

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 7425 of 2020

With

CRIMINAL MISC. APPLICATION (FOR STAY) NO. 1 of 2021

In

R/SPECIAL CRIMINAL APPLICATION NO. 7425 of 2020

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE GITA GOPI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

HARDIK BHARATBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR AJ YAGNIK(1372) for the Applicant(s) No. 1

NOTICE SERVED(4) for the Respondent(s) No. 2

MR MITESH AMIN PUBLIC PROSECUTOR WITH MR PRANAV TRIVEDI APP for the Respondent(s) No. 1

CORAM:HONOURABLE MS. JUSTICE GITA GOPI

Date : 01/12/2021

ORAL JUDGMENT

1. **Rule.** Mr. Pranav Trivedi, learned Additional Public Prosecutor waives service of notice of rule on behalf of respective parties. Respondent No.2 - original complainant is the Circle Officer, Aslali Division, Office of Mamlatdar, Daskroi, Ahmedabad.

2. The present petition has been filed under Article 226 of the Constitution of India and under section 482 of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C.") for quashing and setting aside the complaint being FIR No.II/325/2017, dated 19.12.2017 registered with Bopal Police Station, Dist.: Ahmedabad for the offences punishable under section 188 of IPC, charge-sheet, Criminal Case No.4708 of 2018 and the proceedings initiated pursuant thereto.

3. The petitioner is arraigned as accused no.3 along with other two accused namely Rajubhai Natvarbhai Patel - accused no.1 and Sureshbhai Narendrabhai Patel - accused no.2. It is alleged in the FIR that Rajubhai Natvarbhai Patel and Sureshbhai Narendrabhai Patel had requested permission to carry out rally, which was rejected by way of communication dated 10.12.2017.

3.1 On 11.12.2017, without taking any permission, the accused persons along with other persons including that of the petitioner had carried out rally in car and motorcycle at Bopal, Guma, Shilaj and Bhadaj area and

thereby violated the order promulgated by the Additional District Magistrate. Hence, the impugned FIR came to be lodged on 19.12.2017 with Bopal Police Station, Ahmedabad by respondent no.2 Circle Officer, Aslali Division, office of Mamlatdar, Daskroi, Ahmedabad upon receiving written order from the Mamlatdar of Daskroi after carrying out inquiry about the alleged incident.

3.2 Thereafter, on 14.05.2018, charge-sheet was filed by the investigating officer before the Court of learned Judicial Magistrate, First Class, Ahmedabad. The learned 6th Additional Civil Judge and Judicial Magistrate, First Class, Mirzapur, Ahmedabad has taken cognizance on the basis of the charge-sheet and the case been registered as Criminal Case No.4708 of 2018. Thereafter, it was transferred to the Court of learned 3rd Additional Senior Civil Court, at Ahmedabad in the month of July, 2020.

4. Mr. A.J.Yagnik, learned advocate for the petitioner, stated that the FIR is nothing but an abuse of process of law and is filed with ulterior motive. He submits that in order to take cognizance under Section 188 of IPC, learned Court below must satisfy the criteria of Section 195 of the Cr.P.C., more particularly section 195(1)(a)(i) of the Cr.P.C., and for the satisfying the same, there has to be a complaint by the public servant concerned or by some other public servant to whom he is

administratively subordinate. He states that in the present case instead of a complaint, an FIR is filed by the Circle Officer - respondent no.2 at the behest of Mamlatdar and subsequently the charge-sheet came to be submitted before the court below. Mr. Yagnik, therefore, stated that the cognizance taken on the basis of FIR and charge-sheet is itself not maintainable under section 188 of IPC without there being any complaint by the public servant concerned.

4.1 Mr. Yagnik stated that the learned Magistrate has taken cognizance on the basis of the police report and not on the basis of any complaint by the public servant concerned and therefore the trial itself is *void-ab-initio*, without jurisdiction and deserves to be quashed and set aside. He stated that the person who is authorized to file a complaint is not a good substitute to confer jurisdiction. It is stated by Mr. Yagnik that assuming without admitting that the Mamlatdar had power to sanction Circle Officer - respondent no.2 to register a complaint, but the Circle Officer has not moved any complaint before the learned Court below as envisaged under Section 195 Cr.P.C. and has rather chosen to register an FIR.

