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May 8.

NAGRAJ

v.

STATE OF MYSORE

(K. SUBBA RAO, RAGHUBAR DAYAL and J. R. MUDHOLKAR JJ.)

Sanction to prosecute—Sub-Inspector of Police—Trial for offence alleged in course of duties—Evidence in counter case, if can be considereds--Circumstances where sanction is necessary—Code of Criminal Procedure, 1898 (Act V of 1898), ss. 127-132, 197.—Mysore Police Act, 1908 (5 of 1908), ss. 4 (c), 8, 26 (1) and (3).

The appellant, a Sub-Inspector of Police in Mysore State, was committed to Sessions Court for trial on the complaint of K. K alleged that the appellant and another person had severely beaten T, and that the appellant, when forcibly taking away T, and requested by K to excuse T, wantonly fired on two persons. The appellant's case, on which his counter case is based, is that while he and a constable, after arresting, were taking T to the Police Station, 20 or 30 persons attacked them and rescued T. Not heeding to appellant's advice to desist from voilence, the crowed asked him to wait till K came. On appellant's refusal, the crowd threatened. Just then K came. Apprehending danger to their lives, the appellant first fired in the air, but when the people pelted stones and grappled him, two shots went off injuring two persons. K snatched his revolver and two mazahars prepared by the appellant in T's case, and the people beat him. These persons have also been committed to the Sesions Court for trial. The Sesions Judge made the reference for quashing the commitment of the appellant, holding that the Magistrate could not have taken cognizance of the offences without the sanction of the State Government in view of the provisions of ss. 132 and 197 Code of Criminal Procedure. The High Court rejected the reference of the Sessions Judge for quashing the commitment order. On appeal by special leave, the appellant contended that (1) the appellant could be dismissed by the State Government alone and, therefore, sanction under s. 197 Code of Criminal Procedure was necessary ; (2) a police officer cannot be prosecuted without a sanction for an offence which the police officer alleges took place in course of his duty ; (3) when a case and

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a counter case are both committed to Sessions Court, it should be inferred that the appellant has *prima facie* established his version of the incident and that his producing a copy of the committal order in the counter case is sufficient for holding that sanction under s. 132 Code of Criminal Procedure was necessary, and (4) it is not necessary for the police officer to prove conclusively that he was dispersing an unlawfull assembly before he can raise the plea of want of sanction.

Held that (1) in view of the provisions of ss. 4 (C), 8 and sub-ss. (I) & (3) of s. 26 of the Mysore Police Act, the Inspector-General of Police can dismiss Sub-Inspector and therefore, no sanction of the State Government for prosecution of the appellant was necessary even if he had committed the offences alleged while acting or purporting to act in discharge of his offiicial duty ;

(2) the court can consider the necessity of sanction only when from the evidence recorded in the proceedings or the circumstances of the case it be possible to hold either definitely that the alleged offence was committed or was probably committed in connection with action under ss. 127 and 128 of the Code. If at any stage of the proceedings it appears to the court that the action of the police officer complained of comes within the provisions of ss. 127 and 128 of the Code, the court should hold that sanction was necessary. The jurisdiction of the court to proceed with the complaint emanates from the allegations made in the complaint and not from what is alleged by the accused or what is finally established in the case as a result of the evidence recorded.

Majajoj Dobey v. *H. C. Bhari*, [1955] 2 S. C. R. 925, referred to.

(3) in the present case it does not appear from the record that the evidence *prima facie* establishes the appellant's contention that he could not be prosecuted without the sanction of the Government. This question is to be decided on the evidence in this case and not on the basis of evidence and inferences drawn in the other case ;

(4) in order that the appellant can get the benefit of the provisions of s. 132 of the Code, he has to establish that (i) there was an unlawful assembly likely to cause disturbance of public peace, (ii) the assembly was commanded to disperse, (iii) the assembly did not disperse on the command or, if no command had been given, its conduct had shown a determination not to disperse; and (iv) in the circumstances he had

used force against the members of such assembly. This he has to do in the same manner as an accused has to establish an exception he pleads in his defence. Therefore, the accused in the present case has to show to the court that the alleged offences were committed during the performance of his duties and on his so doing the court would hold that the complaint could not proceed without the sanction of the Government under s. 132 of the Code.

