THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Jurisdiction)

S.B.: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. M.C. No. 15 of 2017

Mr. Shrish Khare,
S/o Shri Girish Khare,
R/o Bhanjyang Road, South Sikkim

... Petitioner

versus

1. Mr. C. B. Basnett,
   S/o late Ranjit Basnet,
   Presently posted at Deputy Commandant (SAP)
   Pangthang, East Sikkim.

2. Shri Tashi Chopel,
   Address-At Police Headquarters,
   Gangtok, East Sikkim

... Respondents

Application under Section 482 of the Code of Criminal Procedure, 1973 for setting aside the Impugned Order dated 29.08.2017.

Appearance:

Dr. Doma T. Bhutia and Ms. Preeti Chhetri, Advocates for the Petitioner.

Mr. N. Rai, Senior Advocate with Ms. Tamanna Chhetri, Ms. Malati Sharma and Mr. Suraj Chhetri, Advocates for the Respondents.

J U D G M E N T

(18.09.2018)

Bhaskar Raj Pradhan, J

1. The Petitioner seeks to invoke the inherent powers of this Court to challenged the impugned order dated 29.08.2016

passed by the learned Sessions Judge, South Sikkim at Namchi in Criminal Revision Case No. 5 of 2016 as well as the order dated 25.10.2016 passed by the learned Chief Judicial Magistrate South Sikkim at Namchi in Private Complaint Case No.03 of 2016.

2. A preliminary issue raised by Mr. N. Rai, learned Senior Advocate for the Respondent regarding the scope of Section 482 Code of Criminal Procedure, 1973 (Cr.P.C.) must necessarily be noted before examining the merits of the case. Relying upon the judgment of the Supreme Court in re: ***Ganesh Narayan Hegde v. S. Bangarappa & ors.***[1] he would emphasise upon paragraph 12 quoted below and submit that:

> ***"12****. While it is true that availing of the remedy of the revision to the Sessions Judge under Section 399 does not bar a person from invoking the power of the High Court under Section 482, it is equally true that the High Court should not act as a second revisional court under the garb of exercising inherent powers. While exercising its inherent powers in such a matter it must be conscious of the fact that the learned Sessions Judge has declined to exercise his revisory power in the matter. The High Court should interfere only where it is satisfied that if the complaint is allowed to be proceeded with, it would amount to abuse of process of Court or that the interest of justice otherwise call for quashing of the charges. ……."*

3. The impugned order dated 29.08.2017 passed by the Sessions Judge would decline to interfere with the order dated 25.10.2016 passed by the learned Chief Judicial Magistrate by

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[1] **1995 CRI L.J. 2935**

which the Criminal Complaint preferred by the Petitioner was *"quashed"* on the ground that sanction as required under Section 197 Cr.P.C. had not been obtained by the Petitioner for prosecuting the Respondents who are police officers.

4. At the outset Mr. N. Rai would draw attention to paragraph 10 of the impugned order dated 29.08.2017 passed by the learned Sessions Judge in which it has been recorded that while concluding the arguments learned Counsel for the Petitioner submitted that he did not intend to press the revision against the Respondent No.2. Dr. Doma T. Bhutia, learned Counsel for the Petitioner would fairly concede and submit that, therefore, she would press the present petition only against the Respondent No.1. The Respondent No.1, it is urged, at the relevant time was the Station House Officer (SHO) of the Namchi Police Station.

5. On the strength of First Information Report (FIR) filed by one Smt. Rita Pradhan (accused no.3) on 31.12.2012 at about 1250 hrs at the Namchi Police Station against the Petitioner a criminal prosecution case would be launched against the Petitioner. After the judgment rendered by the Court of the Judicial Magistrate dated 30.05.2014 holding that the prosecution had failed to produce any evidence against the Petitioner to establish his guilt under Section 324 and 509 Indian Penal Code, 1860 (IPC) beyond reasonable doubt he would be acquitted. Thereafter, a Criminal Complaint would be

filed on 25.05.2016 by the Petitioner. The Criminal Complaint would array the Respondent No. 1 and 2 and accused no. 3 as the accused persons and seek conviction against the Respondent Nos. 1 and 2 under Section 220/120B/500/34 IPC.

6. On examination of the complaint the learned Chief Judicial Magistrate vide order dated 05.08.2016 would take cognizance of the offences under Section 220/120B/500/34 IPC against the Respondent Nos. 1 and 2 and under Section 120B/500/34 IPC against the Respondent No.3 and issue summons to them. On 04.10.2016 after the Respondents would appear before the Court the order of the learned Chief Judicial Magistrate would record that the learned Counsel for the Respondent Nos.1 and 2 had submitted that sanction was required under Section 197 Cr.P.C. as he was merely doing his duty as a public officer. *Per contra* the learned Counsel for the Petitioner would submit before the learned Chief Judicial Magistrate that *prima facie* case had been made out against the Respondent Nos. 1 and 2 and further that Section 197 Cr.P.C. renders protection to public servants who are honestly doing their duty which protections cannot be given to the Respondent Nos. 1 and 2 who have committed the illegal acts.

7. On 25.10.2016 the learned Chief Judicial Magistrate would render the impugned order holding that sanction under Section 197 Cr.P.C. was required in the present case and in view of the fact that sanction had not been obtained the complaint against

Respondent Nos. 1 and 2 was liable to be *"quashed"*. The complaint thus stood *"quashed"* for want of sanction under Section 197 Cr.P.C. However, it was directed that the case shall proceed against the accused no. 3.

8. Being dissatisfied with the impugned order dated 25.10.2016 a revision would be preferred before the Sessions Court by the Petitioner. The learned Sessions Judge vide impugned order dated 29.08.2017 would decline to interfere with the order dated 25.10.2016 passed by the learned Chief Judicial Magistrate holding that the Respondent Nos. 1 and 2 were discharging their official duty and their acts were closely connected with the discharge of their official duty and therefore the learned Chief Judicial Magistrate was justified in quashing the proceedings against Respondent Nos. 1 and 2 for want of sanction under Section 197 Cr.P.C.

