commission for this purpose in favour of four persons, namely, H. C. Bhari, A. D. De, A. K. Bose and P. Mukherjee, to carry out the search.

The authorised officials went to the Kalakar Street premises, third floor on the morning of December 1950. Matajog Dobey, (Appellant in Criminal Appeal No. 67), the darwan of Kashiram Agarwala, says that when he found them forcibly breaking open the entrance door of the flat he challenged them and requested them to desist. They paid no heed to him, broke open the door, went inside and interfered with some boxes and drawers of tables. They tied him with a rope and assaulted him causing injuries. On these facts, he filed a complaint on 27-12-1950 against H.C. Bhari and three others (names unknown) under sections 323, 341, 342 and 109, Indian Penal Code.

1955

Matajog Dobey v. *H. C. Bhari*

Chandrasekhara Aiyar J.

The four officials and some policemen raided the Armenian Street premises on the evening of 26-12-1950. Nandram Agarwala (father of Kashiram Agarwala) came to the place and found that they had forcibly opened the lock of the door of the room in which there were several books and papers, which they were collecting and packing into bundles for removal. He protested, pointed out that their actions were illegal and oppressive, and he wanted a proper search list to be prepared and proper receipts to be given to him for the books and documents sought to be seized and removed. Thereupon, two policemen held him down and he was assaulted mercilessly, kicked, dragged downstairs, put in a police van, and taken to the Burra Bazar thana, where he was assaulted again before being sent to the hospital. He was brought back and kept in the lock up till midnight when he was released on bail. Setting out these facts, he lodged a complaint against the four officials, other subordinates and police officers whose names he did not then know but could supply later. The offences mentioned in the complaint are sections 323, 342 and 504, Indian Penal Code. Later, the names of two police officers were given—Bibhuti Chakravarti and Nageswar Tiwari.

The two complaints were sent over for judicial inquiry to two different magistrates. On 21-2-1951, the magistrate held on Agarwala's complaint that a *prima facie* case had been made out under section 323 against all the four accused and under section 342 against the two policemen. On this report, summonses were directed to issue under section 323 against all the accused. On 1-5-1951, two prosecution witnesses were examined in chief and the case stood adjourned to 22-5-1951. It was on this latter date that the 1st accused Bhari filed a petition, taking the objection of want of sanction under section 197, Criminal Procedure Code. The objection was upheld and all the accused discharged on 31-5-1951. Nandram Agarwala went up to the High Court in revision, but the order of the Presidency Magistarte was affirmed.

In Matajog Dobey's complaint, after the termina-

tion of the inquiry, process was issued only against Bhari under sections 323 and 342, Indian Penal Code for 22-12-1951. After some adjournments, accused filed on 26-2-1952 a petition as in the other case raising the same objection. The magistrate on whose file the case was pending overruled the objection and directed that the case should proceed. Accused Bhari took the matter on revision to the High Court and succeeded.

In Nandram Agarwala's case (Criminal Revision Petition No. 559 of 1951) Chief Justice Harries and Banerjee, J. held that the test formulated by the Privy Council in *Gill's case*(1) applied and that on a fair reading of the complaint, bereft of exaggerations and falsehoods, the officers could reasonably claim that what they did was done by them in the exercise of their official duty. In Matajog Dobey's case (Criminal Revision Petition No. 312 of 1952), the learned Judges (Lahiri and Guha, JJ.) came to the same conclusion in these words: "From the nature of the allegations therefore against the petitioner, it is abundantly clear that there was something in the acts alleged against him which attached them to the official character of the petitioner, that is, which attached them to his official character in holding the search".

