THE DISTINCTION BETWEEN " *COGNIZABLE OFFENCE*" AND *"THE CURIAL ACT OF TAKING COGNIZANCE OF AN OFFENCE"*

I N D E X

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(A) INTRODUCTION

1. I retired from the High Court of Kerala in the year 2012. During my tenure as a Judge in the High Court all the Chief Justices while fixing the roster, were giving me mostly criminal jurisdictions and I have now metamorphosed into a confirmed criminal, although as a lawyer, I was practicing exclusively on the civil side. While I was convalescing after an influenza during the COVID-19 lockdown period, Advocate Mr. Shyam Padman from Calicut sent me a message inviting me to render a lecture in the "10th Legal Empowerment through Interaction Lecture series". Accordingly, true to my functional proclivities, I signified my consent to give a lecture on a subject in criminal law. Fortunately, I was already grappling with a problem posed before me in connection with the tackling of the violators of COVID-19 lockdown. This is that subject. I gave the lecture on 03-05-2020 at 3:30 PM in a Zoom meeting arranged by Advocate Mr. Shyam Padman.

(B) THE DOUBT RAISED

2. The doubt raised was the following:-

Q) *On the complaint lodged by a policeman (a public servant) on duty on 20-03-2020 who was controlling the violators of the lockdown at Kozhikode, an FIR is registered against the violators by the S.H.O of the Kozhikode Kasaba Police Station for an offence punishable under Section*

3 of the Epidemic Diseases Act, 1897(Central Act 3/1897) and for an offence punishable under Section 117(e) of the Kerala Police Act, 2011. Section 3 of Central Act 3/1897 says that any person disobeying any regulation or order made under that Act shall be deemed to have committed an offence punishable under Section 188 IPC the first part of which is punishable with simple imprisonment for 1 month or fine of Rs.200 or both. The latter part of Section 188 IPC where the disobedience causes danger to human life, health, safety etc., is punishable with imprisonment up to 6 months or fine of Rs.1000 or both. As per Column (4) of the First Schedule to Cr.P.C, the offence punishable under Section 188 IPC is a "cognizable offence". But as per Section 195 (1) (a) (i) Cr.P.C, cognizance by a Magistrate of the offence punishable under Section 188 IPC can be taken only on the complaint of the public servant concerned or some other public servant to whom he is administratively subordinate. The offence under Section 117 (e) of the Kerala Police Act, 2011, by virtue of Section 125 thereof, is a cognizable offence punishable with imprisonment up to 3 years and/or fine. No specific mode of cognizance by the Court is stipulated by the Kerala Police Act.

(a) Can the S.H.O register an FIR and conduct investigation and submit a charge sheet in respect of the offence under Section 3 of Central Act 3/1897 also?

(b) Can the Magistrate take cognizance of the said offence in the absence of a complaint by the policeman on duty or his official superior?

3. There is much confusion at least among a sizeable section of the Bench and the Bar regarding the distinction between the two concepts referred to above. Column (4) of the table of offences in the First Schedule to the Cr.P.C indicates which all offences are ***cognizable offences*** and which all offences are ***non-cognizable offences***. In the Explanatory Note given at the beginning of the First Schedule it is stated that the word ***"cognizable"*** stands for " *a police*

officer may arrest without warrant" and the word "***non-cognizable"*** stands for " *a police officer shall not arrest without warrant*". "*Cognizable offences*" are relatively graver offences and are, therefore, non-bailable. *"Non-cognizable offences"* are relatively less graver offences and hence bailable except Sections 194,195,355,466,467,476,477,493 and 505 (*of the Indian Penal Code)* which are non-bailable.

4. The expression ***"cognizable offence"*** has nothing to do with the process of ***"taking cognizance of an offence"*** by a Court. This process of "*taking cognizance of an offence"* by a Court can be called "***cognizability"*** of an offence. Regardless of the question as to whether the offence is "*cognizable"* or *"non-cognizable"*, the process of "*taking cognizance of the offence"* by the Court is a must for both, if the Court were to proceed further either on the "*complaint*" or on the *"police report"*.

C COGNIZABLE OFFENCE

5. What is a "*cognizable offence"?* The expression "***cognizable offence***" has been defined under Section 2(c) Cr.P.C as follows:-

> ***"(c) "Cognizable offence" means an offence for which and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant."***

When a complaint alleging the commission of a *cognizable offence* is lodged before the officer-in-charge of a police station (i.e. Station House Officer-S.H.O) he has to mandatorily register an FIR in view of the statutory compulsion under Section 154 (1) Cr.P.C. There is, however, the Judge-made law that the S.H.O, before registering an FIR, can conduct a ***preliminary inquiry*** in the following cases:-

i. *To ascertain whether the information received discloses a cognizable offence.*
ii. *In matrimonial disputes/family disputes.*
iii. *In commercial offences.*
iv. *In medical negligence cases.*
v. *In corruption cases, and*
vi. *In cases where there is abnormal delay/laches in lodging the complaint.*

When once the S.H.O registers an FIR, the offence being a "*cognizable offence",* the S.H.O has the authority under Section 156(1) Cr.P.C to conduct investigation of such offence without the order of a Magistrate. If he has reason to suspect the commission of a "*cognizable offence"* he can enter on investigation into the offence in view of Section 157 Cr.P.C. Here the S.H.O has no freedom to consider whether the information given regarding the *cognizable offence* is true or credible. In other words, the S.H.O has no authority to examine the ***veracity*** of the allegations in the complaint regarding the commission of the *cognizable offence.* (vide **Lalita Kumari v. Government of UP (2014) 2 SCC 1-** 5 Judges).