4.2 It is stated by Mr. Yagnik that, Section 195 Cr.P.C. does not permit delegation, or else the legislature would have made an express provision and therefore such delegation itself is without any authority, foundation, and

is arbitrary, discriminatory and illegal. Mr. Yagnik submits that by taking cognizance on the basis of a police report, the learned Court below has completely stultified procedure prescribed under the Cr.P.C. and thereby acting contrary to the mandate of Article 21 of the Constitution of India. He submits that the police authorities have wrongly registered the FIR. The prosecution has no affirmative evidence, which indicates that the petitioner had anything to do with the allegations levelled in the FIR and cognizance should not have been taken by the police authorities as well as by the learned Court below. He submits that the FIR is lodged only on the basis of conjecture and surmises and therefore the FIR and the subsequent proceedings thereof deserves to be quashed and set aside.

4.3 Mr. Yagnik further contended that *mens rea* is an essential ingredient to constitute offences under the IPC or under and other substantive law, which is absent from the allegations levelled in the FIR. He submits that the allegations, even if they taken at their face value and accepted in their entirety, do no *prima facie* constitute any offence or make out a case against the present petitioner and therefore, the FIR is bad in law. He submits that the ingredients of the offence, so alleged in the FIR, are not satisfied in order to make out a case against the present petitioner.

4.4 It is stated by Mr. Yagnik that when there are materials to indicate that a criminal proceeding is manifestly attended with *malafide* intention and maliciously instituted with an ulterior motive, the Court should not hesitate to exercise its jurisdiction under Section 482 Cr.P.C. to quash the proceedings, as settled by the Hon'ble Supreme Court in plethora of judgments.

4.5 In support of his submissions, Mr. Yagnik has relied upon the following judgments: (1) **Basir-ul-Huq Vs. State of West Bengal**, reported in 1953 AIR SC 293 (ii) **Krishna Tukaram Jadhav Vs. Secretary to the Chief Minsiter, Bombay State & Ors.**, reported in 1955 AIR (Bom.) 315 (iii) **Daulat Ram Vs. State of Punjab**, reported in 1962 AIR (SC) 1206 (iv) **State of Karnataka Vs. Hemareddy Alias Vemareddy And Another**, reported in 1981 (2) SCC 185 (v) **State of U.P. Vs. Suresh Chandra Srivastava**, reported in 1984 (3) SCC 92 (vi) **State of U.P. Vs. Mata Bhikh & Ors.**, reported in 1994 (4) SCC 95 (vii) **Ramji Bhikha Koli Vs. State of Gujarat**, reported in 1999 (1) GLH 203 (viii) **M.S. Ahlawat Vs. State of Haryana**, reported in 2000 (1) 278 (ix) **C. Muniappa Vs. State of Tamil Nadu**, reported in 2010 (9) SCC 567 (x) **Saloni Arora Vs. State (NCT of Delhi)**, reported in 2017 (3) SCC 286 (xi) **Govardhankumar Thakoredas Asrani Vs. State of Gujarat**, reported in 2018 (1) GLH 63 (xii) **Nikhilbhai Kesubhai Patel Vs. State of Gujarat**, in

Criminal Misc. Application No.8451 of 2018. (xiii) **Jeevandham Vs. State Represented by Inspector of Police**, reported in **2019 (1) MadL.J. (Cri.) 36** (xiv) **Mohmadmohsin Mohmadirfan Chhalotiya Vs. State of Gujarat**, reported in **2019 (1) GLH 693** (xv) **Kandhal Sarman Jadeja Vs. State of Gujarat**, reported in **2019 (2) GLR 1460** (xvi) **HLA Shwe & Ors. Vs. State of Maharashtra** in Cri. Application (Apl.) No.453 of 2020 (xvii) **Dr. Apurva Ghiya Vs. State of Chhattisgarh**, in Writ Petition (Cr.) No.310 of 2020 (xviii) **Parshottambhai Odhavjibhai Solanki Vs. State of Gujarat** in Criminal Misc. Application No.31264 of 2016 (xix) **Shahidkhan Vahidkhan Pathan Vs. State of Gujarat** in CRMA No.17473 of 2020 (xx) **Suresh Ramanbhai Patel Vs. State of Gujarat** in CRMA No.5434 of 2017 (xxi) **Lilaben Danjibhai Makwana Vs. State of Gujarat** in CRMA No.6759 of 2018.

5. Mr. Mitesh Amin, learned Public Prosecutor with Mr. Pranav Trivedi, learned APP for the respondent State has opposed to the grant of present petition by stating that, on receiving written order from the Mamlatdar, the respondent no.2 - Circle Officer, conducted proper inquiry and thereafter the FIR has been lodged against the accused. Permission to organize rally was rejected, despite that, the accused have organized rally with others and thereby violated the order promulgated by the Additional District Magistrate.