Mr. Isaacs, learned counsel for the appellants in the two appeals, challenged the soundness of these conclusions and advanced three categorical contentions on their behalf. Firstly, an act of criminal assault or wrongful confinement can never be regarded as an act done while acting or purporting to act in the discharge of official duty; secondly, that in a case where the duty is clearly defined by statute and warrant of authority, such acts could never come within the scope of employment; and thirdly, that in any case it was the duty of the court to allow the prosecution to proceed and not stifle it *in limine*. He also urged that as the entry on the 23rd December was into a wrong place, P-17, Kalakar Street, and not 17, Kalakar Street which was the authorised premises, the search was illegal from the commencement. He raised the

(1) [1948] L.R. 75 I.A. 41.

1955

Matajog Dobey v. *H. C. Bhari*

Chandrasekhara Aiyar J.

constitutional point that section 5(1) of the Taxation on Income (Investigation Commission) Act (XXX of 1947) and section 197, Criminal Procedure Code were *ultra vires*, as they were discriminatory in their nature, and offended article 14 of the Constitution.

In the course of his arguments, he referred to section 6 sub-sections (7) and (9) of the Taxation on Income (Investigation Commission) Act (XXX of 1947) and rule 10 and the search warrant that was issued under them. His main argument was that there was no power conferred by statute or under common law on the authorised officials to assault or use force in the execution of their duty and any such acts must therefore be deemed to be entirely outside the scope of their employment. He drew our attention to the sections of the Criminal Procedure Code relating to searches and quoted two old English cases to reinforce this position.

The search warrant is in these terms :

"Warrant of Authorisation under sections 6(7) and 6(9) and Rule 8.

Taxation on Income (Investigation Commission) Act, 1947.

Whereas information has been laid before the Commission and on the consideration thereof the Commission has been led to believe that certain books, documents and papers, which are or may be relevant to proceedings under the above Act in the cases compendiously known as the S. Jhabbarmull group (R. C. No. 313) and connected cases have been kept and are to be found in (i) the third floor, 17, Kalakar Street, Calcutta (ii) 47, Khengraputty Street, Calcutta-7, and (iii) the second floor and adjoining rooms, 36, Armenian Street, Calcutta, compound, offices and out-houses or other places in that locality.

This is to authorise and require you,

Sri H. C. Bhari,

Authorised Official,

Income-tax Investigation Commission,

(a) to enter and search with such assistance of police officers as may be required, the said premises or any other place or places where you may have

reason to believe that such books, documents or papers may be found ;

(b) to place identification marks on such books, documents and papers as may be found and as you may consider relevant to the proceedings aforesaid and to make a list thereof together with particulars of the identification marks ;

(c) to make copies or extracts from such books, documents and papers ;

(d) to seize such books, documents and papers and take possession thereof ; and

(e) to exercise all other powers and duties under the said sections and the Rules relating thereto".

Straightaway, it may be conceded that the warrant set out above specifies precisely the scope of the duties entrusted to the authorised officials. Whether they took any policemen with them even at the commencement or whether they were only sent for when resistance was offered is not clear. This, however, does not matter as the warrant authorises police assistance at the search.

The version of the complainants as to what happened at the search is set out in the two complaints. The story of the accused is found in the petitions filed by Bhari urging the objection under section 197, Criminal Procedure Code. Details about the occurrences were also elicited at the two judicial enquiries. There are two medical certificates specifying the injuries found on Nandram Agarwala and Matajog Dobey.

The minor contentions may be disposed of at the outset. Even if there was anything sound and substantial in the constitutional point about the *vires* of section 5(1) of the Act, we declined to go into it as it was not raised before the High Court or in the grounds of the petition for special leave to appeal. Article 14 does not render section 197, Criminal Procedure Code *ultra vires* as the discrimination is based upon a rational classification. Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. It was argued that

1955

Matajog Dobey
v.
H. C. Bhari

Chandrasekhara Aiyar J.