9. Complaints to Magistrate fall under Chapter XV of Cr.P.C.

10. Section 200 deals with examination of the Complainant. The said section provides that a Magistrate taking cognizance of an offence on complaint shall examine upon oath the Complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the Complainant and the witnesses, and also by the Magistrate. The two provisos to Section 200 Cr.P.C. are not attracted in the present case.

11. On 25.05.2016 the learned Chief Judicial Magistrate would examine the complaint and register a private complaint case and list it for examination of the complainant. On 09.06.2016 the complainant would be examined. On 07.07.2016 and 22.07.2017 the complainant witnesses would be examined.

12. Under Section 202 Cr.P.C. any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192 Cr.P.C., may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct and investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

13. Under Section 203 Cr.P.C. if, after considering the statement on oath (if any) of the Complainant and the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

14. Under Section 204 Cr.P.C. if in the opinion of the Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be (a) a

summons-case, he shall issue his summons for the attendance of the accused, or (b) a warrant-case he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction. In a case instituted upon a complaint made in writing, every summons or warrant issued under sub-section 1 of Section 204 Cr.P.C. shall be accompanied by a copy of such complaint.

15. The learned Chief Judicial Magistrate would record in the order dated 05.08.2016 that:

> **"***On a perusal of the evidence of the complainant, his witnesses and the documents prima facie I am satisfied that there is sufficient material under Section 220/120-B/500/34, I.P.C. against accused no. 1 and 2 and under section 120-B/500/34, I.P.C. against accused no.3. Accordingly, this Court takes cognizance. Issue summons to accused no. 1, 2 and 3 returnable by 22.8.2016. To:-22.08.2016. For:-Appearance of accused no. 1, 2 and 3.***"**

16. From the records of the order passed by the learned Chief Judicial Magistrate it would be evident that the proceeding under Section 204 Cr.P.C. had been completed and summons to the Respondent Nos. 1 and 2 and accused no. 3 had been issued as accused in the said proceedings.

17. Evidently, since the Learned Judicial Magistrate had found "*sufficient material under Section 220/120-B/500/34, I.P.C. against accused no. 1 and 2"* at the time of taking cognizance

this was case that would be governed by Chapter XIX of Cr.P.C. for trial of warrant cases by Magistrates. Chapter XIX of Cr.P.C. is in two parts. Part – A deals with cases instituted on a police report. Since this was a complaint case Part-B of Chapter XIX of Cr.P.C. dealing with cases instituted otherwise than a police report would apply. Section 244 of Cr.P.C. would apply in a warrant case instituted otherwise than a police report after the accused appears or is brought before a Magistrate. Section 244 Cr.P.C. enjoins upon the Magistrate to proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution. On an application by the prosecution summons may be issued to witnesses directing him to attend or to produce any document or other thing.

18. On 22.08.2016 the Respondent No.1 and accused no. 3 would appear before the learned Chief Judicial Magistrate and bail would be granted to them. On 27.08.2016 the Respondent No. 2 would appear before the learned Chief Judicial Magistrate and he would also be granted bail. The learned Chief Judicial Magistrate would thereafter, fix 05.09.2016 for examination of the complainant, on 07.09.2016 for witnesses Nos. 2 and 3 and on 12.09.2016 for witnesses No. 4 and 5. Evidently, the learned Chief Judicial Magistrate was proceeding under Section 244 Cr.P.C. by fixing 05.09.2016 for examination of complainant on 07.09.2016 and 12.09.2016 for the complainant witnesses.

19. Section 245 Cr.P.C. provides when accused shall be discharged. Section 245 Cr.P.C. is reproduced herein below:

> ***"245. When accused shall be discharged.****-(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.*
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> *(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.***"**

20. On 05.09.2016 the learned Counsel for the Respondent No.1 and 2 would file applications under Section 197 Cr.P.C. which was heard on 04.10.2016 and order reserved. On 25.10.2016 the impugned order would be passed by the learned Chief Judicial Magistrate quashing the Criminal Complaint for lack of sanction under Section 197 Cr.P.C.

21. Quite clearly the evidence required to be taken under Section 244 Cr.P.C. had not been taken by the learned Chief Judicial Magistrate when on 25.10.2016 the Criminal Complaint was *"quashed"* for lack of sanction under 197 Cr.P.C.

22. Dr. Doma T. Bhutia, learned Counsel for the Petitioner would submit that the learned Chief Judicial Magistrate having taking cognizance and issued the process under Section 204 Cr.P.C. did not have the power to move the clock back and quash the complaint and by doing so would amount to recall of the order issuing process dated 05.08.2016. She would further

submit that the only remedy open in such a situation would be to approach this Court under Section 482 Cr.P.C. Dr. Doma T. Bhutia would rely upon the judgment of the Supreme Court in re: ***Adalat Prasad v. Rooplal Jindal & Ors.***[2].