5.1 Mr. Amin submits that, the provisions of Section 195 Cr.PC are limited only to the prosecution of certain offences specified therein and not the other distinct offences. He submits that the provision of section 195 Cr.P.C. deals with the prosecution for contempt of lawful authority of the public servants, for the offences against the public justice and for the offences relating to the documents given in evidence. He submits that in such cases, there is a bar against the Court, taking cognizance of the offences, except on the written complaint of the public servant or the Court, as the case may be. The provisions are exception to the general rule that any person having knowledge of the commission of an offence may set the criminal law in motion, whether he is personally interested and affected or not. He submits that there is nothing in the section to suggest that the prosecution in respect of the other distinct offences based on the same facts could not be instituted except otherwise in compliance with the provisions of that section.

5.2 Mr. Amin submitted that course would be open to the Investigating Officer to even proceed further to investigate for further evidence to find out whether any other offence was committed during the alleged act. Mr. Amin submitted that administratively superior officers prerogative to file the complaint cannot be scuttle and

therefore prayed for reconsideration of such liberty in contemplation of the provision of limitation in Cr.P.C.

6. Before adverting to the rival submissions canvassed on either side, it would be appropriate to deal with the relevant provisions of law.

6.1 Clause (a) of sub-section (1) of Section 195 Cr.P.C. reads as under:

“195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.-

(1) No Court shall take cognizance-

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;...”

6.2 Section 195 Cr.P.C. is a sufficient protection provided, which are in the mandatory form and non-compliance of it would vitiate the prosecution. Sub-section (1)(a)(i)(iii) of Section 195 Cr.P.C. provides that

the offence which are punishable under Sections 172 to 188 of the IPC would be taken cognizance by the Court only on a complaint in writing to that Court by public servant concerned or of some other public servant to whom he is administratively subordinate. Section 2(d) of Cr.P.C. defines the term 'complaint' which means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Section 2(r) of Cr.P.C. given the meaning of police report, which says, a report forwarded by a police officer to a Magistrate under sub-section(2) of section 173 Cr.P.C. So the law under Section 195 Cr.P.C. provides for a complaint in writing before the Court, for the Court to take cognizance of the matter; filing of F.I.R. by the police for the offence punishable under Sections 172 to 188 of IPC before the Police Station is bad in law.

7. The Hon'ble Supreme Court while dealing with the provisions of Section 195 Cr.P.C. in *Saloni Arora Vs. State (Govt. Of NCT of Delhi)* (supra) referring to the case of **Daulat Ram Vs. State of Punjab** reported in **AIR 1962 SC 1206**, has observed in para-9 and 10 as under:

"9. As rightly pointed out by the learned counsel for the parties on the strength of law laid down by this Court in Daulat Ram v. State of Punjab that in order to prosecute

an accused for an offence punishable under Section 182 IPC, it is mandatory to follow the procedure prescribed under Section 195 of the Code else such action is rendered void ab initio.

10. It is apposite to reproduce the law laid down by this Court in the case of Daulat Ram (supra) which reads as under:

There is an absolute bar against the Court taking seisin of the case under S.182 I.P.C. except in the manner provided by S.195 Crl.P.C. Section 182 does not require that action must always be taken if the person who moves the public servant knows or believes that action would be taken. The offence under S.182 is complete when a person moves the public servant for action. Where a person reports to a Tehsildar to take action on averment of certain facts, believing that the Tehsildar would take some action upon it, and the facts alleged in the report are found to be false, it is incumbent, if the prosecution is to be launched, that the complaint in writing should be made by the Tehsildar, as the public servant concerned under S.182, and not leave it to the police to put a charge-sheet. The complaint must be in writing by the public servant concerned. The trial under S.182 without the

Tehsildar's complaint in writing is, therefore, without jurisdiction ab initio."
(Emphasis supplied)

7.1 This Court in case of Govardhankumar Thakoredas Asrani Vs. State of Gujarat (supra), in para (48), while referring to the case of C. Muniappan & Ors. vs. State of Tamil Nadu (supra), has observed about the ratio laid down in various judgments in connection to the provision of section 195 Cr.P.C., which read as under:

"27. ...