> (*With due respect, the concept of preliminary inquiry conceded to an S.H.O is totally alien to the Cr.P.C. "Inquiry", whether preliminary or final is the exclusive domain of the Magistrate and not the police. Preliminary inquiry is an unnecessary Judge-made conundrum. Such a discretion of conducting a preliminary inquiry by the S.H.O before registering an FIR, is definitely liable to be abused by unscrupulous police officers. Even assuming that the authority to conduct a preliminary inquiry could be ceded to the S.H.O in a limited category of cases, the conclusion made in* ***Lalita Kumari*** *that the scope of preliminary inquiry is only to examine whether the information received by or the complaint made to the S.H.O discloses the commission of a cognizable offence or not, does not appear to be correct. It may be necessary to make a cursory glance into the history of preliminary inquiry.*

In the concurring judgment of Mudholkar- J in ***State of U.P. v/s Bhagwant Kishore Joshi AIR 1964 SC 221 –*** *3 Judges, it was observed as follows:-*

> *"Merely making some preliminary enquiries upon receipt of information from an anonymous source or a source of doubtful reliability for checking up the correctness of the information does not amount to collection of evidence and so cannot be regarded as investigation. In the absence of any prohibition in the Code, express or implied, I am of opinion that it is open to a Police Officer to make preliminary enquiries before registering an offence and making a full scale investigation into it."*

The above passage was affirmed and approved in paragraph 78 of ***State of Haryana v/s Bhajan Lal 1992 Supp. (1) SCC 335 = AIR 1992 SC 604 –*** *para 80. In paragraphs 17 and 19 of* ***P. Sirajuddin v/s State of Madras (1970) 1 SCC 595 = AIR 1971 SC 520,*** *the Apex Court held as follows;-*

> *"Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer.* ***The lodging of such a report against a person****, specially one* ***who*** *like the appellant* ***occupied the top position in a department****, even if baseless,* ***would do incalculable harm not only to the officer in particular but to the department he belonged to, in general****."*
>
> *(Emphasis supplied by me)*

The above observations were noted with approval in paragraph 53 of ***State of Bihar v/s P.P. Sharma 1992 Supp. (1) SCC 222;*** *paragraph 77 of* ***State of Hariyana v/s Bhajan Lal 1992 Supp. (1) SCC 335;*** *paragraph 14 of* ***Navin Chandra N. Majithia v/s State of Meghalaya (2000) 8 SCC 323 –*** *3 Judges; para 23 of* ***Sashikant v/s CBI (2007) 1 SCC 630 = AIR 2007 SC 351;*** *paragraph 17 of* ***Ashok Tshering Bhutia v/s State of Sikkim (2011) 4 SCC 402.*** *The two judges (Mr. Justice P.Sathasivam and Dr. Justice B.S. Chawhan) who constituted the Bench which rendered the verdict in* ***Ashok Tshering Bhutia v/s State of Sikkim (2011) 4 SCC 402*** *observed as follows :-*

> *"6. This Court in P. Sirajuddin and Others v. The State of Madras and Others, 1970 KHC 428 : 1970 (1) SCC 595 : 1970 SCC (Cri) 240 : AIR 1971 SC 520 : 1971 CriLJ 523; and State of Haryana and Others v. Ch. Bhajan Lal and Others, 1992 KHC 600 : AIR 1992 SC 604 : 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 : 1992 CriLJ 527 has categorically held that before a public servant is charged with an act of dishonesty which amounts to serious mis - demeanor and an FIR is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. Such a course has not been adopted by the prosecution though* ***the law declared by this Court is binding on everyone in view of the provisions of Art.141 of the Constitution, which would by all means override the statutory provisions of the CrPC and such an irregularity is not curable nor does it fall within the ambit of S.465 CrPC."***
>
> *(Emphasis supplied by me)*

What prompted the Apex Court in ***Sirajuddin's case*** *to direct a preliminary enquiry before a crime was formally registered against a public servant, was the fact that a public servant could be an easy target for disgruntled favour-seekers to vex him with false and frivolous prosecutions in case their attempt to curry official favours from the public servant could not fructify. Hence, before registering a case against such public servant the Officer-in-charge of the Police station should conduct some informal enquiry to examine the truth or otherwise of the allegations levelled against the public servant. In other words, it is only if the SHO is convinced regarding the veracity of the allegations after conducting the informal preliminary enquiry, would he be justified in registering a case against the public servant.*

