Before Harnaresh Singh Gill, J.

TEHSILDAR SINGH—*Petitioners*

versus

STATE OF HARYANA—*Respondent*

CRR No.1116 of 2012

May 28, 2019

Code of Criminal Procedure, 1973—S.197—Indian Penal Code, 1860—S.223 and 120-B—Sanction for prosecution—Petitioners who were Constables were alleged to have been directed to produce two accused before the Duty Magistrate—One accused took his hand out of handcuff and taking advantage of rush managed to slip away—Petitioners tried and convicted for offences under sections 223 and 120-B IPC—Appeals dismissed—Revisions filed—Allowed—Held, it could not be brought on record as to how Sub Inspector fastened the allegation of custody of the accused on the petitioners—Further held, a public servant can be tried in a criminal case after sanction of Government for the offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty is obtained—Further held, society suffers from wrong conviction and it equally suffers from wrong acquittals.

Held that, vide order dated 3.2.2003, each guard was entrusted with the custody of specific accused by name. As per this document, petitioner Anil Kumar was given the custody of Fakru, whereas custody of Iqbal (who escaped from the Court complex) was given to Constable Naresh Kumar. It could not be brought on record as to how complainant Sub Inspector Ram Kumar, who appeared as PW-1 in the witness box, had fastened the allegation of custody of the accused upon the petitioners. Even in his cross-examination, he was unable to produce the record assigning the duties to the Constables, but he did not deny that order was issued and specific custody was assigned to the Constables to produce the accused in the Courts. This witness went to the extent of stating that he did not remember to whom the custody of the accused was handed over. Thus, as per the record, custody of Iqbal son of Alla Khan was entrusted to Constable Naresh Kumar and the said Constable Naresh Kumar, who was also present there, was duty bound to check the custody of accused Iqbal. Thus, the petitioners cannot be held liable for accused Iqbal having fled away from the Court premises. (Para 18)

Further held that, so far as Section 197 Cr.P.C. is concerned, a public servant can only be tried in a criminal case after the sanction of the Government for the offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.

(Para 19)

Further held that, Court should not oversight that the society suffers by wrong conviction and it equally suffers from wrong acquittals. Therefore, it is the duty of the Court to scrutinize the evidence carefully and in the terms of felicitous metaphor, separate the grain from the chaff. Thus, it is better that 10 guilty persons escape than the one innocent suffers. To my mind, similar is the situation in the present case, where even the custody of accused person, who absconded, was never handed over to the petitioners and, therefore, they cannot be held to be guilty for the escape of the said accused.

(Para 25)

Bineet Chaudhary, Advocate
for the petitioner in CRR No. 1116 of 2012

R.S.Ghuman, Advocate
for the petitioner in CRR No. 1205 of 2012

Tanuj Sharma, A.A.G., Haryana.

HARNARESH SINGH GILL, J.

(1) This order shall dispose of above mentioned two revision petitions as both have arisen from a common judgment dated 4.4.2012 passed by the Additional Sessions Judge, Faridabad.

(2) The petitioners were tried for committing the offences under Sections 223, 120-B of the Indian Penal Code ('*IPC*' for short) in case FIR No. 95 dated 3.2.2003, registered at Police Station Central Faridabad. Vide judgment dated 1.11.2011, the learned Judicial Magistrate Ist Class found the petitioners guilty for the offences under Sections 223, 120-B and vide order dated 2.11.2011 sentenced them to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs. 1,000/- each under Section 223 IPC and to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs. 1,000/- each under Section 120-B IPC. In default of payment of fine, they were to further undergo simple imprisonment for a period of three months.

(3) Aggrieved of the judgment passed by learned Judicial Magistrate Ist Class, the petitioners filed two separate appeals which

came up for hearing before Additional Sessions Judge, Faridabad. Both the appeal were dismissed on 4.4.2012.

(4) Still aggrieved of the judgments and order passed by the Courts below, the petitioners have preferred two separate revisions.

(5) Prosecution story, in brief, is that on 3.2.2003, Sub Inspector Ram Kumar moved a complaint to the effect that he along with Head Constables Ran Singh, Udeybir, Tehsildar Singh, Anil Kumar, Bharat Singh, Naresh Kumar and Rameshwar had brought five accused from Tihar Jail, New Delhi to produce them before the different Courts at Faridabad Court complex.