28. Section 195(1)(a)(i) Cr.PC bars the court from taking cognizance of any offence punishable under Section 188 IPC or abetment or attempt to commit the same, unless, there is a written complaint by the public servant concerned for contempt of his lawful order. The object of this provision is to provide for a particular procedure in a case of contempt of the lawful authority of the public servant. The court lacks competence to take cognizance in certain types of offences enumerated therein. The legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by persons actuated by malice, ill-will or frivolity of disposition and to save the time of the criminal courts being wasted by endless prosecutions. This provision has been carved out as an exception to the general rule contained under Section 190 Cr.PC that any person can set the law in motion by making a complaint, as it prohibits the court from taking cognizance of certain offences until and unless a complaint has been made by some particular authority or person. Other provisions in the Cr.PC like sections 196 and 198 do not lay down any rule of procedure,

rather, they only create a bar that unless some requirements are complied with, the court shall not take cognizance of an offence described in those Sections. (vide Govind Mehta v. The State of Bihar, AIR 1971 SC 1708; Patel Laljibhai Somabhai v. The State of Gujarat, AIR 1971 SC 1935; Surjit Singh & Ors. v. Balbir Singh, (1996) 3 SCC 533; State of Punjab v. Raj Singh & Anr., (1998) 2 SCC 391; 2 K. Vengadachalam v. K.C. Palanisamy & Ors., (2005) 7 SCC 352; and Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr., AIR 2005 SC 2119).

29. *The test of whether there is evasion or noncompliance of Section 195 Cr.PC or not, is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of a public servant is required. In Basir-ul-Haq & Ors. v. The State of West Bengal, AIR 1953 SC 293; and Durgacharan Naik & Ors v. State of Orissa, AIR 1966 SC 1775, this Court held that the provisions of this Section cannot be evaded by describing the offence as one being punishable under some other sections of IPC, though in truth and substance, the offence falls in a category mentioned in Section 195 Cr.PC. Thus, cognizance of such an offence cannot be taken by mis-describing it or by putting a wrong label on it.*

30. *In M.S. Ahlawat v. State of Haryana & Anr., AIR 2000 SC 168, this Court considered the matter at length and held as under :*

"....Provisions of Section 195 CrPC are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that section."

(Emphasis added)

31. *In Sachida Nand Singh & Anr. v. State of*

Bihar & Anr., (1998) 2 SCC 493, this Court while dealing with this issue observed as under :

"7. ..Section 190 of the Code empowers "any magistrate of the first class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the court with a complaint to that extent curtailed. It is a well recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise." (Emphasis supplied)

32. In Daulat Ram v. State of Punjab, AIR 1962 SC 1206, this Court considered the nature of the provisions of Section 195 Cr.PC. In the said case, cognizance had been taken on the police report by the Magistrate and the appellant therein had been tried and convicted, though the concerned public servant, the Tahsildar had not filed any complaint. This Court held as under : "The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant, namely, the Tahsildar in this case. The trial was thus without jurisdiction ab initio and the conviction cannot be maintained. The appeal is, therefore, allowed and the conviction of the appellant and the sentence passed on him are set aside." (Emphasis added)

33. Thus, in view of the above, the law can be summarized to the effect that there must be a complaint by the public servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.PC are mandatory. Non-compliance of it would

vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction.

34. Learned counsel for the appellants have submitted that no charge could have been framed under Section 188 IPC in the absence of a written complaint by the officer authorised for that purpose, the conviction under Section 188 IPC is not sustainable. More so, it falsifies the very genesis of the case of the prosecution as the prohibitory orders had not been violated, no subsequent incident could occur. Thus, entire prosecution case falls.

35. Undoubtedly, the law does not permit taking cognizance of any offence under Section 188 IPC, unless there is a complaint in writing by the competent Public Servant. In the instant case, no such complaint had ever been filed. In such an eventuality and taking into account the settled legal principles in this regard, we are of the view that it was not permissible for the trial Court to frame a charge under Section 188 IPC. However, we do not agree with the further submission that absence of a complaint under Section 195 Cr.PC falsifies the genesis of the prosecution's case and is fatal to the entire prosecution case.

36. There is ample evidence on record to show that there was a prohibitory order; which had been issued by the competent officer one day before; it had been given due publicity and had been brought to the notice of the public at large; it has been violated as there is no denial even by the accused persons that there was no 'Rasta Roko Andolan'. Unfortunately, the agitation which initially started peacefully turned ugly and violent when the public transport vehicles

were subjected to attack and damage. In such an eventuality, we hold that in case the charges under Section 188 IPC are quashed, it would by no means have any bearing on the case of the prosecution, so far as the charges for other offences are concerned.”