The two Judges who thus opined that the aforesaid observations in ***Sirajuddin's case*** *as approved in* ***Bhajan Lal*** *was the law declared by the Supreme Court and binding on all by the force of Article 141 of the Constitution of India and even overriding the status law, however, made a clean somersault sitting in a Constitution Bench in* ***Lalita Kumari v/s Government of U.P. (2014) 2 SCC 1 –*** *5 Judges, to hold that the scope of preliminary enquiry was only to find out whether a cognizable offence was made out in the complaint lodged. If it is not for examining the genuineness of the information or the complaint, why should there be a preliminary inquiry by the S.H.O. Even in category (vi) referred to above, if there is abnormal delay in lodging the complaint, it is really the veracity of the complaint which is examined by the S.H.O through the preliminary inquiry. There is not even a whisper in* ***Lalita Kumari***

regarding the correctness or otherwise of the earlier decisions including ***Sirajuddin's*** *case which is virtually upheld in para 117 of* ***Lalita Kumari.*** *None of those earlier decisions has been overruled. There is not even a dissent. No doubt,* ***Lalita Kumari*** *is by a Constitution Bench. But it came before the Constitution Bench evidently on a reference. Hence, fairness demanded that* ***Lalita Kumari*** *either approved or disapproved those earlier decisions particularly when* ***Ashok Tshering Bhutia*** *stated in no unmistakable terms that the law laid down in* ***Sirajuddin*** *would override the statutory provisions in the Cr.P.C and was binding under Article 141 of the Constitution of India and also that any violation of the said law would not be curable under Section 465 Cr.P.C).*

Ⓓ NON-COGNIZABLE OFFENCE

6. The expression "***non-cognizable offence***" has been defined under Section 2(l) Cr.P.C as follows:-

> ***"(l) "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which a police officer has no authority to arrest without warrant."***

In the case of a "***non-cognizable offence***", apart from the fact that a police officer has no authority to arrest the offender without a warrant, he cannot also register an FIR or conduct investigation without the order of the Jurisdictional Magistrate in view of sub-section (2) of Section 155 Cr.P.C. The said Section reads as follows:-

> *"(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer, the informant to the Magistrate.*
>
> *(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.*

> *(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.*
>
> *(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable."*

If an S.H.O receives a complaint alleging the commission of a "*non-cognizable offence*", he has to enter or cause to be entered the substance of the information in a book prescribed by the State Government and then ***refer the complainant to the Magistrate concerned*** under Section 155 (1) Cr.P.C. The Magistrate concerned means the Magistrate having jurisdiction to either try the case or commit the case for trial to the Court of Session. Instead of directing the complainant under Section 155 (1) Cr.P.C to approach the Magistrate for an order under Section 155 (2) Cr.P.C, it is also open to the S.H.O to himself obtain the permission of the Magistrate under Section 155 (2) Cr.P.C and then start investigation. (vide Para 12 of **State of Gujarat v. Girish Radhakrishnan (2014) 3 SCC 659**). When what we have today is a *"Janamythri Police",* there is nothing wrong in the S.H.O himself approaching the Magistrate and taking orders under Section 155 (2) Cr.P.C. The SHO will have jurisdiction to investigate into a "*non-cognizable offence*" only after the Magistrate having jurisdiction has issued an order under Section 155(2) Cr.P.C.

(E) MIXED COMPLAINT ALLEGING BOTH COGNIZABLE AND NON- COGNIZABLE OFFENCES

7. Supposing the complaint lodged before the S.H.O alleges the commission of both *cognizable* and *non-cognizable offences*. Should

not the S.H.O refer the complainant to the Magistrate for an order under Section 155 (2) Cr.P.C with regard to the *non-cognizable offence*? The answer is in the negative. Where the complaint alleges the commission of both *cognizable* and *non-cognizable offences*, then, by virtue of Section 2(c) read with Section 155 (4) Cr.P.C it should be treated as a "***cognizable case"*** and consequently, the S.H.O derives power under Section 156 (1) Cr.P.C to investigate the case without the order of the Magistrate concerned. It is pertinent to notice that Section 156 (1) Cr.P.C guardedly uses the expression "*cognizable* ***case****"* and not "*cognizable offence"*. In this context, it may be worthwhile to mention that I had occasion to pen an article pointing out an error committed by a learned Judge of the High Court of Kerala in **James Jose v. State of Kerala 2019 (3) KHC 531** where the verdict rendered was overlooking the concept of "*cognizable* ***case****"* in Section 155 (4) Cr.P.C.

(F) IF THE COGNIZABLE OFFENCE, AFTER INVESTIGATION,TURNS OUT TO BE A NON-COGNIZABLE OFFENCE

8. A situation can arise whereunder after registering an FIR in a "*cognizable case*" (*involving at least one* ***"cognizable offence"*** *and one or more* ***"non-cognizable offences")*** the S.H.O on completion of investigation discovers that the "*cognizable offence"* alleged is not made out and that both or all the offences are "*non-cognizable*". What will be the nature of investigation conducted by him in respect of those "*non-cognizable offences"* without obtaining the prior order of the Magistrate under Section 155 (2) Cr.P.C? It is here that the ***Explanation*** to Section 2(d) Cr.P.C comes to the rescue of the S.H.O. Section 2 (d) Cr.P.C which defines the expression *"complaint"* and the "*Explanation"* thereto, are given below:-

> *"(d) "Complaint" 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.*
>
> ***Explanation.--** A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant".*