Held further, that if the court decides that s. 132 of the Code applies to the case the proceedings on the complaint instituted without the sanction would be void and the proper order for it to pass would be that the proceeding be dropped and the complaint rejected.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 172 of 1962.

Appeal by special leave from the judgment and order dated March 7, 1962, of the Mysore High Court in Criminal Revision Case No. 100 of 1961.

R. Gopalakrishnan, for the appellant.

B. R. L. Iyengar and *P. D. Menon*, for the respondent.

1963. May 8. The Judgment of the Court was delivered by

Raghubar Dayal J.

RAGHUBAR DAYAL J.—This appeal by special leave is directed against the order of the High Court of Mysore rejecting the reference by the Sessions Judge, Shimoga Division, recommending the quashing of the commitment order of the Magistrate committing the accused to the Sessions for trial of offences under ss. 307 and 326, I.P.C., on the ground that the Magistrate could not have taken cognizance of the offences without the sanction of the State Government in view of the provisions of ss. 132 and 197 of the Code of Criminal Procedure.

The case against the appellant was started on the complaint of one Kenchappa who alleged that

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the Sub-Inspector and another person had severely beaten one Thimma and that the Sub-Inspector, when forcibly taking away Thimma and requested by Kenchappa to excuse Thimma if he had misbehaved, wantonly fired from his revolver at Hanumanthappa and Shivalingappa. It is on this complaint that, after preliminary enquiry, the Magistrate committed Nagraj, the appellant, to the Court of Session for trial.

The facts of the incident, according to the appellant and the basis of the counter case, are these. The appellant was a Sub-Inspector of Police in the State of Mysore. He was posted at Yagati, Kadur Taluk, in September 1959. On September 7, 1959, he arrested one Gidda, manufacturing illicit liquor and sent him with the constable to the police station. Thereafter, he arrested Thimma who was supposed to be in league with Gidda in manufacturing liquor. When Thimma was being taken to the police station by the Sub-Inspector and a constable a crowd of about 20 or 30 persons rushed at them, surrounded them and the police officials attacked them and rescued Thimma. Nagraj asked those people not to resort to violence, but to remain calm. The people however, did not pay heed to the advice, caught the constable and asked Nagraj to stay there till one Kenchappa came. Upon this, the Sub-Inspector again told them to go away without creating any trouble and said that there was no reason for him to wait for Kenchappa. The people threatened him and the constable with dire consequences if they left the place. Just then Kenchappa came and then these persons encircled the Sub-Inspector and the constable and the Sub-Inspector, apprehending danger to his life and that of the constable, first fired his revolver in the air and when the people pelted stones at him and grappled with him, two shots went off from the revolver and injured two persons, Hanumanthappa and Shivalingappa. Kenchappa snatched

the revolver, leather bag with the ammunition pouch and the two mahazars prepared by the Sub-Inspector regarding the prohibition case. The people beat the Sub-Inspector and carried him to a pond saying that they would throw him into it. They were, however, released at the remonstrance of one Basappa.

The persons who are said to have attacked Nagraj that day have also been committed to the Court of Session for trial, of offences under ss, 147, 332, 341 and 395 read with s.149, though prosecuted for offences under ss. 143, 147, 149, 224, 225, 395 and 34, I.P.C.

The Sessions Judge made the reference for the quashing of the commitment of the appellant as it appeared that the two cases arose out of one incident that the Sub-Inspector was at the time discharging his duties, that while discharging his duties he had to disperse an unlawful assembly by force as his own life and that of his subordinate were in jeopardy and that therefore previous sanction of the Government under s. 197 of the Code was necessary, for the Court's taking cognizance of the offence against him as the power of dismissing a Sub-Inspector of Police vested in the Government. He was also of opinion that even if the Sub-Inspector had fired without any justification as alleged by the complainant, sanction under s. 132 of the Code was necessary. He observed :

> "Now, it cannot be gainsaid that at that time he was clearly on duty and was taking Thimma to the Police station in the discharge of his official duty as a Sub-Inspector. A large number of persons then surrounded him and rescued Thimma. It cannot also hence be denied that there was an unlawful assembly which the Sub-Inspector was entitled to disperse by force. Now s. 132 of the Cr. P.C. is clearly a bar to

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the prosecution of police officers purporting to act under Chapter IX of the Cr. P. C. which deals with unlawful assemblies without the sanction of the local Government."