7.2 In C. Muniappan (supra), two separate FIRs were registered. One under Section 147, 148, 149, 436 and 302 of the IPC and sections 3 and 4 of the Tamil Nadu Property (Prevention of Damage & Loss) Act, 1992, and another one for the offence punishable under Section 188 of the IPC. Both the FIRs were clubbed and a consolidated charge-sheet was filed. In that circumstances, a view was taken that the entire prosecution case could not have been discarded merely on the ground of improperly framing the charge under Section 188 of the IPC. The clubbing of both the FIRs did not cause any prejudice to any of the accused. In such circumstances, the Apex Court observed in para (36) that quashing of charge under Section 188 of the IPC, by no means, had any bearing on the case of the prosecution so far as the charges for the other offences were concerned.

8. Learned Public Prosecutor, Mr. Mitesh Amin, emphasized on the right of administrative superior authority to file complaint in writing. This Court need not delve into that aspect of the submission, as the question herein is about the maintainability of the FIR dated 19.12.2017 under Section 188 of the IPC. As per the

record, the charge-sheet was forwarded to 6th Additional Judicial Magistrate, Mirzapur Court, Ahmedabad (Rural) on 14.05.2018 with an allegation that three accused named in the charge-sheet, in spite of rejection of their request for carrying out a rally in the name of 'Patidar Samaj Kranti Rally' by the Mamlatdar, Daskroi vide communication at bearing No.M.A.G/Sangarsh rally/Manjuri/Vasi 29/17 dated 10.12.2017 and M.A.G/Sangarsh rally/Manjuri/Vasi 30/17 dated 10.12.2017 as also oral instructions by Police Inspector, Bopal in that regard, had carried out such rally from Ghuma Bus Stand, Taluka - Daskroi towards Vadaj Circle via Bopal Road, and had thereby alleged that they have violated the order promulgated by the Additional District Magistrate. No further allegations are made in the charge-sheet.

9. In **State of Punjab Vs. Raj Singh & Anr., 1998 CrLJ 1104**, the Supreme Court took the view that the statutory power of the police to investigate under the Cr.P.C. is not in any way controlled or circumscribed by section 195 Cr.P.C. The relevant observations is quoted herein below:

"We are unable to sustain the impugned order of the High Court quashing the F.I.R. lodged against the respondents alleging commission of offences under Sections 467 and 468 I.P.C. by Chem in course of the proceeding of a civil suit, on the ground that Section 195 (1) (b) (ii) Cr.P.C. prohibited

entertainment of and investigation into the same by the police. From a plain reading of Section 195 Cr.P.C. it is manifest that it comes into operation at the stage when the Court intends to take cognizance of an offence under Section 190(1) Cr. P.C.; and it has nothing to do with the statutory power of the police to investigate into an F.I.R. which discloses a cognisable offence, in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in, or in relation to, any proceeding in Court. In other words, the statutory power of the Police to investigate under the Code is not in any way controlled or circumscribed by Section 195 Cr.P.C. It is of course true that upon the charge-sheet (challan), if any, filed on completion of the investigation into such an offence the Court would not be competent to take cognizance thereof in view of the embargo of Section 195(1) (b) Cr. P. C. , but nothing therein deters the Court from filing a complaint for the offence on the basis of the F.I.R. (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in section 340 Cr. P.C. The judgment of this Court in Gopal Krishna Menon and Anr. Vs. D. Raja Reddy [AIR 1983 SC 1053], on which the High Court relied, has no manner of application to the facts of the instant case for there cognizance was taken on a private complaint even though the offence of forgery was committed in respect of a money receipt produced in the Civil Court and hence it was held that the Court could not take cognizance on such a complaint in view of Section 195 Cr. P. C. “

10. Here, in the present case, as observed, the charge-sheet is filed only under Section 188 IPC. No further allegations are made against the present

applicant and when there is absolute bar on taking the cognizance of the offence punishable under Sections 172 to 188 of the IPC, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate and when the present case does not disclose any commission of the offence distinct from the alleged offence under Section 188 IPC, the Magistrate is debarred from taking cognizance in the present matter, as provision of Section 195 Cr.P.C. has not been complied with.

11. In the result, the petition is allowed. The impugned complaint being FIR No.II/325/2017 dated 19.12.2017 registered with Bopal Police Station, Dist.: Ahmedabad, charge-sheet, Criminal Case No.4708 of 2018 and the proceedings initiated pursuant thereto qua the present applicant are quashed and set aside. Rule is made absolute. Direct service is permitted.

12. Criminal Misc. Application No.1 of 2021 stands disposed of in view of the order passed in the main matter.

(GITA GOPI, J.)

Pankaj