The All-India Anglo-Indian Association, v. Mr. R. A. Massey

Kapur, J.

Ma. Si. Muthuveeran Chettiar and others v. *Mottayan Chettiar* (1), reference was made to a notification but the question does not seem to have been raised that as a result of that notification the statute contemplated the right of initiating proceedings to be vested in the Registrar alone, and in the Calcutta case *Surendra Nath Sarkar* v. *Kali Pada Das*, (2), no reference was made to a previous judgment of that very High Court which I have quoted above. No doubt, the two English cases that we have mentioned were referred to but they were not followed on the ground that in the absence of any specific provision in the Act itself, it could not be inferred that the intention of the legislature was to bar private prosecutions. I am, therefore, of the opinion that as far as this State is concerned the prosecutions by private individuals in regard to offences which are a creation of the Indian Companies Act alone are not permissible because of the existence of the regulation made under section 248(2) of the Indian Companies Act.

I would, therefore, accept the reference and order that the proceedings be quashed.

APPELLATE CRIMINAL

Before Harnam Singh, Falshaw, and Dulat, JJ.

KRISHAN KUMAR,—*Convict-Appellant.*

versus

THE STATE,—*Respondent.*

Criminal Appeal No. 25-D of 1953.

1954

November, 3rd

Prevention of Corruption Act (II of 1947)—Section 5-A—Provisions of—Failure to comply with, in respect of investigation—Whether illegality which vitiates the whole proceedings in the trial or bars a trial, or whether merely an irregularity curable under the provisions of the Code of

(1) A.I.R. 1942 Mad. 283
(2) I.L.R. (1940) 1 Cal 575

Criminal Procedure—Arrest of the offender without warrant—Whether vitiates the proceedings in the trial—Code of Criminal Procedure (Act V of 1898)—Section 537—Conditions requisite for the application of—Section 156(2)—Irregularities in investigation under-stated—Constravention of section 5-A of Act II of 1947—Whether falls under section 156(2) of the Code—Code of Criminal Procedure (Act V of 1898)—Section 190(1)(b)—Report of any Police Officer—Meaning of.

Held, per Full Bench—

(1) that non-compliance with the provisions of section 5-A of the Act in the matter of investigation does not bar the trial based on the report of a police officer not empowered by section 5-A of the Act to investigate;

(2) that non-compliance with the provisions of section 5-A of the Act does not vitiate the proceedings based on the report of a police officer not empowered by section 5-A of the Act to investigate;

(3) that non-compliance with the provisions of section 5-A of the Act in the matter of investigation is curable within section 537 of the Code; and

(4) that the arrest of an offender for an offence punishable under sections 161, 165 or 165-A of the Indian Penal Code or section 5(2) of the Act without warrant does not vitiate the proceedings in the trial.

Held, per Harnam Singh and Dulat, JJ.—

(1) that in order to bring the case within section 537 of the Code of Criminal Procedure, the conditions specified hereunder must be satisfied—

(a) the finding, sentence, or order under review is one passed by a Court of competent jurisdiction,

(b) the error or irregularity is not one which renders the proceedings void under the provisions of the Code contained before section 537 of the Code;

(c) the error or irregularity complained of was committed in proceedings under the Code before or during the trial; and

(d) the error or irregularity complained of has not in fact occasioned a failure of justice.

(2) Section 537 of the Code does not make any distinction between an *illegality* and an *irregularity*. In all such cases the point that arises for decision is whether the infringement of the provisions of the Code is such as to render the proceedings void under the provisions of the Code appearing before section 537 of the Code or whether the infringement is such as has in fact occasioned a failure of justice.

(3) Section 537 of the Code cannot be used by the Court of first instance to validate errors or irregularities committed in that Court.

(4) The irregularities in investigation which fall within section 156(2) of the Code are—

(1) when the powers to investigate a cognizable case given to a police officer in charge of a police station are exercised by him outside the territorial limits specified in section 156(1) of the Code, and

(2) when the investigation in a cognizable case is made by a police officer inferior in rank to an officer incharge of a police station.