In the contingency referred to above, the S.H.O can file a "***report"*** before the Magistrate and such *"report"* shall be deemed to be a ***complaint*** and the S.H.O who has filed the *"report"* shall be deemed to be the ***complainant***. The Magistrate can take cognizance of the "*non-cognizable offences"* made mention of in the deemed complaint and can proceed accordingly. One thing to be noticed here is that for the application of the *Explanation* to Section 2 (d) Cr.P.C, it should be a *"cognizable **case**"* to begin with involving at least one "*cognizable offence"* and the S.H.O, after investigation, discovers that the offence involved is really a *"non-cognizable offence"* and not a *"cognizable offence"*. If at the threshold itself no "*cognizable offence"* is alleged or if all the offences alleged are *"non-cognizable offences"*, then the *Explanation* to Section 2(d) Cr.P.C is not attracted. In other words, *Explanation* to Section 2(d) Cr.P.C covers only those cases where the S.H.O initiates investigation into a *"cognizable offence"* but the offence made out after investigation, is a "*non-cognizable offence"*. (vide **Keshav Lal Thakur v. State of Bihar (1996) 11 SCC 557**).

Ⓖ TAKING COGNIZANCE OF AN OFFENCE

9. Regarding the curial process of *taking cognizance of an offence*, the matter is covered by Chapter XIV of Cr.P.C. Sections 190 to 199 in that Chapter are the relevant Sections pertaining to the conditions requisite for ***initiation of proceedings***. The 4 sources on which a Magistrate may *take cognizance of an offence* have been enumerated under Section 190 (1) Cr.P.C. They are —

*(a) Upon receiving a **complaint** of facts constituting the offence. Section 2 (d) Cr.P.C.*
*(b) Upon a **police report** under Section 2 (r) Cr.P.C.*
(c) (i) Upon information received from any person other than a police officer (eg: a news item in the print or electronic media or in the internet).
(ii) Upon the own knowledge of the Magistrate (eg: where an offence is committed in the very presence of the Magistrate).

The two common sources on which *cognizance* is usually taken by the Magistrates are the ***complaint*** *(loosely called a "**private complaint**")* and the ***police report***.

The expression "*taking cognizance of an offence*" has not been defined under the Cr.P.C. We have, therefore, only the Judge- made law on the subject. If a Magistrate, on receiving a **complaint**, applies his mind for the purpose of proceeding under Chapter XV of Cr.P.C (*starting with Section 200 onwards*), he may legitimately be said to have *taken cognizance of the offence* under Section 190 (1) (a) Cr.P.C. (vide Para 35 of **Subramanian Swamy v. Manmohan Singh (2012) 3 SCC 64**). If on receiving a **police report** the Magistrate applies his mind and takes the case on file against all or any of the accused persons for all or any of the offences alleged and issues process, he can legitimately be said to have *taken cognizance of the offence* under Section 190 (1) (b) Cr.P.C. (vide Paras 68 to 80 of **Prasad Shrikant Purohit v. State of Maharashtra (2015) 7 SCC 440 = AIR 2015 SC 2514**).

(H) CONDITIONS PRECEDENT FOR INITIATION OF PROCEEDINGS IN RESPECT OF CERTAIN OFFENCES

10. Chapter XIV Cr.P.C lays down the pre-conditions to be followed in respect of certain classes of offences before a Court can *take cognizance of those offences*. The following are those classes of offences:-

*(i) **Section 191**. Where the Magistrate has taken cognizance of the offence under (c) above, the accused has to be informed of his right to exercise his option to have the case inquired into or*

tried by another Magistrate. This is because the Magistrate who has taken cognizance of the offence is virtually in the position of a complainant and any possible bias on the part of the Magistrate can be got over by the accused by exercising this option.

(ii) ***Section 192****. The Chief Judicial Magistrate (CJM) is given the power to make over a case for inquiry or trial either before or after taking cognizance of the offence.*

(iii) ***Section 193****. Barring a few exceptions, a Court of Session can take cognizance of an offence as a Court of original jurisdiction only if the case has been committed to that Court for trial by the appropriate Magistrate under Section 209 Cr.P.C.*

(iv) ***Section 194****. The Sessions Judge of a Division is given the power to make over cases for trial to the Additional and Assistant Sessions Judges.*

(v) ***Section 195 (1) (a).*** *Where certain specified offences have been committed before a* ***public servant*** *and the offender is to be prosecuted for* ***contempt of the lawful authority*** *of such public servant, the offender can be prosecuted either for the said offence or any abetment, attempt or criminal conspiracy in respect of such offence only by such public servant or by another public servant to whom the public servant concerned is administratively subordinate. (*The offences covered by Section 195 (1) (a) are Sections 172 to 188 IPC and any abetment, attempt or criminal conspiracy to commit such offences. Out of the aforesaid offences, those punishable under Sections 175 and 188 IPC are cognizable and the rest are non-cognizable).

Section 195 (1) (b). *Where certain specified offences have been committed in relation to any proceeding in any Court or in respect of any document produced or given in evidence in a proceeding in any Court, he can be prosecuted either for the said offence or any criminal conspiracy, or attempt or abetment in respect of such offence only by that Court or its authorized officer or by some other Court to which that Court is subordinate.* (The offences covered by Section 195 (1) (b) are Sections 193 to 196, 199 , 200, 205 to 211, 228, 463, 471, 475 and 476 and criminal conspiracy or attempt or abetment to commit those offences. Out of those offences, Section 228 and 471 are cognizable and the rest are non-cognizable).