The High Court rightly observed that the Sessions Judge was wrong in practically accepting the version of the appellant that he was surrounded by a number of persons who constituted an unlawful assembly and that they rescued Thimma and that therefore he was entitled to disperse the unlawful assembly by force.

The High Courtheld that the Sub-Inspector of Police could be removed from service by the Deputy Inspector-General of Police and that therefore no question of sanction under s. 197 arose. It further held that before a Court could hold that the cognizance of the case had been taken by the Magistrate without sanction of the Government under s. 132, it must be established that there was an unlawful assembly and that the police officer purported to disperse the assembly under any of the sections 128 to 131 of the Code. The High Court stated later :

> "Section 132 Cr. P.C. has nothing to do with the ingredients of any offence. It is a protection against prosecution. In order to obtain its benefit the accused person need not prove that the acts complained of were done under circumstances mentioned in Section 132 Cr. P.C. In other words, he must place before the Judge materials and circumstances justifying an inference that there was an unlawful assembly and the acts complained of were purported to have been done while dispersing that assembly."

The High Court further held that it is for the Sessions Judge to decide on facts established in

the case whether s. 132 Cr. P.C. was applicable and if he came to the conclusion that the facts of the case brought it within the provisions of s. 132, Cr. P.C., the Sessions Judge was at liberty to reject the complaint holding that it was barred under s. 132, Cr. P.C.

Lastly, the High Court suggested that the Sessions case against the other party be tried first and that if after its trial the Sessions Judge was satisfied that the complaint against the accused was barred under s. 132 Cr. P.C., it would be appropriate for him to reject that complaint on that ground alone.

Learned Counsel for the appellant has raised four contentions in this Court: (1) The appellant as Sub-Inspector of Police could be dismissed by the State Government alone and that, therefore, sanction under s. 197 of the Code was necessary for his prosecution of the offences spurported to have been committed in the discharge of his duty. (2) That a police officer cannot be prosecuted without a sanction from the State Government for an offence which the police officer alleges, took place during the course of performance of duties under Ch. IX of the Code. (3) That when both a case and a counter case have been committed for trial to the Sessions Court it could be said that the appellant has *prima facie* established his version of the incident and that his producing a copy of the committal order in the counter case is sufficient for holding that sanction under s. 132, Cr. P.C. was necessary. (4) That it is not necessary for the police officer to prove conclusively that he was dispersing an unlawful assembly before he can raise the plea of want of sanction as a bar from prosecution.

We are not satisfied that the appellant, the Sub-Inspector can be dismissed by the State

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Government alone. Section 4 (c) of the Mysore Police Act, 1908 (Act No. V of 1908), hereinafter called the Act, provides that unless there be something repugnant in the subject or context the word 'inspector' in the Act, subject to such rules and orders as the Government may pass, includes 'Sub-Inspector.' Section 8 states that the appointment of Inspectors of such grades as Government may from time to time prescribe shall be made by Government and the dismissal of Inspectors of all grades shall vest in Government. It is on the basis of these two provisions that it is submitted for the appellant that it is the Government which can dismiss him as he, though a Sub-Inspector, is an Inspector for the purposes of s. 8 of the Act. The contention is not sound. It is the dismissal of Inspectors of all grades which vests in the Government. It appears there are Inspectors of various grades. Inspectors of some grades were appointed by the Government but the dismissal of Inspectors of all grades is vested in the Government. In this context, the word 'Inspector' in s. 8 will not include Sub-Inspector as he could not possibly be an Inspector of any grade. Sub-section (1) of s. 26 of the Act further provides that any officer authorised by sub-s. (3) in that behalf may dismiss any police officer below the grade of Assistant Superintendent and sub-s. (3) provides that subject to the provisions of s. 8, the Inspector-General shall have authority to punish any Police Officer below the grade of Assistant Superintendent. It follows that the Inspector-General of Police can dismiss a Sub-Inspector who is a police officer below the grade of Assistant Superintendent. No sanction, therefore, of the State Government for the prosecution of the appellant was necessary even if he had committed the offence alleged while acting or purporting to act in the discharge of his official duty.