Section 156(2) of the Code has no application to objections which do not fall within section 156(1) of the Code

(5) The contravention of section 5-A of the Prevention of Corruption Act, 1947, does not fall within section 156(2) of the Code of Criminal Procedure.

(6) In a criminal case the conviction or acquittal of the accused proceeds upon the evidence given at the trial. In case there is anything suspicious in the investigation it is for the Court to consider that matter in determining the truth of the charge. The investigation by a police officer not empowered by law to investigate cannot, therefore, prejudice the accused.

Per Falshaw, J.—

(1) If the objection to the validity of the investigation is taken by the accused in the preliminary stages of the case against him it ought to be set right by having the investigation formally checked by a Deputy Superintendent of

Police, or by a Police Officer of lesser rank after obtaining the permission of a Magistrate of the First Class, and if the objection is only taken by the accused at the stage of revision or appeal it should be held to be a mere irregularity which has not prejudiced the trial of the accused in any way and it has no effect on the jurisdiction of the Court to deal with the case.

(2) That the words "report of any police officer" in section 190(1)(b) of the Code of Criminal Procedure have a wide meaning and include any report of a police officer as to an offence, whether the case is one which he can investigate or not, and whether the report is in any particular form or not.

(3) That subsection (2) of section 156 of the Code of Criminal Procedure embodies the principle that the merits of a case are not affected by the fact that it has been investigated by a police officer not empowered to do so.

Queen Empress v. *Mehri* (1), *Empress* v. *Shivbhat Manjunathbhat Hattangadi* (2), *Abdul Rehman* v. *King Emperor* (3), *Zahir-ud-Din* v. *Emperor* (4), *Tara Singh* v. *The State* (5), *Emperor* v. *Vinayak Damodar Savarkar* (6), *Sudhir Kumar* v. *The State* (7), *Promod Chandra Shekhar* v. *Rex* (8), *Parbhu* v. *Emperor* (9), *Rustom Ardeshir* v. *Emperor* (10), *State* v. *Madan Lal* (11),referred to.

Case referred by Hon'ble Mr. Justice Falshaw, to Division Bench, consisting of Hon'ble Mr. Justice Falshaw, and Hon'ble Mr. Justice Dulat, and then referred to Full Bench, consisting of Hon'ble Mr. Justice Harnam Singh, and Hon'ble Mr. Justice Falshaw, and Hon'ble Mr. Justice Dulat.

R. L. ANAND, for Appellant.

BISHAMBAR DAYAL, for Advocate-General for Respondent.

---

(1) 1895 All. W. N. 9
(2) I.L.R. 52 Bom 236
(3) A.I.R. 1927 P.C. 44
(4) A.I.R. 1947 P.C. 75
(5) 1951 S.C.R. 729
(6) I.L.R. 35 Bom. 225
(7) A.I.R. 1953 Cal. 226
(8) A.I.R. 1951 All. 546
(9) A.I.R. 1944 P.C. 73
(10) A.I.R. 1948 Bom 163.
(11) 55 P.L.R. 475.

JUDGMENT

Falshaw, J.

FALSHAW, J. This is an appeal by Krishan Kumar who has been convicted by a Special Judge at Delhi, under section 5 (2) of the Prevention of Corruption Act and sentenced to one and-a-half years' rigorous imprisonment.

At a somewhat late stage, after the arguments on the merits of the case had been heard at length a legal objection has been raised to the trial, namely that provisions of section 5 (4) of the Act had not been complied with as regards the investigation of the case. Subsection (4) reads—

> "Notwithstanding anything contained in the Code of Criminal Procedure, 1898, a police officer below the rank of Deputy Superintendent of Police shall not investigate any offence punishable under subsection (2) without the order of a Magistrate of the first class or make any arrest therefor without a warrant."