(vi) ***Section 195-A****. Where a witness in a case is threatened, he or any other person can file a complaint for prosecuting the*

offender for an offence punishable under Section 195-A of IPC. (Here the witness or any other person can file a complaint before the Court by which the offence of giving false evidence is triable).

(vii) ***Section 196.*** *There is an embargo against any Court taking cognizance of certain specified offences against the State and for criminal conspiracy to commit those offences except with the previous sanction of the Central Government or the State Government or the District Magistrate, as the case may be. (*The offences by this Section are those punishable under Sections 121 to 130, 153-A, 295-A, 505 (1) (a), (b) and (c), 505 (2) and (3). Out of the above offences 505 (1) (a) and (b) alone are non-cognizable. The rest are cognizable).

(viii) ***Section 197.*** *There is an embargo against any Court taking cognizance of any offence committed by Judges, Magistrates or other Public Servants including persons employed in connection with the affairs of the Union or the States, members of the Forces including police, military personnel, except with the previous sanction of the Central Government or the State Government as the case may be.*

(ix) ***Section 198.*** *There is an embargo against any Court taking cognizance of offences against marriage under Chapter XX of IPC except on a complaint by the specified aggrieved persons.* (Here the offences are punishable under Section 493 to 498 IPC all of which are non-cognizable).

(x) ***Section 198-A.*** *There is an embargo against prosecuting a person for an offence punishable under Section 498-A IPC except upon a police report or upon a complaint made by the specified aggrieved person.* (Here the offence covered by the Section is Section 498-A which is cognizable if the complaint is given to the S.H.O by the persons specified in Column 4 of the table in the First Schedule to Cr.P.C).

(xi) ***Section 198-B.*** *There is an embargo against prosecuting a person for an offence punishable under Section 376-B IPC except upon a complaint filed by the wife where the parties are in a marital relationship.* (The offence covered by this Section is Section 376-A of IPC which is cognizable).

(xii) ***Section 199 (1).*** *There is an embargo against prosecuting a person for the offence of defamation punishable under Chapter XXI of IPC except upon a complaint by the aggrieved person. (vide Khushboo v. Kanniammal (2010) 5 SCC 600- 3 Judges).*(The offences covered by this Section are Sections 500 to 502 of IPC all of which are non-cognizable and cognizance by the Court only on a complaint by the aggrieved person).

(xiii) ***Section 199 (2).*** *There is an embargo against prosecuting a person for an offence of defamation punishable under Chapter XXI IPC against the President of India, Vice-President of India, the Governor of a State, the Administrator of a Union territory, a Minister of the Union or of a State or Union Territory or any other Public Servant employed in connection with the affairs of the Union or the State except upon a complaint in writing by the Public Prosecutor before a Court of Session.* (The offences covered by this Section are Sections 500 to 502 of IPC all of which are non-cognizable except upon a complaint by the Public Prosecutor before the Court of Session or on a complaint by the person aggrieved before a Magistrate having jurisdiction in view of Section 199 (6) Cr.P.C).

The above provisions (*items (v) to (xiii) above*) in Chapter XIV of Cr.P.C will suggest that even a *cognizable offence* can become *non-cognizable* (*not in the sense of Section 2(l) Cr.P.C)* unless the pre-conditions specified in the respective sections have been complied with. The interdict against *taking cognizance* is on the Court.

I THE CURIAL ACT OF TAKING COGNIZANCE IS APPLICABLE EVEN IN THE CASE OF NON-COGNIZABLE OFFENCES

11. There is a misconception at least in some quarters that a Magistrate need take cognizance only of a *cognizable offence* and he need not take cognizance of a *non-cognizable offence*. The distinction between a "*cognizable offence"* and a *"non-cognizable offence"* has already been seen. Those expressions "*cognizable offence"* and *"non-cognizable offence"* have nothing to do with the curial process of "*taking cognizance of an offence"*. Whether the offence is "*cognizable"* or "*non-cognizable"*, the process of *taking cognizance* by the Magistrate is a must if the Magistrate wants to proceed further. It may be profitable to make mention of an instance where a learned Judge of a High Court in India had quashed under Section 482 Cr.P.C the *cognizance* taken by a Magistrate with regard to a "*non-cognizable offence"*. Evidently, the learned Judge was laboring under a misconception that it is impermissible for the Magistrate to *take*

cognizance of a "non-cognizable offence". As already mentioned, every offence, whether "*cognizable"* or *"non-cognizable"* has to be necessarily *taken cognizance of* by the Magistrate if he is desirous of proceeding further in the matter. In the above instance the Advocate who argued the case was equally at fault in, either nocently or innocently, taking the Judge for a ride.

(J) WHERE THE OFFENCE IS COGNIZABLE BUT COGNIZANCE BY THE COURT IS STATUTORILY INSISTED ONLY ON A COMPLIANT

12. Yet another area of confusion is in cases where the offence may be "*cognizable"* entitling the S.H.O to register an FIR and enter on investigation without the order of the Magistrate but the *cognizability of the offence* by the Court is statutorily restricted to be taken only on a "***complaint"*** by a specified person. While on the one hand, we have the S.H.O, who by virtue of the fact that the offence is a *cognizable offence*, would be entitled to conduct investigation and file a ***final report***, on the other hand, we find the Court being debarred from *taking cognizance of the offence* on such *final report* in the absence of a complaint by the designated person.