Before dealing with the other contentions raised we may refer to the provisions of Ch. IX of

the Code of Criminal Procedure which has the heading 'unlawful assemblies.' Section 127 empowers any Magistrate or officer in charge of a police station to command any unlawful assembly or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse and further provides that it shall be the duty of the members of such assembly to disperse on command. If such a command is not obeyed by the members of such an assembly, s. 128 authorizes the Magistrate or the officer in charge of the police station to use civil force to disperse the assembly. Civil force can also be used even without giving such command, if the conduct of the assembly shows a determination not to disperse. Such officer can call upon any male person to assist in the dispersing of the assembly and can also arrest and confine the persons who form part of the assembly. Sections 129 and 130 deal with the use of military force in the dispersing of such assembly and of the duty of the officer commanding the armed forces called upon to disperse such assembly. Section 131 authorises any commissioned officer of the armed forces, in the absence of any communication with any Magistrate, to disperse such an assembly with the help of armed forces in certain circumstances. The officers and persons who act under these provisions for the purpose of dispersing, the unlawful assembly are protected from prosecution under the provisions of s. 132 on which the appellant relies. The relevant portion of this section, for the purpose of this appeal, reads :

> "No prosecution against any person for any act purporting to be done under this Chapter shall be instituted in any Criminal Court, except with the sanction of the State Government; and
>
> (a) no Magistrate or police-officer acting under this Chapter in good faith,
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> x x x x

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shall be deemed to have thereby committed an offence".

It is clear that when a complaint is made to a criminal court against any police officer and makes allegations indicating that the police officer had acted or purported to act under ss. 127 and 128 of the Code and in so doing committed some offence complained of, the Court will not entertain the complaint unless it appears that the State Government had sanctioned the prosecution of that police officer. If the allegations in the complaint do not indicate such facts, the Court can have no ground for looking to the sanction of the Government and in the absence of such a sanction for refusing to entertain the complaint. It must proceed with the complaint in the same manner as it would have done in connection with complaints against any other person.

The occasion for the Court to consider whether the complaint could be filed without the sanction of the Government would be when at any later stage of the proceedings it appears to the Court that the action of the police officer complained of appears to come within the provisions of ss. 127 and 128 of the Act. This can be either when the accused appears before the Court and makes such a suggestion or when evidence or circumstances *prima facie* show it. The mere suggestion of the accused will not, however be sufficient for the Court to hold that sanction was necessary. The Court can consider the necessity of sanction only when from the evidence recorded in the proceedings or the circumstances of the case it be possible to hold either definitely that the alleged criminal conduct was committed or was probably committed in connection with action under ss. 127 and 128 of the Code.

It is contended for the appellant that if the question of sanction is not decided in the very first

instance when a complaint is filed or when the accused alleges that he could not be prosecuted for the alleged offences without the sanction of Government in view of s. 132 of the Code, the protection given by this section will be nugatory as the object of giving this protection is that the police officer be not harassed by any frivolous complaint. There may be some such harassment of the accused, but the Court has no means to hold in the circumstances alleged that the prosecution of the accused was in connection with such action as the complaint did not disclose the necessary circumstances indicating that fact and the bare word of the accused cannot be accepted to hold otherwise. Just as a complainant is likely to omit mentioning the facts which would necessitate the sanction of Government before he can prosecute the accused, the accused too is likely to make such allegations which may lead to the rejection of the complaint for want of sanction. It is well settled that the jurisdiction of the Court to proceed with the complaint emanates from the allegations made in the complaint and not from what is alleged by the accused or what is finally established in the case as a result of the evidence recorded.

In this connection reference may be appropriately made to the observations of this Court in connection with prosecution to which the provisions of s. 197 of the Code apply. In *Matajog Dobey* v. *H. C. Bhari* (1), in connection with the question "is the need for sanction to be considered as soon as the complaint is lodged and on the allegations therein contained?", it was said :

> "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

(1) [1955] 2 S.C.R. 925, 935.

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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."

It follows, therefore, that the contention that a police officer cannot be prosecuted without the sanction from the State Government for an offence which he alleges to have taken place during the course of his performing the duties under Ch. IX of the Code cannot be accepted. His mere allegation will not suffice for the purpose and will not force the Court to throw away the complaint of which it had properly taken cognizance on the basis of the allegations in the complaint.