Briefly the case against the appellant is that in his capacity as an Assistant Store-keeper working in the Central Tractor Organization at Delhi, he misappropriated almost the whole of a consignment of iron and steel goods despatched by rail to Delhi for the Central Tractor Organization. He is alleged to have taken delivery of this consignment at the Railway Goods Depot at Delhi on the 2nd of October, 1950 and to have misappropriated large portions of it on the 2nd and 3rd of October. The matter came to light on the 7th of October 1950 when the accused was arrested and a case was registered against him by the police on the report of the Director of Administration of the C. T. O. under sections 409 and 420, Indian Penal Code. It

was admitted by the Sub-Inspector who registered the case and investigated it in the witness-box that no permission had been obtained from any Magistrate for investigating the case against the accused.

On behalf of the appellant reliance was placed on a recent decision of my own in *the State* v. *Madan Lal* (1), decided on the 18th of August 1953. This was a case in which the respondent Madan Lal was being prosecuted in the Court of a Special Judge at Hissar for an offence punishable under section 5 (2) of the Act, and in the preliminary stages of the case Madan Lal had raised the plea that the proceedings should be quashed because the provisions of section 5 (4) had not been complied with. The learned Special Judge had accepted this plea and passed an order quashing the proceedings. The State filed a revision petition against this order. In deciding the matter I had before me conflicting decisions of the Allahabad and Calcutta High Courts. In the Allahabad case *Promod Chandra Shekhar* v. *Rex*, (2), the question "What is the effect of non-compliance with the proviso to section 3 of the Prevention of Corruption Act, 1947" was one of three questions referred to a Division Bench in connection with the revision petition of a man who had been convicted under section 161, Indian Penal Code. It may be mentioned that the provisions of the proviso to section 3 of the Prevention of Corruption Act are exactly similar regarding offences under sections 161 and 165, Indian Penal Code, to those contained in section 5 (4) regarding offences punishable under section 5 (2) as regards Police Officers competent to carry out an investigation.

(1) 55 P.L.R. 475
(2) A.I.R. 1951 All. 546

Krishan Kumar v. The State

Falshaw, J.

The view taken by Mootham and Wanchoo, JJ., on this point was expressed in the following terms—

> "The proviso to section 3 in so far as it places a restriction on the powers of investigation of police officers below a certain rank, is in effect, therefore, a proviso to subsection (1) of section 156 of the Code and is analogous to the provisions in subsection (2) of section 561 of the same Code that no police officer below the rank of police inspector shall be employed or take part in the investigation of the offence specified in subsection (1) of the section.
>
> Subsection (2) of section 156 provides that no proceedings of a police officer in any such case as is referred to in subsection (1) shall at any stage be called in question on the ground that the case was one which such officer was not empowered under that section to investigate. This subsection is, in our opinion, in terms wide enough to cover an investigation into an offence punishable under section 161 or section 165, Penal Code, which is conducted by a police officer not so authorised by the proviso to section 3, Prevention of Corruption Act."

The view was taken that the investigation of that case by a Police Officer not empowered by the Act had not prejudiced the case of the accused and that failure to comply with the proviso to section 3 of the Prevention of Corruption Act was an irregularity which falls within the ambit of subsection (2) of section 156 of the Code and accordingly the proceedings of the investigating officer could not be called in question.