section 197, Criminal Procedure Code vested an absolutely arbitrary power in the government to grant or withhold sanction at their sweet will and pleasure, and the legislature did 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 an act done or purporting to be done by the public servant in the discharge of his official duties. No one can take such proceedings without such sanction. If the Government gives sanction against one public servant but declines to do so against another, then the government servant against whom sanction is given may possibly complain of discrimination. But the petitioners who are complainants cannot be heard to say so for there is no discrimination as against any complainant. It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where the discretion is vested in the government and not in a minor official. Further, we are not now concerned with any such question. We have merely to see whether the court could take cognisance of the case without previous sanction and for this purpose the court has to find out if the act complained against was committed by the accused while acting or purporting to act in the discharge of official duty. Once this is settled, the case proceeds or is thrown out. Whether sanction is to be accorded or not is a matter for the government to consider. The absolute power to accord or withhold sanction conferred on the government is irrelevant and foreign to the duty cast on the court, which is the ascertainment of the true nature of the act.

The objection based on entry into the wrong premises is of no substance; it is quite probable that the warrant specified 17 instead of P. 17 by a *bona fide* mistake or error; or it may be that the party made an honest mistake. As a matter of fact, the account books, etc., were found in P. 17, the premises raided.

Slightly differing tests have been laid down in the

decided cases to ascertain the scope and the meaning of the relevant words occurring in section 197 of the Code; "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". But the difference is only in language and not in substance. The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What we must find out is 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 the official duty, though possibly in excess of the needs and requirements of the situation. In *Hori Ram Singh* v. *The Crown*(1), Sulaiman, J. observes:

"The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction".

The interpretation that found favour with Varadachariar, J. in the same case is stated by him in these terms at page 187: "There must be something in the nature of the act complained of that attaches it to the official character of the person doing it". In affirming this view, the Judicial Committee of the Privy Council observe in *Gill's case*(2) "A public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to

(1) [1939] F.C.R. 159, 178. (2) [1948] L.R. 75 I.A. 41.

1955

Matajog Dobey v. *H. C. Bhari*

Chandrasekhara Aiyar J.

lie within the scope of his official duty....The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office". *Hori Ram's case*(1) is referred to with approval in the later case of *Lieutenant Hector Thomas Huntley* v. *The King-Emperor*(2) but the test laid down that it must be established that the act complained of was an *official* act appears to us unduly to narrow down the scope of the protection afforded by section 197 of the Criminal Procedure Code as defined and understood in the earlier case. The decision in *Meads* v. *The King*(3) does not carry us any further; it adopts the reasoning in *Gill's case*(4).

There are two cases of this Court to which reference may be made here. In *Shreekantiah Ramayya Munipalli* v. *The State of Bombay*(5), Bose, J. observes as follows: "Now it is obvious that if section 197 of the Code of Criminal Procedure is construed too narrowly, it can never be applied, for of course, it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act can be performed in the discharged of official duty as well as in dereliction of it. The section has content and its language must be given meaning". The question of previous sanction also arose in *Amrik Singh* v. *The State of PEPSU*(6). A fairly lengthy discussion of the authorities is followed up with this summary: "If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under section 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required".

The result of the foregoing discussion is this: There must be a reasonable connection between the act and the discharge of official duty; the act must bear such

(1) [1939] F.C.R. 159, 178.
(2) [1944] F.C.R. 262.
(3) [1948] L.R. 75 I.A. 185.
(4) [1948] L.R. 75 I.A. 41.
(5) [1955] 1 S.C.R. 1177, 1186.
(6) [1955] 1 S.C.R. 1302, 1307, 1308.

relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

Is the need for sanction to be considered as soon as the complaint is lodged and on the allegations therein contained ? At first sight, it seems as though there is some support for this view in *Hori Ram's case* and also in *Sarjoo Prasad* v. *The King-Emperor*(1). Sulaiman, J. says that as the prohibition is against the institution itself, its applicability must be judged in the first instance at the earliest stage of institution. Varadachariar, J. also states that the question must be determined with reference to the nature of the allegations made against the public servant in the criminal proceeding. But a careful perusal of the later parts of their judgments shows that they did not intend to lay down any such proposition. Sulaiman, J. refers (at page 179) to the prosecution case as disclosed by the complaint or the *police report* and he winds up the discussions in these words : "Of course, if the case as put forward fails or the defence establishes that the act purported to be done is in execution of duty, the proceedings will have to be dropped and the complaint dismissed on that ground". The other learned Judge also states at page 185, "At this stage we have only to see whether the case alleged against the appellant or *sought. to be proved* against him relates to acts done or purporting to be done by him in the execution of his duty". It must be so. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty ; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction. Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case.