The third contention really is that the Court can hold that sanction was necessary if the appellant could *prima facie* show that his action which is complained of was in connection with the performance of his duties under ss.127 and 128 of the Code. Assuming that this is the position in law, it does not appear from the record which consists of the orders of the Sessions Judge and the High Court that the evidence in this case *prima facie* establishes that the appellant's contention that his acts complained of were such for which he could not be prosecuted without the sanction of the Government. In this case the High Court has definitely said that the Sessions Judge did not arrive at any such conclusion and had made the reference on a mere acceptance of the accused's version, for which there was no justification. It is contended for the appellant that the mere fact that some of the persons alleged to have formed part of the unlawful assembly were prosecuted by the State and have also been committed by the Magistrate to the Sessions Court for trial establishes *prima facie* that the accused's contention about the necessity

for sanction under s. 132 of the Code is correct. The commitment of the other accused is on the basis of evidence in that case and cannot be legally taken into consideration to decide the question raised in this case. The question is to be decided on the evidence in this case and not on the basis of evidence and inferences drawn in the other case. The third contention, therefore, has no force.

The next question and the real question to decide then is to determine what the accused has to show in order to get the benefit of the provisions of s. 132 of the code in the case. To get such a benefit and to put off a clear decision on the question whether his conduct amounts to an offence or not, the appellant has to show (i) that there was an unlawful assembly or an assembly of five or more persons likely to cause a disturbance of the public peace; (ii) that such an assembly was commanded to disperse; (iii) that either the assembly did not disperse on such command or, if no command had been given; its conduct had shown a determination not to disperse; and (iv) that in the circumstances he had used force against the members of such assembly. He has to establish these facts just in the same manner as an accused has to establish any other exception he pleads in defence of his conduct in a criminal case. It is sufficiently well-settled that it is for the prosecution to prove the offence in the sense that the offence was committed in the circumstances in which no recourse to an exception could be taken and therefore if the accused establishes such circumstances which either conclusively establish to the satisfaction of the Court or make the Court believe them to be probable that the case comes within the exception that would be sufficient compliance on the part of the accused with respect to his proving the exception to prove which the onus was on him. In the present case therefore the accused has to show to the Court that the alleged offences were committed during the performance of his

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duties in the circumstances narrated above. On his so showing, it would be the duty of the Court to hold that the complaint could not have been entertained without the sanction of the Government under s. 132 of the Code. To show this is not equivalent to the accused establishing facts which would be necessary for him to take advantage of the provisions of s. 79 of the Indian Penal Code as had been thought in some of the cases cited to us. Section 79, I.P.C. deals with circumstances which when proved makes acts complained of not an offence. The circumstances to be established to get the protection of s. 132, Cr. P.C. are not circumstances which make the acts complained of no offence, but are circumstances which require the sanction of the Government in the taking of cognizance of a complaint with respect to the offences alleged to have been committed by the accused. If the circumstances to be established for seeking the protection of s. 132 of the Code were to make the alleged conduct no offence, there could be no question of a prosecution with the sanction of the State Government. This distinction had not been considered in the cases we were referred to. It is not necessary to refer to those cases which were ultimately decided on the basis that the allegations either in the complaint or taken together with what had appeard from the evidence on record justified the conclusion that the action complained of came under ss. 127 and 128 of the Code and that no prosecution in connection with such an action could be instituted in the Court without the sanction of the State Government.

The last question to consider is that if the Court comes at any stage to the conclusion that the prosecution could not have been instituted without the sanction of the Government, what should be the procedure to be followed by it, *i e.*, whether the Court should discharge the accused or acquit him of the charge if framed against him or just drop the proceedings and pass no formal order of discharge or

acquittal as contemplated in the case of a prosecution under the Code. The High Court has said that when the Sessio s Judge be satisfied that the facts proved bring the case within the mischief of s. 132 of the Code then he is at liberty to reject the complaint holding that it is barred by that section. We consider this to be the right order to be passed in those circumstances. It is not essential that the Court must pass a formal order discharging or acquitting the accused. In fact no such order can be passed. If s. 132 applies, the complaint could not have been instituted without the sanction of the Government and the proceedings on a complaint so instituted would be void, the Court having no jurisdiction to take those proceedings. When the proceedings be void, the Court is not competent to pass any order except an order that the proceedings be dropped and the complaint is rejected.

We accordingly consider the order of the High Court to be correct and dismiss this appeal.

Appeal dismissed.