On the other hand in the Calcutta case *Sudhir Kumar* v. *The State*, (1), the petitioner had moved the High Court to quash the proceedings

(1) A.I.R. 1953 Cal. 226

against him in a pending case in which he was accused under section 161, Indian Penal Code, on the ground that the investigation had been carried out only by a Sub-Inspector without any order from a first class Magistrate. The matter was decided by K. C. Das Gupta and Debabrata Mookerjee, JJ., who after taking notice of the Allahabad decision above-mentioned and the reasons given by the learned Judges for their conclusion observed—

> "It is difficult to see however how the fact that the proviso in section 3 of Act 2 of 1947 operates as the limitation to the powers of investigation given to police officers incharge of police stations can attract the provision of subsection (2) of section 156, Criminal Procedure Code. Certainly that would have been the position if the proviso to section 3 of Act 2 of 1947 had in fact been incorporated by the Legislature in Section 156, Criminal Procedure Code. That was not done and instead very clear words were used by the Legislature to ensure that such offence shall not be investigated by any police officer below the rank of the Deputy Superintendent of Police, without the order of a Magistrate, 1st Class. In my opinion, we are not treating the Legislature seriously if we are to ignore such words and take the view that even though command of this nature is disobeyed, it is a mere irregularity."

They accordingly held that failure to comply with the provisions of the proviso to section 3 was an illegality, the effect of which was that the entire proceedings based on the charge-sheet reported by the officer who was not competent to investigate must fail and they ordered the quashing of the proceedings.

Krishan Kumar
v.
The State

Falshaw, J.

In dealing with the case of Madan Lal I was of the opinion that the view of the Calcutta High Court was substantially correct and that the view of the Allahabad High Court was wrong, though at the same time I did not go so far as to quash the proceedings in that case, but merely ordered that they could be continued if the illegality was removed by holding a fresh investigation either by a Deputy Superintendent of Police or by a Sub-Inspector duly authorised by a Magistrate.

There is, however, a difference between the cases dealt with by the two High Courts of which I was not unaware at the time, but did not refer to it as I thought it better only to deal with the point if and when it arose in a case before me. This difference is that in the Calcutta case, as also in the case with which I was dealing, the objection was taken by the accused to the continuance of the proceedings against him at a very early stage, whereas in the Allahabad case the point only arose in the High Court in revision after the petitioner had been convicted by a Magistrate, and also presumably his appeal dismissed by a Sessions Judge. The importance of this difference lies in the fact that when any irregularity or illegality of this kind is pointed out at an early stage, obviously the proceedings cannot be allowed to continue unless and until the irregularity or illegality is removed. On the other hand once a case has been decided, unless there is some fundamental defect such as want of the proper sanction or lack of jurisdiction before any conviction is set aside on the ground of such a defect in the proceedings, the principles of section 537, Criminal Procedure Code, have to be applied according to which no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment

or other proceedings before or during trial or in any inquiry or other proceedings under this Code, unless such error, omision or irregularity has in fact occasioned a failure of justice, and in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. In my opinion the question involved requires further consideration by a larger Bench, and I accordingly order that before I decide the appeal of Krishan Kumar on the merits, the case should be laid before my Lord the Chief Justice for constituting a Division Bench to determine the question "the failure to comply with section 5 (4) of the Prevention of Corruption Act of 1947 is an illegality which vitiates the whole proceedings in the trial or is merely an irregularity curable under the provisions of section 537 of the Code of Criminal Procedure."

DULAT, J. The question that arises in the two cases before us and which is likely to arise in a large number of such cases is what is the effect of violation of the provision contained in section 5-A of Act II of 1947. The provision of law is that an offence punishable under section 161, 165, or 165-A of the Indian Penal Code, or under subsection (2) of section 5 of Act II of 1947 shall not outside the Presidency Towns of Madras, Bombay and Calcutta be investigated by any police officer below the rank of a Deputy Superintendant of Police without the order of a first class Magistrate. Two High Courts that of Allahabad and Calcutta have taken two different views, the former holding that a violation of this particular provision is merely an irregularity which need

Krishan Kumar v. The State

Dulat, J.

not affect the trial and the latter adopting contrary view. There are weighty considerations on both sides and the question involved is of sufficient general importance likely to affect a large number of cases. We in the circumstances consider it proper that this question should be authoritatively settled by a Full Bench. The question is—

> "Whether the failure to comply with section 5-A of the Prevention of Corruption Act, 1947, in respect of investigation, is an illegality which vitiates the whole proceedings in the trial or bars a trial, or whether it is merely an irregularity curable under the provisions of the Code of Criminal Procedure?"