13. Before examining the judicial pronouncements on the question, let us first examine the provisions of law and try to evolve an answer on first principles. Initially let us take up the Cr.P.C. itself. Sections 195 A and 471 of IPC are cognizable offences as shown by column (4) of part I of the First Schedule to Cr.P.C. Being cognizable offences, if information regarding the commission of those offences is received by an SHO, he is bound to register a crime and conduct investigation if he has reason to suspect the above crimes and ultimately submit a "*Police Report*" before the appropriate Court. (vide **Lalita Kumari v. Government of U.P. (2014) 2 SCC** 1- 5 Judges.) But, if those offences are committed in relation to any proceeding in any Court, then by virtue of Section 195 (1) (b) Cr.P.C. it is the Court alone which is entitled to file a complaint before the appropriate Magistrate after conducting an inquiry, if any, under

Section 340 (1) Cr.P.C. In such a case it is impermissible for an SHO to register a crime and conduct investigation if information regarding the commission of the aforesaid offences is received by the SHO. The mandatory duty of the SHO under Section 154 Cr.P.C. will have to yield to the authority of the Court to file a complaint under Section 195 (1) (b) Cr.P.C. and the SHO in such a case will not be entitled to register a crime. Let us take another instance. Part XIV of the Electricity Act, 2003 which came into force on 10-06-2003 deals with the offences and penalties under the said Act. Sections 135 to 142, 146 to 150 are the offences made punishable under the said Act. Sections 135 to 138 and Section 150 of the said Act are punishable with imprisonment upto 3 years and those offences, by virtue of Part II of the First Schedule to Cr.P.C., are cognizable offences. However, Section 151 of the said Act declares that "***No Court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by appropriate Government or appropriate Commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or licensee or the generating company, as the case may be, for this purpose***".

There is thus an embargo against a Court taking cognizance of an offence punishable under the said Act except on a complaint by the authorities specified under Section 151 of the Act. If so, by virtue of Section 4 (2) Cr.P.C. with regard to an offence punishable under the Electricity Act, 2003, the Court is debarred from taking cognizance of the offences on a Police Report even though the offences may be cognizable. The above Act was amended with effect from 15 -06-2007 by *inter alia* declaring the offences punishable under Sections 135 to 140 and 150 as cognizable and non bailable and conferring power to the Police to conduct investigation of those offences and also providing that the Court may also take cognizance of the above offences upon a Police Report.

Various High Courts in the country took conflicting views on Police Reports regarding the cognizability by Courts of the offences under the said Act. In a case from Patna the offences punishable under Section 39 *(imprisonment upto 3 years)* and Section 44 *(imprisonment upto 2 years)* of the Electricity Act, 1910 were committed on 24-01-2007 which is on a date prior to the aforesaid amendment of the Electricity Act, 2003. The Assistant Electrical Engineer filed a complaint before the Police Station concerned and the Police registered a crime, conducted investigation and filed a charge sheet before Court for an offence punishable under Section 135 *(with imprisonment upto 3 years)* of the Electricity Act, 2003. Actually the 1910 Act had no application to the facts of that case. The accused moved the Patna High Court for quashing the FIR alleging that the Police had no jurisdiction to register a crime and conduct investigation. The Patna High Court accepted the said contention. The matter was taken up before the Supreme Court in **Assistant Electrical Engineer v. Satyendra Rai (2014) 4 SCC 513 = 2014 KHC 2717**. Reversing the decision of the Patna High Court the Apex Court held that insertion of the first proviso to Section 151 of the Act with effect from 15-06-2007 enabling the Court to take cognizance of the offences punishable under the Act upon a Police Report filed under Section 173 (2) Cr.P.C., is only clarificatory in nature and that the said amendment would operate retrospectively. If the Cr.P.C. were to govern the case, the offence under Section 135 of the Electricity Act, 2003 being a cognizable offence could be taken cognizance of on a Police Report by initially lodging a complaint before the Police or on a private complaint to be filed before the Magistrate. But as per Section 151 of the Electricity Act, 2003 prosecution for the above offence could be initiated only by means of a complaint to be filed by the Electrical Inspector or by the Electrical Engineer. To that extent, Section 151 of the said Act was a deviation from the Cr.P.C. within the meaning of the Section 4 (2) Cr.P.C. Disabling the Electrical Inspector or the Electrical Engineer from lodging a complaint before the Police. At the time when the