23. In re: ***Adalat Prasad (supra)*** the Supreme Court would hold:

> ***"14.*** *But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under Section 204 of the Code. Therefore, what is necessary or a condition precedent for issuing process under Section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under Section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under Section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in Mathew case [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] that before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises under Section 203 of the Code at which stage the accused has no role to play, therefore, the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under Section 203 of the Code on a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.*

[2] **(2004) 7 SCC 338**

> ***15.*** *It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code.*
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> ***16.*** *Therefore, in our opinion the observation of this Court in the case of Mathew [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] that for recalling an erroneous order of issuance of process, no specific provision of law is required, would run counter to the scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in Mathew case [(1992) 1 SCC 217 : 1992 SCC (Cri) 88] that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law.****"***

24. In re: ***Iris Computers Ltd. v. Askari Infotech (P) Ltd.[3] & Ors.***, the Supreme Court would hold:

> ***"8.*** *The point that would fall for our consideration and decision is, whether the learned Magistrate was justified in recalling the order passed by him issuing summons to the respondents upon an application made by them under Sections 202, 203 and 245 of the Code.*
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> ***9.*** *This Court has dealt with the question of recall of a process issued under Section 204 of the Code in Adalat Prasad case [Adalat Prasad v. Rooplal Jindal, (2004) 7 SCC 338 : 2004 SCC (Cri) 1927] and opined that the Code does not contemplate or provide for any provision affording opportunity to the accused*

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[3] **(2015) 14 SCC 399**

until the issuance of process to him under Section 204. This Court has observed that before issuing summons under Section 204 of the Code the Magistrate must be satisfied that there exists sufficient ground for proceeding with the complaint and a prima facie case is made out against the accused. The said satisfaction should be arrived at by conducting an inquiry as contemplated under Sections 200 and 202 of the Code. The first stage of dismissal of the complaint before the issuance of process arises under Section 203 of the Code, at which stage the accused has no role to play. Subsequent to issuance of process, the question of the accused approaching the court by making an application under Section 203 of the Code for dismissal of the complaint is impermissible because by then the stage of Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

10. *Therefore, the crux of the matter rests into the existence of two different scenarios; the former involving only the complainant's role and the latter introducing the accused. The former constitutes cognizance of the offence on complaint, satisfaction reached by the Magistrate that a prima facie case is made out and thereafter, issuance of process to the accused. It is only after the aforesaid stages are complete; the next stage is triggered enabling the accused to actively participate in the proceedings. The dismissal of complaint by the Magistrate under Section 203 evidently falls into the former stages of proceedings when the Magistrate has to base his opinion as to the existence of sufficient ground for proceeding towards the second stage on the statements of the complainant and the witnesses along with the result of the inquiry conducted under Section 202. It is for obvious reasons that none of the former stages in the Code provide for hearing the summoned accused, the said being only preliminary stages and the stage of hearing of the accused arising at subsequent stages provided for in the latter provisions in the Code. (See Bholu Ram v. State of Punjab [Bholu Ram v. State of Punjab, (2008) 9 SCC 140: (2008) 3 SCC (Cri) 710] .)***"**

25. In re: ***Adalat Prasad (supra)*** on an application filed by the Appellant therein under Section 203 Cr.P.C. the Trial Court vide

its order dated 28.01.1995 after hearing the parties recalled the summons issued earlier. This order of the learned Trial Judge recalling the summons originally issued by him was challenged before the High Court on the ground that the Magistrate had no jurisdiction to recall summons issued under Section 204 Cr.P.C. The High Court allowed the revision on the ground that the Trial Court did not have the power to review its own order. The Supreme Court would examine its earlier judgment in re: ***K. M. Mathew v. State of Kerala & Anr.***[4] wherein it was held that it was open to the Court issuing summons to recall the same on being satisfied that the issuance of summons was not in accordance with law. The Supreme Court would hold that the observation in re: ***K. M. Mathew (supra)*** that for recalling an erroneous order of issuance of process, no specific provision of law is required, would run counter to the scheme of the Cr.P.C. which has not provided for review and prohibits interference at interlocutory stages. The Supreme Court would hold that if a Magistrate take cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provisions of Section 200 and 202 Cr.P.C., the order of the Magistrate may be vitiated, but then the relief and aggrieved accused can obtain at that stage is not by invoking Section 203 of the Cr.P.C. because the Cr.P.C. does not contemplate a review of an order. Hence, in the absence of any

[4] **(1992) 1 SCC 217**

review power with the Subordinate Criminal Courts, the remedy lies in invoking Section 482 of the Cr.P.C.

26. In re: ***Urmila Devi v. Yudhvir Singh***[5] the Supreme Court would have occasion to explain its judgment in re: ***Adalat Prasad (supra)*** and hold that the revisional jurisdiction under Section 397 Cr.P.C. is available to the aggrieved party in challenging the order of the Magistrate, directing issuance of summons.

27. In re: ***Iris Computers Ltd. (supra)*** the learned Magistrate returned the complaint filed by the Appellant therein on the grounds of lack of territorial jurisdiction and also recalled the order issuing summons to the Respondents therein on the application filed by the Respondents therein under Sections 202, 203 and 245 Cr.P.C. The Supreme Court would hold that it had dealt with the question of recall of process issued under Section 204 Cr.P.C. in re: ***Adalat Prasad (supra)*** and opined that Cr.P.C. does not contemplate or provide for any provision affording opportunity to the accused until the issuance of process to him under Section 204 Cr.P.C. The Supreme Court would also note that in re: ***Adalat Prasad (supra)*** it had observed that before issuing summons under Section 204 Cr.P.C. the Magistrate must be satisfied that there exists sufficient ground for proceeding with the complaint and a *prima facie* case is made out against the accused. The said satisfaction should be arrived at by conducting an inquiry as contemplated under Section 200

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[5] **(2013) 15 SCC 624**

and 202 Cr.P.C. The first stage of dismissal of the complaint before the issuance of process arises under Section 203 Cr.P.C., at which stage the accused has no role to play. Subsequent to the issuance of process, the question of the accused approaching the Court by making an application under Section 203 Cr.P.C. for dismissal of the complaint is impermissible because by then the stage of Section 203 is already over and the Magistrate has proceeded further to Section 204 stage. The Supreme Court would hold that the crux of the matter rests into the existence of two different scenarios; the former involving only the complainant's role and the latter introducing the accused. The former constitutes cognizance of the offence on complaint, satisfaction reached by the Magistrate that a *prima facie* case is made out and thereafter, issuance of process to the accused. It is only after the aforesaid stages are complete; the next stage is triggered enabling the accused to actively participate in the proceedings. The dismissal of complaint by the Magistrate under Section 203 evidently falls into the former stages of proceedings when the Magistrate has to base his opinion as to the existence of sufficient ground for proceeding towards the second stage on the statements of the complainant and the witnesses along with the result of the inquiry conducted under Section 202. It is for obvious reasons that none of the former stages in the Code provide for hearing the summoned accused, the said being only preliminary stages and the stage of hearing of the accused

arising at subsequent stages provided for in the latter provisions in the Code.