(6) It is alleged that out of above five accused, two accused, namely, Iqbal son of Alla Khan and Fakru son of Kannu, who were facing trial under Sections 399 and 402 IPC in FIR No. 374/2001, registered at Police Station Sadar Ballabgarh, were handcuffed together. Both of them were to be produced before the learned Additional Sessions Judge, Faridabad. Since the learned Judge was not holding Court on 3.2.2003 because of holiday, both the accused were produced before the Judicial Magistrate Ist Class/Duty Magistrate. Constable Anil Kumar and Constable Tehsildar Singh (petitioners) were directed to produce the above said accused before the Duty Magistrate. Constable Tehsildar Singh-petitioner was armed with a 9 mm carbine weapon. Since the weapon was not allowed to be taken inside the Court, Constable Anil Kumar-petitioner took both the accused inside the Court room, whereas Constable Tehsildar Singh-petitioner was deputed on the gate of the Court. As the Court room was jam-packed, the Reader of the Court had taken the signatures of both the accused on the case file and, thereafter, somehow accused Iqbal took his hand out of the handcuff and by taking the advantage of the rush in the Court room, slipped away. It is further alleged in the complaint that Fakru did not disclose that accused Iqbal had removed the handcuff, therefore, he collided with accused Iqbal in this offence. Thus, due to negligence of petitioners Constable Tehsildar Singh and Constable Anil Kumar, accused Iqbal had fled away. Thus, necessary action against the petitioners was sought to be taken. On the basis of the said complaint, the FIR in question was registered against the petitioners.

(7) After completion of investigation and necessary formalities, challan was presented against the petitioners and accused-Iqbal.

(8) Charges were framed against the accused under Sections 223 and 120-B IPC. Accused-Iqbal was also charged for commission of the offence punishable under Section 224 IPC. The accused pleaded not guilty and claimed trial. The said charge was modified vide order dated 14.11.2005.

(9) When the case was fixed for prosecution evidence, accused Iqbal absconded from the trial and he was declared a proclaimed offender vide order dated 4.6.2009.

(10) In order to prove its case, the prosecution had examined as many as 7 witnesses, including complainant SI-Ram Kumar as PW-1.

(11) In the statement recorded under Section 313 Cr.P.C., the accused denied the charges and pleaded false implication.

(12) The trial Court, while convicting the petitioners has drawn a conclusion that the petitioners being public servants were deputed to produce accused Iqbal along with other accused to the Courts at Faridabad, and since this fact has not been denied nor disputed by the petitioners, therefore, it was because of the negligence of the petitioners, accused Iqbal had fled away from the Court premises. The Court has further drawn the conclusion that no effort was made by the petitioners to apprehend accused Iqbal.

(13) The trial Court has further drawn the conclusion that in order to make out a case that sanction under Section 197 Cr.P.C. was required, the petitioners were to establish that the offence was committed while acting or purporting to act in discharge of their official duty. Accordingly, the trial Court, vide judgement dated 1.11.2011 convicted the petitioners under Sections 223 and 120-B IPC and vide order dated 2.1.2011 sentenced them accordingly. As noticed above, the appeals filed by the petitioners were dismissed by the learned Additional Sessions Judge on 4.4.2012

(14) I have heard learned counsel for the parties and have also gone through the records of the Courts below, with their able assistance.

(15) It has been argued by the counsel for the petitioners that the head of the team, who brought five accused from Tihar Jail, New Delhi, was Sub Inspector Ram Kumar complainant who appeared as PW-1. It is on record that the written orders were issued vide DD No. 9 dated 3.2.2003 and each guard was entrusted with the custody of specific accused by name. It has been further argued that as per order dated

3.2.2003, petitioner Anil Kumar was given the custody of accused Fakru son of Kannu, whereas custody of Iqbal son of Alla Khan (who had escaped from the Court complex, Faridabad), was given to Constable Naresh Kumar. Since custody of Iqbal was not handed over to any of the petitioners, they have been convicted without any basis.

(16) It is further argued that so far as the sanction under Section 197 Cr.P.C. is concerned, the trial Court did not apply its judicial mind while deciding this issue. The trial Court has discussed in para 10 of the judgment that the petitioners were public servants and they were deputed to bring accused Iqbal to the Court from Faridabad and the defence counsel, appearing before the trial Court, had also argued that the petitioners were public servants and no sanction was placed on record by the prosecution. Thus, it is clear that no sanction under Section 197 Cr.P.C. was taken by the prosecution before initiating the criminal prosecution against the petitioners and, therefore, the conviction and sentence imposed, is bad in the eyes of law.

(17) Per contra, learned counsel for the State has argued that the petitioners have been rightly convicted by the Courts below. The custody of Iqbal was handed over to the petitioners and it was their duty not to allow him to flee away from the Court complex. Thus, the petitioners had not discharged their duty and were rightly convicted and sentenced by the Courts below. It is also argued that the Courts below have already taken a lenient view against the petitioners. Thus dismissal of the revision petitions, is prayed for.