Let the papers be laid before my Lord the Chief Justice for constituting a Full Bench.

BEFORE THE FULL BENCH

Appellant by:—MR. RAM LAL ANAND, Advocate.

Respondent by:—MR. KARTAR SINGH CHAWLA, Advocate.

Harnam Singh, J.

HARNAM SINGH, J. In Criminal Appeals Nos. 25-D and 434 of 1953 the question given hereunder has been referred to the Full Bench for decision —

> "Whether the failure to comply with section 5-A of the Prevention of Corruption Act, 1947, in respect of investigation, is an illegality which vitiates the whole proceedings in the trial or bars a trial, or whether it is merely an irregularity curable under the provisions of the Code of Criminal Procedure?"

Shortly put, the facts of the cases out of which Criminal Appeals Nos. 25-D and 434 of 1953 have arisen are these : In Corruption Case No. 3 of

Krishan Kumar v. The State

Harnam Singh, J.

1953, Krishan Kumar was prosecuted under section 5(2) of the Prevention of Corruption Act, 1947, hereinafter referred to as the Act, on the charge that he, being a public servant, committed the offence of criminal misconduct by dishonestly and fraudulently misappropriating wagonload of iron and steel, weighing 550 maunds worth rupees 11,141-8-0 on the 2nd of October, 1950. Sub-Inspector Sumair Shah Singh investigated that case without the order of a Magistrate of the first class as required by section 5(4) of the Act. In 1951 *Shri* Atma Parkash, Magistrate of the first class, took cognizance of the offence under section 190 of the Code of Criminal Procedure, hereinafter referred to as the Code, on the report of Sub-Inspector Sumair Shah Singh. On the commencement of the Criminal Law Amendment Act, 1952, the Magistrate forwarded for trial to the Special Judge under section 10 of that Act the case, *State* v. *Krishan Kumar*. In the Court of the Special Judge, *Shri* P. C. Gera, P.W. 1, was examined on the 1st of May, 1953 and by the judgment under appeal in Criminal Appeal No. 25-D of 1953 the Special Judge has convicted Krishan Kumar under section 5(2) of the Act and sentenced him to suffer rigorous imprisonment for one year and six months. In corruption case No. 30/2 of 1952 Mohindar Singh was prosecuted under section 161 of the Indian Penal Code and section 5(2) of the Act on the charge that on the 31st of October 1952 he, being a public servant, accepted Rs. 50 by way of bribe from Madan Lal, P.W. 1. Sub-Inspector Hargopal Singh, P.W. 7, investigated the case under order of *Sardar* Sant Singh, P.W. 3, Magistrate, Second Class, passed on the 31st of October, 1952, Exhibit P.M./1. By the judgment under appeal in Criminal Appeal No. 434 of 1953 the Special Judge has convicted Mohindar Singh under section 161 of the Indian Penal Code

Krishan Kumar
v.
The State

Harnam Singh, J.

and section 5 (2) of the Act and sentenced him to suffer rigorous imprisonment for six months under section 161 of the Indian Penal Code. No sentence has been imposed on Mohinder Singh under section 5 (2) of the Act.

In Corruption Case No. 3 of 1953, objection as regards contravention of the provisions of section 5 (4) of the Act was neither raised in the Court of the Magistrate nor in the Court of the Special Judge. In corruption case No. 30/2 of 1952 objection as regards the contravention of the provisions of section 5-A of the Act was raised in the trial Court but the Special Judge finding that there was no suggestion that investigation by Sub-Inspector Hargopal Singh has in fact occasioned a failure of justice has overruled the objection.