28. On 22.08.2016 and 27.08.2016 the Respondent Nos. 1 and 2 as well as accused no. 3 would appear as accused persons before the learned Chief Judicial Magistrate. Thus, evidently, as per the scheme of Cr.P.C. as explained by the order of the Supreme Court in re: ***Iris Computers (supra)*** the present case had reached the next stage when the accused was introduced and brought before the learned Chief Judicial Magistrate enabling the accused persons to actively participate in the proceedings. Evidently again, it is at this stage that the Respondent Nos. 1 and 2 filed the applications dated 05.09.2016 under Section 197 Cr.P.C. and sought dismissal of the complaint filed by the complainant on the ground that the alleged role of the Respondent Nos. 1 and 2 as alleged in the complaint fell within the provisions of Section 197 Cr.P.C. and they being public servants could not be prosecuted without obtaining prior sanction. The question which would therefore arise for consideration in the present case is whether the impugned order dated 25.10.2016 passed by the learned Chief Judicial Magistrate *"quashing"* the complaint filed by the Petitioner would amount to a discharge under Section 245 (2) Cr.P.C.?

29. No application for recall of summons as was done in re: ***Adalat Prasad (supra)*** as well as ***Iris Computers Ltd. (supra)*** was made before the learned Chief Judicial Magistrate under Section

203 by the Respondent Nos. 1 and 2 in the present case. The applications clearly sought for dismissal of the complaint under Section 197 Cr.P.C. The learned Chief Judicial Magistrate instead *"quashed"* the complaint. There is a fundamental difference between dismissal and quashing. To dismiss would imply to terminate without further hearing and to quash would mean to annul or make void. Section 197 Cr.P.C. provides that when any person who is a public servant not removal from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take *"cognizance"* of such offence except with the previous sanction.

30. In re: ***Ajoy Kumar Ghose v. State of Jharkhand & Anr.***[6] the Supreme Court would hold:

> *"**24.** Now, there is a clear difference in Sections 245(1) and 245(2) of CrPC. Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether if the evidence remains unrebutted, the conviction of the accused would be warranted. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) CrPC.*
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> *23. Essentially, the applicable sections are Sections 244 and 245 CrPC since this is a warrant trial instituted otherwise than on police report. There had to be an opportunity for the prosecution to lead evidence under Section 244(1) CrPC or to summon its witnesses under Section 244(2) CrPC. This did not*

[6] **(2009) 14 SCC 115**

happen and instead, the accused proceeded to file an application under Section 245(2) CrPC on the ground that the charge was groundless.

25. *The situation under Section 245(2) CrPC is, however, different. There, under sub-section (2), the Magistrate has the power of discharging the accused at any previous stage of the case i.e. even before such evidence is led. However, for discharging an accused under Section 245(2) CrPC, the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the court or the evidence is led under Section 244 CrPC. The words appearing in Section 245(2) CrPC "at any previous stage of the case", clearly bring out this position.*

26. *It will be better to see what is that "previous stage". The previous stage would obviously be before the evidence of the prosecution under Section 244(1) CrPC is completed or any stage prior to that. Such stages would be under Section 200 CrPC to Section 204 CrPC. Under Section 200, after taking cognizance, the Magistrate examines the complainant or such other witnesses, who are present. Such examination of the complainant and his witnesses is not necessary, where the complaint has been made by a public servant in discharge of his official duties or where a court has made the complaint or further, if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 CrPC. Under Section 201 CrPC, if the Magistrate is not competent to take the cognizance of the case, he would return the complaint for presentation to the proper court or direct the complainant to a proper court.*

27. *Section 202 CrPC deals with the postponement of issue of process. Under sub-section (1), he may direct the investigation to be made by the police officer or by such other person, as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Under Section 202(1)(a) CrPC, the Magistrate cannot give such a direction for such an investigation, where he finds that offence complained of is triable exclusively by the Court of Session. Under Section 202(1)(b) CrPC, no such direction can be given where the complaint has been made by the court.*

28. *Under Section 203 CrPC, the Magistrate, after recording the statements on oath of the complainant and of the witnesses or the result of the inquiry or investigation ordered under Section 202 CrPC, can dismiss the complaint if he finds that there is no sufficient ground for proceeding.*

29. *On the other hand, if the Magistrate comes to the conclusion that there is sufficient ground for proceeding, he can issue the process under Section 204 CrPC. He can issue summons for the attendance of the accused and in a warrant case, he may issue a warrant, or if he thinks fit, a summons, for securing the attendance of the accused. Sub-sections (2), (3), (4) and (5) of Section 204 CrPC are not relevant for our purpose. It is in fact here, that the previous stage referred to under Section 245 CrPC normally comes to an end, because the next stage is only the appearance of the accused before the Magistrate in a warrant case under Section 244 CrPC.*

30. *Under Section 244, on the appearance of the accused, the Magistrate proceeds to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. He may, at that stage, even issue summons to any of the witnesses on the application made by the prosecution. Thereafter comes the stage of Section 245(1) CrPC, where the Magistrate takes up the task of considering on all the evidence taken under Section 244(1) CrPC, and if he comes to the conclusion that no case against the accused has been made out, which, if unrebutted, would warrant the conviction of the accused, the Magistrate proceeds to discharge him.*