(18) I have given my thoughtful consideration to the rival contentions of the parties and have come to a conclusion that vide order dated 3.2.2003, each guard was entrusted with the custody of the specific accused by names. As per this document, petitioner Anil Kumar was given the custody of Fakru, whereas custody of Iqbal (who escaped from the Court complex) was given to Constable Naresh Kumar. It could not be brought on record as to how complainant Sub Inspector Ram Kumar, who appeared as PW-1 in the witness box, had fastened the allegation of custody of the accused upon the petitioners. Even in his cross-examination, he was unable to produce the record assigning the duties to the Constables, but he did not deny that the order was issued and specific custody was assigned to the Constables to produce the accused in the Courts. This witness went to the extent of stating that he did not remember to whom the custody of the accused was handed over. Thus, as per the record, custody of Iqbal son of Alla Khan was entrusted to Constable Naresh Kumar and the said Constable

Naresh Kumar, who was also present there, was duty bound to check the custody of accused Iqbal. Thus, the petitioners cannot be held liable for accused Iqbal having fled away from the Court premises.

(19) 'Further, so far as Section 197 Cr.P.C. is concerned, a public servant can only be tried in a criminal case after the sanction of the Government for the offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty.

(20) Section 197 Cr.P.C. is reproduced hereunder:-

> Prosecution of Judges and public servants.
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> (1) When any person who is or was a Judge or Magistrate or a public servant not removable 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-
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> (a)in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;
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> (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:
>
> Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression" State Government" occurring therein, the expression" Central Government" were substituted.
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> (2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.
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> (3) The State Government may, by notification, direct that the provisions of sub- section (2) shall apply to such

class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub- section will apply as if for the expression" Central Government" occurring therein, the expression" State Government" were substituted.

(3A)1 Notwithstanding anything contained in sub- section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991 , receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

(21) The Courts below have discussed Section 197 Cr.P.C. in the impugned judgments. It is not disputed that the petitioners were public servants, who were discharging their official duty entrusted to them to keep guard on the five accused who were brought from Tihar Jail, New Delhi to the Courts at Faridabad. To my mind, the Courts have drawn a

wrong conclusion that the petitioners were to establish that the offence was committed while acting or purporting to act in discharge of their official duty. It is not disputed that the petitioners were performing their official duty and this factor has not been taken into consideration by the Courts below while convicting the petitioners.

(22) The Apex Court in the case of ***Rakesh Kumar Mishra*** versus ***State of Bihar and others*** [1] has drawn a conclusion that no Court can entertain or take notice of the complaint except with previous sanction of competent authority and sanction is mandatory under Section 197 Cr.P.C. The relevant para of the said judgment reads as under:-

> "The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is, if the conditions mentioned are not made out or are absent then no prosecution can be set in motion. For instance no prosecution can be initiated in a Court of Sessions under Section 193, as it cannot take cognizance, as a court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or unless the Code expressly provides for it. And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than police officer, or upon his knowledge that such offence has been committed. So far public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, `no court shall take cognizance of such offence except with the previous sanction'. Use of the words, `no' and `shall' make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. Very cognizance is barred.

[1] 2006(1) R.C.R. (Criminal) 456

> That is the complaint, cannot be taken notice of. According to Black's Law Dictionary the word `cognizance' means `jurisdiction' or `the exercise of jurisdiction' or `power to try and determine causes'. In common parlance it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty."

(23) Similarly in the case of ***Anjani Kumari*** versus ***State of Bihar and another***[2] the Apex Court has also drawn a conclusion that sanction for prosecution of public servant is mandatory. The Apex Court has further held as under:-

> "Section 197(1) provides that when any person who is or was a public servant not removable 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 (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government and (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government."

(24) In the similar case of ***C. Satnam Singh*** versus ***State of Punjab,CRR No. 3348 of 2012 decided on 6.2.2019,*** the conviction of the petitioner under Section 223 IPC was set aside by this Court.

(25) The Court should not oversight that the society suffers by wrong conviction and it equally suffers from wrong acquittals. Therefore, it is the duty of the Court to scrutinize the evidence carefully and in the terms of felicitous metaphor, separate the grain from the chaff. Thus, it is better that 10 guilty persons escape than the one innocent suffers. To my mind, similar is the situation in the present case, where even the custody of accused person, who absconded, was

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[2] 2008(2) R.C.R. (Criminal) 849

never handed over to the petitioners and, therefore, they cannot be held to be guilty for the escape of the said accused.

(26) Thus, keeping in view the above facts and circumstances of the present case, both the petitions are allowed. The petitioners are acquitted of the charges framed against them. As a result, the impugned judgments and order of the Courts below, are set aside.

J. S. Mehndiratta