Electrical Engineer lodged the complaint before the Police, the Magistrate, either by virtue of Section 151 of the 2003 Act could take cognizance of the offence under Section 135 of the 2003 Act only on a private complaint by the Electrical Inspector or by the Electrical Engineer. But, in the mean while the amendment to Section 151 of the 2003 Act was inserted on 15-06-2007. Being procedural in nature the said amendment would operate retrospectively validating the investigation by the Police. Therefore, the view of the Patna High Court was not correct and the view taken by the Apex Court was right. However, with due respect, I am not inclined to agree with the observations of the Apex Court in paras 10 and 11 of the verdict in **Satyendra Rai's case** that even prior to the amendment of Section 151 of the Electricity Act, 2003 it was permissible for the Police to register a crime, conduct investigation and file a charge sheet before the Magistrate. Such a course would have been open to the Police only if it was a "*cognizable **case"*** within the meaning of Section 155 (4) Cr.P.C. But, when the offence under Section 135 of the 2003 Act could be taken cognizance of only on a complaint by the designated person, it was not permissible for the Police to register a crime, conduct investigation and file a Police Report on which the Magistrate was debarred from taking cognizance of the offence. It was the amendment of Section 151 of the 2003 Act operating retrospectively which persuaded the Apex Court to take the view that the amendment to Section 151 of the 2003 Act would operate retrospectively so as to overcome the mandate of Section 151 as it originally stood. For the same reason given in **Satyendra Rai's case** on the amendment of Section 151, the view taken in **Vishal Agrawal v. Chhattisgarh State Electricity Board (2014) 3 SCC 696 = AIR 2014 SC 1539** where also the offence was detected on 23-03-2006 and reported to the Police on 31-03-2006, much before the amendment of Section 151 which came into effect from 15-06-2007 onwards, accords with the view in **Satyendra Rai**. The verdict in **Union of India v. Mustaq @ Mustafa (2016) 13 SCC 398 = 2016 KHC 7112** which followed

Satyendra Rai and **Vishal Agrawal** also is one taking note of the aforesaid amendment. ***What is relevant to bear in mind in this connection is that but for the amendment of Section 151 operating retrospectively, the position would have been different***.

In **Ushaben v. Kishorbhai Chunilal Talpada (2012) 6 SCC 353 = 2012 (2) KLT 415** the Apex Court took the view that the Court can *take cognizance of the offence* on the *police report* notwithstanding the fact that a "*complaint*" by the designated person is missing or is absent. The said view is also fallacious. **Ushaben'**s case arose from the State of Gujarat. The offences there were Sections 494 IPC (*non-cognizable and cognizance can be taken only on a complaint by the aggrieved person in view of Section 198 (1) Cr.P.C),* Section 498-A of IPC (*cognizable offence and cognizance can be taken on a police report in view of Section 198-A)* and Section 506 (2) of IPC which is a *non-cognizable offence*. The Supreme Court of India took the view that if any of the offences is *cognizable,* then the power of the police to register a crime, conduct investigation, arrest the offender without a warrant and submit a final report before the Court under Section 173 (2) Cr.P.C cannot be denied and that the statutory direction with regard to one of the offences being *cognizable only on a complaint*, will have to yield to the power of the police to file a *police report* and accordingly the Court was held entitled to *take cognizance of the offence.* But, it may be noted that this was not strictly a "*cognizable* ***case***" within the meaning of Section 155 (4) Cr.P.C. because the offence punishable under Section 494 IPC apart from being *non-cognizable* was one which could be *taken cognizance of* only on a complaint. In my humble view, **Ushaben** was wrongly decided. In **Subash Babu A v. State of AP (2011) 7 SCC 616 = AIR 2011 SC 3031** arising from the State of Andhra Pradesh**,** the offences were punishable under Sections 417 IPC (*non-cognizable),* 420 IPC (*cognizable)*, 494 and 495 IPC (*which had been made cognizable by a State amendment of the year 1992).* So it was a clear instance of a ***cognizable case*** within the meaning of Section 155 (4) Cr.P.C and the Apex Court rightly held that it was open to the police

to conduct investigation and file a *police report* on which the Magistrate could *take cognizance*. Unlike our present problem, **Subash Babu** did not contain any offence which could be *taken cognizance of only on a complaint*. Hence, **Subash Babu** is clearly distinguishable. In **State of NCT of Delhi v. Sanjay (2014) 9 SCC 772 = AIR 2015 SC 75** it was held that even though Section 22 of the Mines and Minerals (Development and Regulation) Act, 1957(*MMDR Act for short*), insists on a complaint for the contravention of Section 4 (1A) of the said Act, the offence which was held really made out was one of theft under Section 378 IPC and punishable under Section 379 IPC which is *cognizable.* It was therefore held that the bar under Section 22 of the MMDR Act would not apply. So, this case is also clearly distinguishable.

14. In **M.S.Ahlawat v. State of Haryana (2000) 1 SCC 278 = AIR 2000 SC 168**, a 3 Judge Bench considered the question of prosecuting a person for giving or fabricating false evidence in a judicial proceeding. In that context the Bench observed in paragraph 5 as follows:-

> "*Provisions of Section 195 Cr.P.C 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".*

The question of prosecuting a person who committed an offence punishable under Section 188 IPC, pointedly arose in **C.Muniappan and others v. State of Tamil Nadu (2010) 9 SCC 567 = AIR 2010 SC 3718**. In paragraph 28 of the reported decision the Apex Court observed as follows:-

> *"28. 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 S.195 Cr.P.C 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."*

15. My considered view, therefore, is that if one of the offences alleged is one which can be taken cognizance of only on the complaint by a specified person either under the Cr.P.C. or under any other law, then such a case cannot be treated as a "***cognizable case"*** within the meaning of Section 155 (4) Cr.P.C. and the Station House Officer will not be entitled to register a crime, conduct the investigation and ultimately file a Police Report before the Magistrate. The Magistrate also will not be entitled to take cognizance of the offence on such Police Report. Instead, the Magistrate will be entitled to take cognizance of the offence only on the complaint of the designated person.