31. *The situation under Section 245(2) CrPC, however, is different, as has already been pointed out earlier. The Magistrate thereunder has the power to discharge the accused at any previous stage of the case. We have already shown earlier that that previous stage could be from Sections 200 to 204 CrPC and till the completion of the evidence of prosecution under Section 244 CrPC. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 CrPC, and makes an application for discharge.***”**

31. The application filed by the Respondent Nos. 1 and 2 is under Section 197 Cr.P.C. Section 197 Cr.P.C. is the mandate that no Court shall take *"cognizance"* if the offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty is done by a person who is a public servant not removal from his office save by or with the sanction of the Government. The procedure to be followed in a complaint case for trial of warrant cases after the process under Section 204 Cr.P.C. is provided in Section 244 and 245 Cr.P.C. The application seeking dismissal of the complaint on the ground of lack of sanction filed by the Respondent Nos.1 and 2 ought to have invoked the provision of Section 245 Cr.P.C. As held by the Supreme Court in re: ***Ajoy Kumar Ghose (supra)*** the learned Chief Judicial Magistrate had the power and jurisdiction to discharge the Respondent Nos. 1 and 2 under the provision of Section 245 (2) Cr.P.C. even before the taking of the evidence of the prosecution. Merely because the Respondent Nos. 1 and 2 failed to specify the source of power i.e. Section 245 (2) Cr.P.C. or for that matter even if a wrong provision had been invoked would not disentitle the Court to exercise the power it had to render justice. The learned Chief Judicial Magistrate may have not used the appropriate word by holding *"the complaint against accused nos. 1 and 2 stands quashed for want of sanction under Section 197, Cr.P.C., 1973"* but the very fact that the learned Chief Judicial Magistrate decided to proceed against the accused no.3 in the same complaint makes it evident that in effect the

Respondent Nos. 1 and 2 had been discharged. This Court is inclined to take this view on the strength of the settled proposition reiterated by the Supreme Court in several judgments including in re: ***N. Mani v. Sangeetha Theatre & Ors.***[7] in which it would be held:

> ***"9.*** *It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.****"***

32. This brings us to the moot issue as to whether on the allegations made by the Petitioner against the Respondent Nos.1 and 2, sanction as mandated under Section 197 Cr.P.C. was required. There is no quarrel that Respondent No.1 or 2 are public servants.

33. Dr. Doma T. Bhutia would rely upon the judgments of the Supreme Court in re: ***Inspector of Police & Anr. v. Battenapatla Venkata Ratnam & Anr.***[8]; ***Parkash Singh Badal & Anr. v. State of Punjab & Ors.***[9]***; P.K. Pradhan v. State of Sikkim***[10] and submit that the allegations in the complaint filed by the Petitioner would suffice to reflect that the alleged act of the Respondent Nos. 1 and 2 were beyond the scope of their official duty and as such no sanction was required to be taken.

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[7] **(2004) 12 SCC 278**
[8] **(2015) 13 SCC 87**
[9] **(2007) 1 SCC 1**
[10] **(2001) 6 SCC 704**

34. In re: ***Battenapatla Venkata Ratnam (supra)*** the Supreme Court would hold:

> ***"7.*** *No doubt, while the respondents indulged in the alleged criminal conduct, they had been working as public servants. The question is not whether they were in service or on duty or not but whether the alleged offences have been committed by them "while acting or purporting to act in discharge of their official duty". That question is no more res integra. In Shambhoo Nath Misra v. State of U.P. [(1997) 5 SCC 326 : 1997 SCC (Cri) 676] , at para 5, this Court held that: (SCC p. 328)*
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> *"5. The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund, etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds, etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund, etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained."*
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> ***8.*** *In Parkash Singh Badal v. State of Punjab [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] , at para 20 this Court held that: (SCC pp. 22-23)*
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> *"20. The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity."*
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> *and thereafter, at para 38, it was further held that: (Parkash Singh Badal case [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] , SCC p. 32)*

"38. The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage."

***9**. In a recent decision in Rajib Ranjan v. R. Vijaykumar [(2015) 1 SCC 513 : (2015) 1 SCC (Cri) 714] at para 18, this Court has taken the view that: (SCC p. 521)*

> *"18. … even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted."*
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> *(emphasis supplied)*

***10.** Public servants have, in fact, been treated as a special category under Section 197 CrPC, to protect them from malicious or vexatious prosecution. Such protection from harassment is given in public interest; the same cannot be treated as a shield to protect corrupt officials. In Subramanian Swamy v. Manmohan Singh [(2012) 3 SCC 64 : (2012) 1 SCC (Cri) 1041 : (2012) 2 SCC (L&S) 666] , at para 74, it has been held that the provisions dealing with Section 197 CrPC must be construed in such a manner as to advance the cause of honesty, justice and good governance. To quote: (SCC pp. 101-02)*

> *"74. … Public servants are treated as a special class of persons enjoying the said protection so that they can perform their duties without fear and favour and without threats of malicious prosecution. However, the said protection against malicious prosecution which was extended in public interest cannot become a shield to protect corrupt officials. These provisions being exceptions to the equality provision of Article 14 are analogous to the provisions of protective discrimination and these protections must be construed very narrowly. These procedural provisions relating to sanction must be construed in such a manner as to advance the causes of honesty and justice and good governance as opposed to escalation of corruption.*

11. *The alleged indulgence of the officers in cheating, fabrication of records or misappropriation cannot be said to be in discharge of their official duty. Their official duty is not to fabricate records or permit evasion of payment of duty and cause loss to the Revenue. Unfortunately, the High Court missed these crucial aspects. The learned Magistrate has correctly taken the view that if at all the said view of sanction is to be considered, it could be done at the stage of trial only.**"***

35. *In re:* ***P.K. Pradhan (supra)*** the Supreme Court would hold:

"5. *The legislative mandate engrafted in sub-section (1) of Section 197 debarring a court from taking cognizance of an offence except with the previous sanction of the Government concerned in a case where the acts complained of are alleged to have been committed by a public servant in discharge of his official duty or purporting to be in the discharge of his official duty and such public servant is not removable from office save by or with the sanction of the Government, touches the jurisdiction of the court itself. It is a prohibition imposed by the statute from taking cognizance. Different tests have been laid down in decided cases to ascertain the scope and meaning of the relevant words occurring in Section 197 of the Code: "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point for determination is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits. What a court has to find out is whether the act and the official duty are so interrelated that one can postulate reasonably that it was done by the accused in the performance of official duty, though, possibly in excess of the needs and requirements of the situation.*

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15. *Thus, from a conspectus of the aforesaid decisions, it will be clear that for claiming protection under Section 197 of the Code, it has*

to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well settled that question of sanction under Section 197 of the Code can be raised any time after the cognizance; maybe immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."