We are not prepared to concede in favour of the

(1) [1945] F.C.R. 227.

1955

Matajog Dobey v. *H. C. Bhari*

Chandrasekhara Aiyar J.

appellants the correctness of the extreme proposition advanced by Mr. Isaacs on their behalf that when obstruction is laid or resistance offered against an authorised and therefore lawful search, the officials conducting the search have no right to remove or cause to be removed the obstruction or resistance by the employment of reasonable force, and their remedy is only to resort to the police or the magistracy with a complaint. Such a view would frustrate the due discharge to the official duty and defeat the very object of the search, as the books, etc. might be secreted or destroyed in the interval; and it would encourage obstruction or resistance even to lawful acts. It may be that more than reasonable force is used to clear the obstruction or remove the resistance, but that would be a fit subject-matter for inquiry during the proceedings; it would not make the act of removal improper or unlawful. It is a matter for doubt if Chapter V and VII of the Criminal Procedure Code can be read as an exhaustive enumeration of all the powers of a search party. Anyhow, section 6, sub-section (9) of the Investigation Commission Act makes the provisions relating to searches applicable only "so far as they can be made applicable".

The two English cases relied on are scarcely of any help. In *Jones* v. *Owen*(1), a rather startling view was taken that a power to apprehend a person for a statutory offence did not include a power to move that person gently aside. *Hatton* v. *Treeby*(2) was a case where the Act of Parliament which created a new offence did not in itself provide for a power of detention of the offender.

Where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution. If in the exercise of the power or the performance

(1) [1823] L.J. Reports (KB) 139; 2 D. & R. 600.
(2) [1897] L.R. 2 Q.B.D. 452.

of the official duty, improper or unlawful obstruction or resistance is encountered, there must be the right to use reasonable means to remove the obstruction or overcome the resistance. This accords with commonsense and does not seem contrary to any principle of law. The true position is neatly stated thus in Broom's Legal Maxims, 10th Ed., at page 312: "It is a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command".

Let us however assume that Mr. Isaacs is right in his contention. Still, it can be urged that the accused could claim that what they did was in the discharge of their official duty. The belief that they had a right to get rid of the obstruction then and there by binding down the complaints or removing them from the place might be mistaken, but, surely, it could not be said that their act was necessarily *mala fide* and so entirely divorced from or unconnected with the discharge of their duty that it was an independent act maliciously done or perpetrated. They could reasonably claim that what they did was in virtue of their official duty, whether the claim is found ultimately to be well-founded or not.

Reading the complaints alone in these two cases, even without the details of facts as narrated by the witnesses at the judicial inquiries, it is fairly clear that the assault and use of criminal force, etc. alleged against the accused are definitely related to the performance of their official duties. But taken along with them, it seems to us to be an obvious case for sanction. The injuries—a couple of abrasions and a swelling on Nandram Agarwala and two ecchymosis on Matajog—indicate nothing more than a scuffle which is likely to have ensued when there were angry protests against the search and a pushing aside of the protestors so that the search may go on unimpeded.

Mr. Isaacs finally pointed out that the fourth accused Nageswar Tewari was a constable and the case should have been allowed to proceed against him at least. This question arises only in Nandram Agarwala's case. The Magistrate who dismissed the com-

1955

Matajog Dobey
v.
H. C. Bhari

Chandrasekhara Aiyar J.

plaint took the view that there was no use in proceeding against him alone, as the main attack was directed against the Income-Tax Officials. No such grievance was urged before the High Court and it is not raised in the grounds for special leave.

We hold that the orders of the High Court are correct and dismiss these two appeals.