(K) ANSWER TO THE DOUBT RAISED

16. Now, let us try to answer the question posed.

The Epidemic Diseases Act, 1897 (*Central Act No. 3 of 1897*) which came into force on 04-02-1897 in the whole of India except the territories which, immediately before 01-11-1956, were comprised in Part B States. In the given problem, the offence was committed in Kozhikode where the Epidemic Diseases Act, 1987 was in force. As per Section 3 of the said Act, any person disobeying any regulation or order made under the Act shall be deemed to have committed an offence punishable under Section 188 IPC which as per Column (4) of Part I of the First Schedule of the Cr.P.C, is a *cognizable offence*. But as per Section 195 (1) (a) (i) Cr.P.C a Court can take *Cognizance of an offence* punishable under Section 188 IPC only on the ***complaint*** *in writing* by the public servant concerned or some other public servant to whom he is administratively subordinate. Supposing a police officer enforcing the lockdown in connection with COVID-19 epidemic, is obstructed, that will be deemed to be an

offence committed by the obstructer under Section 188 IPC and by virtue of Section 195 (1) (a) (i) Cr.P.C the police officer concerned will have to prosecute the offender by means of a complaint. The additional offence punishable under Section 117 (e) of the Kerala Police Act, 2011 although a *cognizable offence,* does not improve the position. The offence punishable under Section 188 IPC, no doubt, is *cognizable*. But it can be *taken cognizance* of only on a complaint by the public servant concerned. The question of treating the case as a *cognizable case,* as was done in **Subash Babu** does not arise. Therefore, as was held in **Muniappan's case** (*AIR 2010 SC 3718*) the public servant will have to lodge a complaint before the Magistrate concerned and the Magistrate, after *taking cognizance,* if need be, can forward the complaint for investigation under Section 202 (1) Cr.P.C and then proceed according to law, after receipt of the report of investigation.

(L) THE STATUTORY COMBAT OF EPIDEMIC DISEASES

17. It was by invoking the provisions of the Disaster Management Act, 2005 (*Central Act No.53 of 2005*) that a national "***lockdown***" was clamped in India as per the Order dated 24-03-2020 passed by the National Disaster Management Authority for ensuring social distancing by directing shops and commercial establishments other than essential services to be temporarily closed and also directing the people of India to remain confined to their homes with a view to curb the spreading of the COVID-19 virus. Taking the cue from the above order, the Government of Kerala also swung into action by issuing appropriate directions from time to time. Those who had come from abroad and who had crossed inter-district terrains were directed to observe either home quarantine or quarantine at enclosures provided by the Government. Persons who showed symptoms of the corona virus attack have been and are being isolated either in hospitals or other places where facilities for treatment are available. Sections 51 to 58 in Chapter X of the Disaster Management Act provide for the offences and their

penalties. Since the imprisonment prescribed is for a term less than 3 years, by virtue of Part II of the First Schedule to the Cr.P.C those offences are *non-cognizable* and *bailable.* As per Section 60 of the said Act cognizance of the offences by the Court can only be on the strength of a complaint by the persons specified therein and that too after giving 30 days' notice in the prescribed manner. The Epidemic Diseases Act, 1897 (*Central Act No.3/1897*) which came into force on 04-02-1897 had application only to the erstwhile Malabar area which was part of the Madras Presidency and the said Act had no application to the rest of the State of Kerala, namely the Travancore-Cochin area which was comprised in the Part B States prior to 01-11-1956. Taking note of this anomalous situation, the Kerala Epidemic Diseases Ordinance, 2020 (Ordinance No.18/2020) was promulgated by the Governor of Kerala and published in the Kerala Gazette (Extraordinary) dated 27-03-2020 having its operation throughout the State of Kerala. As per Sections 5 and 6 of the said Ordinance persons who contravene or disobey any regulation or order made thereunder or obstruct any officer acting under the Ordinance or any abettor of such an offence, are punishable with imprisonment for a term which may extend to 2 years and/or fine which may extend to Rs.10000.00 (Rupees Ten Thousand). Section 7 of the Ordinance declares that the above offences are *cognizable* and *bailable.*

18. In the meanwhile, the President of India has promulgated the Epidemic Diseases (Amendment) Ordinance No.5 of 2020, *inter alia* extending the Act to the Part B States prior to 01-11-1956 and incorporating two more penal provisions as sub-sections (2) and (3) to Section 3 of the principal Act and declaring those new offences as *cognizable* and *non-bailable*. There is also a provision for compounding of offences.

19. I have not in the present context examined the question as to whether Central Act 3/1897 as amended by the Central Ordinance 5/2020 and State Ordinance 18/2020 occupy the same field of legislation under the Seventh Schedule to the Constitution of India

or whether there is any fatal repugnancy rendering State Ordinance 18/2020 or any portion thereof void.

Ⓜ CONCLUSION

20. My sincere endeavor in this lecture has been to emphasize the distinction between "*cognizable offence*" on the one hand and the curial process of "*taking cognizance of an offence*" on the other. As we have already seen, both these expressions are distinct and different and, in a way, unrelated.

01-08-2020

Justice V Ramkumar,
Former Judge,
High Court of Kerala.