36. *Per contra* Mr. N. Rai would submit that the allegation in the complaint taken in its entirety would reflect that all the alleged acts imputed on the Respondent Nos. 1 and 2 would fall squarely within the phrase *"acting or purporting to act in the discharge of his official duty."* He would rely upon the judgment of the Supreme Court in re: ***D. T. Virupakshappa v. C. Subash***[11] ***and Sankaran Moitra v. Sadhna Das & Anr.***[12]**.**

[11] **(2015) 12 SCC 231**
[12] **(2006) 4 SCC 584**

37. *In re:* ***D. T. Virupakshappa (supra)*** the Supreme Court would hold:

> ***"5.*** *The question, whether sanction is necessary or not, may arise on any stage of the proceedings, and in a given case, it may arise at the stage of inception as held by this Court in Om Prakash v. State of Jharkhand [Om Prakash v. State of Jharkhand, (2012) 12 SCC 72 : (2013) 3 SCC (Cri) 472] . To quote: (SCC p. 94, para 41)*
>
> *"41. The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the public servant concerned at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea."*
>
> ***6****. In the case before us, the allegation is that the appellant exceeded in exercising his power during investigation of a criminal case and assaulted the respondent in order to extract some information with regard to the death of one Sannamma, and in that connection, the respondent was detained in the police station for some time. Therefore, the alleged conduct has an essential connection with the discharge of the official duty. Under Section 197 CrPC, in case, the government servant accused of an offence, which is alleged to have been committed by him while acting or purporting to act in discharge of his official duty, the previous sanction is necessary.*
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> ***7.*** *The issue of "police excess" during investigation and requirement of sanction for prosecution in that regard, was also the subject-matter of State of Orissa v. Ganesh Chandra Jew [State of Orissa v. Ganesh Chandra Jew, (2004) 8 SCC 40 : 2004 SCC (Cri) 2104] , wherein, at para 7, it has been held as follows: (SCC pp. 46-47)*

"7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty."

(emphasis supplied)

8. *In Om Prakash [Om Prakash v. State of Jharkhand, (2012) 12 SCC 72 : (2013) 3 SCC (Cri) 472] , this Court, after referring to various decisions, particularly pertaining to the police excess, summed up the guidelines at para 32, which reads as follows: (SCC p. 89)*

"32. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally

connected with or attached to his office as to be inseparable from it (K. Satwant Singh [K. Satwant Singh v. State of Punjab, AIR 1960 SC 266 : 1960 Cri LJ 410]). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection (Ganesh Chandra Jew [State of Orissa v. Ganesh Chandra Jew, (2004) 8 SCC 40 : 2004 SCC (Cri) 2104]). If the above tests are applied to the facts of the present case, the police must get protection given under Section 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood."

(emphasis supplied)

***9**. In our view, the above guidelines squarely apply in the case of the appellant herein. Going by the factual matrix, it is evident that the whole allegation is on police excess in connection with the investigation of a criminal case. The said offensive conduct is reasonably connected with the performance of the official duty of the appellant. Therefore, the learned Magistrate could not have taken cognizance of the case without the previous sanction of the State Government. The High Court missed this crucial point in the impugned order."*

38. In re: ***Sankaran Moitra (supra)*** the Supreme Court would hold:

***"22.** Learned counsel for the complainant argued that want of sanction under Section 197(1) of the Code did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate time. We are not in a position to accept this submission. Section 197(1), its opening words and the object sought to be achieved by it, and the*

*decisions of this Court earlier cited, clearly indicate that a prosecution hit by that provision cannot be launched without the sanction contemplated. It is a condition precedent, as it were, for a successful prosecution of a public servant when the provision is attracted, though the question may arise necessarily not at the inception, but even at a subsequent stage. We cannot therefore accede to the request to postpone a decision on this question.***"**

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"25**. The High Court has stated that killing of a person by use of excessive force could never be performance of duty. It may be correct so far as it goes. But the question is whether that act was done in the performance of duty or in purported performance of duty. If it was done in performance of duty or purported performance of duty, Section 197(1) of the Code cannot be bypassed by reasoning that killing a man could never be done in an official capacity and consequently Section 197(1) of the Code could not be attracted. Such a reasoning would be against the ratio of the decisions of this Court referred to earlier. The other reason given by the High Court that if the High Court were to interfere on the ground of want of sanction, people will lose faith in the judicial process, cannot also be a ground to dispense with a statutory requirement or protection. Public trust in the institution can be maintained by entertaining causes coming within its jurisdiction, by performing the duties entrusted to it diligently, in accordance with law and the established procedure and without delay. Dispensing with of jurisdictional or statutory requirements which may ultimately affect the adjudication itself, will itself result in people losing faith in the system. So, the reason in that behalf given by the High Court cannot be sufficient to enable it to get over the jurisdictional requirement of a sanction under Section 197(1) of the Code of Criminal Procedure. We are therefore satisfied that the High Court was in error in holding that sanction under Section 197(1) was not needed in this case. We hold that such sanction was necessary and for want of sanction the prosecution must be quashed at this stage. It is not for us now to answer the submission of learned counsel for the complainant that this is an eminently fit case for grant of such sanction."**