In approaching the matter I think it proper to reproduce herein the provisions of the Act bearing on the question referred to us for decision and the amendments made in those provisions by the Criminal Law Amendment Act, 1952, and the Prevention of Corruption (Second Amendment) Act, 1952. In Corruption Case No. 3 of 1953 the provisions of section 5(4) of the Act applied to the investigation. Section 5 (4) of the Act provided—

> "Notwithstanding anything contained in the Code of Criminal Procedure, 1898, a police officer below the rank of a Deputy Superintendent of Police shall not investigate any offence punishable under subsection (2) without the order of a Magistrate of the first class or make any arrest therefor without a warrant."

By section 6 of the Criminal Law Amendment Act, 1952, the State Governments were empowered to appoint by notification in the Official

Gazette Special Judges to try offences punishable under sections 161, 165 or 165-A of the Indian Penal Code or subsection (2) of section 5 of the Act.

By the Prevention of Corruption (Second Amendment) Act, 1952, provisos to section 3 and section 5(4) of the Act were omitted and after section 5 of the Act section 5-A was inserted. Section 5-A provides *inter alia*—

> "5-A. *Investigation into cases under this Act.* Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no police officer below the rank :—
>
> (a) in the presidency towns of Madras and Calcutta, of an Assistant Commissioner of Police ;
>
> (b) in the presidency town of Bombay, of a Superintendant of Police, and
>
> (c) elsewhere, of a Deputy Superintendent of Police,
>
> shall investigate any offence punishable under section 161, section 165 or section 165-A of the Indian Penal Code (Act XL of 1860) or under subsection (2) of section 5 of this Act, without the order of a Presidency Magistrate or a Magistrate of the first class as the case may be, or make any arrest therefor without a warrant."

In these proceedings the points that arise for decision are—

(1) whether investigation of an offence under section 161, section 165 or section 165-A of the Indian Penal Code or under subsection (2) of section 5 of the Act

Krishan Kumar
v.
The State

Harnam Singh, J.

by a police officer below the rank of a Deputy Superintendent of Police without the order of a Magistrate of the first class bars the trial based on the report made by that police officer ;

(2) whether investigation of an offence under section 161, section 165 or section 165-A of the Indian Penal Code or subsection (2) of the Act by a Police officer below the rank of a Deputy Superintendent of Police without the order of a Magistrate of the first class vitiates the whole proceedings in the trial based on the report made by that police officer or is a mere irregularity curable within section 537 of the Code of Criminal Procedure ; and

(3) whether the arrest of an offender for offence punishable under section 161, section 165 or section 165-A of the Indian Penal Code or subsection (2) of section 5 of the Act without warrant vitiates the whole proceedings in the trial.

In *State* versus *Krishan Kumar* the Magistrate took cognizance of the offence under section 190 of the Code of Criminal Procedure and forwarded the case for trial to the Special Judge on the commencement of the Criminal Law Amendment Act, 1952. In *State* versus *Mohindar Singh* the Special Judge took cognizance of the offence under section 8 of the Criminal Law Amendment Act, 1952.

Section 8 of the Criminal Law Amendment Act, 1952, empowers a Special Judge to take cognizance of offences punishable under section 161,

165 or 165-A of the Indian Penal Code or subsection (2) of section 5 of the Act without the accused being committed to him for trial.

Section 6 of the Act provides *inter alia* that no Court shall take cognizance of an offence punishable under section 161 or section 165 of the Indian Penal Code or subsection (2) of section 5 of the Act alleged to have been committed by a public servant except with the previous sanction of the authorities mentioned in that section. In case the intention of the Legislature was to prevent Special Judges from taking cognizance of offences under sections 161, 165 or 165-A of the Indian Penal Code or subsection (2) of section 5 of the Act when the investigation was by a police officer of lower rank than the Deputy Superintendent of Police without the order of a Magistrate of the first class, section 8 of the Criminal Law Amendment Act, 1952, ought to have provided that no Special Judge shall take cognizance of such offences unless the investigation was by Deputy Superintendent of Police or by a police officer of lower rank than the Deputy Superintendent of Police without the order of a Magistrate of the first class.