39. With regard to Respondent No.1 the allegations in the complaint were:

> **"2.** *That the respondent no.1/accused person no.1 is presently posted as Deputy Commandant, Sikkim Armed Police, Pangthang, East Sikkim. While the respondent no.2/accused no.2 is an ex-police Sub-Inspector of Sikkim police, Government of Sikkim.*
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> *xxxxxxxxxxxx*
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> ***8.*** *That the call and the request for seeking police help in order to avoid any law and order problem was received by the respondent no.1/accused no.1, who after some time sent three constables to Nayuma Indane premises in order to pacify and control the respondent no.3/accused no.3 and to avoid any law and order problem.*
>
> *xxxxxxxxxxxx*
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> ***13.*** *That although a hue and cry massage was already communicated to the respondent no.1/accused no.1 by the complainant and later by the three constables for sending a lady constable to control the respondent no.3/accused no.3 but he remained cool and intentionally did not take any further steps to control the respondent no.3/accused no.3.*
>
> *It is stated that the respondent no.1/accused no.1 intentionally did not take any further steps to avoid any criminal acts of the respondent no.3/accused no.3 and also did not maintain any G.D. Entry in the Namchi Police Station concerning the telephonic complaint of the complainant and further request of the three constables for sending a lady constable to control the respondent no.3/accused no.3.*
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> *It is stated that if the respondent no.1/accused no.1 would had taken a serious note of the telephonic complaint made by the complainant and the three constables in that situation the respondent no.3/accused no.3 would have not got any chance to collect a mob during her second return and further to enter into the office of the complainant with an intention to assault him and damage the properties therein.*

14. *That amazingly, later the respondent no.3/accused no.3 lodged a false complaint against the complainant which was immediately registered by the respondent no.1/accused no.1 as Namchi P.S. Case No.71(12) 12, dated 31/12/12, under section 354/324/294 IPC.*

15. *That in fact the respondent no.3/accused no.3 was the main culprit who without any genuine reason (without any document) and with a criminal intention entered into the premises of Nayuma Indane and Dish T.V. with a purpose to assault the staffs and damage properties therein hence it was felt necessary by the complainant to take a legal remedy against her.*

It is stated that after the respondent no.3/accused no.3 was stopped by the complainant from entering into his office and further to vandalize the shop premises with the help of the assembled mob, the complainant too made a written FIR against the respondent no.3/accused no.3 before the Namchi Police station but unfortunately the respondent no.1/accused no.1 deliberately did not take any actions on the said complainant/FIR lodged by the complainant which consequently resulted a failure of maintaining justice by a public servant (here the than SHO of Namchi Police Station i.e. the respondent no.1/accused no.1).

16. *That the respondent no.1/accused no.1 not only denied to register the FIR lodged by the complainant but also did not intentionally take legal actions against the respondent no.3/accused no.3 even after the directions of the senior Superintendent of police, Namchi, South Sikkim.*

17. *That the false FIR lodged by the respondent no.3/accused no.3 and the illegal attitude to not to register the FIR lodged by the complainant and further not to take any legal actions against the respondent no.3/accused no.3 resulted an unfortunate illegal detention of the complainant in Namchi Police Station.*

It is stated that the intentions of all the respondents/accused persons was to maliciously prosecute the complainant and to suppress the material facts which were certainly against the respondent no.3/accused no.3.

18. *That the illegal non cooperative attitude of the respondent no.1/accused no.1 and the harassment caused to the complainant through his illegal detention in Namchi police station resulted a danger to the life of complainant as he was immediately taken to Namchi District Hospital due to a complaint of severe chest pain resulting a mild heart attack.*

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22*. That due to the false allegation by the respondent no.3/accused no.3 in her FIR and the illegal registration of the said FIR by the respondent no.1/accused no.1 and investigation of the said FIR conducted by the respondent no.2/accused no.2 resulted in a harsh injury in the administration of law and order and to the image of the complainant in the society and the public at large. It is stated that the said false FIR not only resulted a false rumor against the complainant but also it resulted as a sizzling news for the local newspapers who without any responsibility took interests in publishing such baseless news and further defaming the complainant throughout the state of Sikkim.*

23. *That in the entire process, the respondent no.1/accused no.1 intentionally and very wickedly did not take any action made by the complainant against the respondent no.3/accused no.3 despite of the directions given to him by Shri Manoj Tewari i.e. the then Superintendent of Police, Namchi, South Sikkim.*

It is stated that the main objective behind non registration of the FIR lodged by the complainant against the respondent no.3/accused no.3 was solely made for the purpose to confine the complainant in the police custody and further to harass and defame him in the society by way of maliciously prosecuting into a false case.

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26. *That during the trial of the G.R. Case No.14/13 (State of Sikkim versus Shirish Khare) following facts were revealed:-*

i) That the telephonic information which was given by the complainant to the respondent no.1/accused no.1 was not entered in the Namchi Police Station, General diary and later the respondent no.1/accused no.1 did not take any initiative to take any legal action

against the respondent no.3/accused no.3 for her criminal intentions against the complainant and the staff of Nayuma Indane and Dish TV.

ii) That despite of the directions of the Senior Superintendent of Police Namchi, South Sikkim, the respondent no.1/accused no.1 intentionally did not register the FIR which was lodged against the respondent no.3/accused no.3 by the complainant on the same day of the incident.

iii) That the statements of the several eye witnesses and the staffs of Nayuma Indane and Dish T.V. were not intentionally recorded under section 161 Cr.P.C. by the investigating officer i.e. respondent no.2/accused no.2.

iv) That the 161 Cr.P.C. statements of several witnesses were intentionally fabricated and twisted against the complainant with a motive to falsely implicate him in a false police criminal case.

v) That during the cross examination the respondent no.2/accused no.2 himself admitted that the respondent no.3/accused no.3 had mislead him during his investigation.

vi) That due to non registration of the FIR lodged by the complainant against the respondent no.3/accused no.3 and further registration of a false and fabricated FIR lodged by the respondent no.3/accused no.3 and later submission of a false and fabricated FIR resulted a miscarriage of justice and the complainant being an innocent person was dragged in a trial of G.R. Case no. 13/14 and maliciously prosecuted for a period of 2 years.

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28**. That the submission of a false FIR by the respondent no.3/accused no.3 and later its registration and wrong investigation was done for the purpose to illegally prosecute, harass and defame the complainant. It is stated that since all the respondents/accused persons acted in a illegal design/strategy to annoy and insult the complainant and since their such personal intention had no connection with any provisions of law consequently no sanction under section 197 Cr.P.C. is required to prosecute the respondent no.1 and 2/accused no.1 and 2."**

40. A perusal of the allegations made in the complaint against the Respondent No.1 shows that the same were allegedly done "*acting or purporting to act in the discharge of his official duty.*" The main argument of Dr. Doma T. Bhutia was that the Petitioner had alleged conspiracy and *"even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted."*

41. There is an elementary difference between public servant committing a criminal act *per se* and the doing of an act in his official duty or purporting to be in his official duty which may and could be construed as a criminal act. The only allegation in the complaint which according to Dr. Doma T. Bhutia would amount to conspiracy is the allegation made in paragraph 26(iv) and 28 of the complaint quoted above. The allegation "*That the 161 Cr.P.C. statements of several witnesses were intentionally fabricated and twisted against the complainant with a motive to falsely implicate him in a false police criminal case"* is not specific and therefore, this Court is inclined to accept the submission made by Mr. N. Rai that even if the statement is accepted as correct it would imply that it was the Investigating Officer who recorded the statements of several witnesses under Section 161 Cr.P.C. and cannot be attributed upon the Respondent No.1 who

was then the Station House Officer. In any case the allegation would not amount to conspiracy as conspiracy necessarily implies meeting of minds of two or more persons. A perusal of the pre-summoning deposition of the Petitioner clarifies that the allegation regarding the recording of the statement under Section 161 Cr.P.C. was specifically attributed to the Investigating Officer i.e. Respondent No. 2 and not the Respondent No. 1. Dr. Doma T. Bhutia would further submit emphasising on the words *"illegal design/strategy"* in paragraph 28 of the complaint that these words used in the said paragraph would imply conspiracy hatched by the Respondent Nos. 1 and 2 along with accused no. 3. Paragraph 28 does not allege conspiracy. Mere use of the words *"design"* or *"strategy"* would not imply conspiracy. A singular person may have a *"design"* or a *"strategy"* to do any illegal act. An allegation of conspiracy must be specific. The essence of conspiracy is the agreement to do, or cause to be done, an illegal act, or an act which is not illegal by illegal means. A perusal of the complaint as well as the pre-summoning deposition of the Petitioner as well as his witnesses does not even *prima facie* indicate any conspiracy between the Respondent Nos. 1, 2 and accused no. 3. Dr. Doma T. Bhutia would submit that although the complaint may not have specifically alleged conspiracy but based on the allegation made in paragraph 26 and 28 of the complaint if the complaint is proceeded with and evidence taken subsequently enough material to establish conspiracy may come forth during trial.

This Court is afraid that such a procedure is unacceptable in law. A criminal accusation is a serious thing. Not only the accusation must be specific but *prima facie* material must be brought on record. If no such material is available the Court is fully within its jurisdiction to discharge the accused and if it is done there would be no reason for the Revisional Court or the High Court in exercise of its inherent powers to interfere with such an order of discharge. Even if in doing their official duty, the Respondent No.1 and 2 acted in excess of their duty, but there is a reasonable connection between the act and the performance of the official duty, the excess would not be a sufficient ground to deprive them of the protection as they were admittedly public servants. The allegations in the complaint would reflect a reasonable connection with the performance of the official duty of the Respondent Nos.1 and 2.

42. In re: ***P. K. Pradhan (supra)*** the Supreme Court has clearly held that it is well settled that question of sanction under Section 197 Cr.P.C. can be raised any time after the cognizance; maybe immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. The same view is found in the judgment of the Supreme Court in re: ***D. T. Virupakshappa (supra)*** in which it was held that the question, whether sanction is necessary or not, may arise on any stage of the proceedings, and in a given case, it may arise at the stage of inception. The High Court of Kerala in re: ***Prasob v. State of***

Kerala[13] would examine a similar issue in a complaint case and discharge the accused under Section 245(2) Cr.P.C. for want of sanction under 197 Cr.P.C. The Supreme Court in re: ***Nanjappa v. State of Karnataka***[14] would hold that the question regarding the validity of sanction can be raised at any stage of the proceedings and in case the sanction is found to be invalid the Court can discharge the accused relegating the parties to a stage where the competent authority may grant a fresh sanction for the prosecution in accordance with law.

43. In view of the aforesaid it is held that the impugned order of the Chief Judicial Magistrate dated 25.10.2016 amounts to an order of discharge against the Respondent Nos. 1 and 2 under Section 245(2) Cr.P.C. for want of sanction under Section 197 Cr.P.C. So interpreted the impugned order dated 25.10.2016 passed by the learned Chief Judicial Magistrate and the order dated 29.08.2017 passed by the learned Sessions Judge brook no interference in exercise of the inherent powers of this Court and are accordingly upheld. The petition under Section 482 Cr.P.C. is dismissed.

(Bhaskar Raj Pradhan)
Judge
18.09.2018

Approved for reporting: yes.
to/ Internet: yes.

[13] **Order dated 08.01.2009 in Crl. Rev. Pet. No. 475 of 2008/ https://indiankanoon.org/doc/129986**
[14] **(2015) 14 SCC 186**