On the 19th of March 1891, section 561 was added to the Code of Criminal Procedure, 1882, by Act X of 1891. That section provided—

> "561 (1). Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall—
>
> (a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife, or

Krishan Kumar
v.
The State

Harnam Singh, J.

(b) commit the man for trial for the offence.

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a police officer, with respect to such an offence as is referred to in subsection (1), no police officer of a rank below that of police inspector shall be employed either to make, or to take part in, the investigation."

In *Queen Empress* v. *Mehri* (1), it was contended that investigation by a police officer who was not empowered by law to investigate an offence of rape where the sexual intercourse was by a man with his own wife vitiated the proceedings. In repelling that contention Knox, J, said—

"The Magistrate of the District has jurisdiction to take cognizance of an offence under section 376 of the Indian Penal Code upon any kind of information that may come before him which he considers sufficient to warrant him in taking further proceedings and the fact that that information can be based on an illegal investigation will not take an offence out of the cognizance of the Magistrate."

That the construction placed upon section 561 of the Code of Criminal Procedure, 1882, was accepted by the Legislature is borne out by the fact that in the Code of 1898, section 561 of the Code of 1882 was re-enacted without any modification. In

(1) 1895 All. W. N. 9.

my judgment *Queen Empress* versus *Mehri* (1), is good authority under section 561 of the present Code.

In 1951 *Shri* Atam Parkash, Magistrate of the first class took cognizance of the offence under section 5 (2) of the Act on the report of Sub-Inspector Sumair Shah Singh.

Section 190 of the Code of Criminal Procedure provides *inter alia* that except as hereinafter provided, District Magistrate or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence upon a report in writing of facts which constitute such offence made by *any* police officer.

From section 4(g) and section 190 of the Code it is plain that in criminal matters the general rule is that any person can set the law in motion by a complaint.

Sections 195, 196, 196-A, 197, 198, 198-A and 199 of the Code enact that no Court shall take cognizance of the offences specified in those sections except on the satisfaction of the condition precedent stated in each one of those sections. Section 193 of the Code provides that except as otherwise provided by the Code or by any other law for the time being in force, no Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

Section 9 of the Code of Civil Procedure provides that a litigant having a grievance of a civil

(1) 1895 All. W.N. 9

Krishan Kumar
v.
The State

Harnam Singh, J.

nature has, independently of any statute, a right to institute in some Court or other a suit unless its cognizance is expressly or impliedly barred.

Section 80 of the Code of Civil Procedure requires that a suit shall only be instituted after the expiry of two months from the date of the delivery of a notice of claim. Section 92 of the Code of Civil Procedure requires the consent of the Advocate-General before the plaintiffs can institute a suit in connection with public trust for the reliefs specified in that section.

From a perusal of several Acts passed by the Legislatures in this country we are all of us familiar with the way in which provisions of Acts are drafted to prevent actions being brought at all unless some condition precedent has been fulfilled. In 1952 the draftsman or the Legislature required no obscure language if they desired to prevent prosecution of offenders under sections 161, 165 or 165-A of the Indian Penal Code or subsection (2) of section 5 of the Act unless the conditions of section 5-A of the Act were satisfied. But sections 8 and 10 of the Criminal Law Amendment Act, 1952, and section 190 of the Code are not framed in the way in which sections are framed when it is intended that a condition precedent should be satisfied before the prosecution can be maintained.

In my judgment, investigation of offences punishable under sections 161, 165 or 165-A of the Indian Penal Code or subsection (2) of section 5 of the Act by a police officer below the rank of a Deputy Superintendent of Police without the order of a Magistrate of the first class does not bar the trial based on the report of that police officer.

In *Emperor* v. *Shivbhat Manjunathbhat Mattangadi* (1), Fawcett, J. (Mirza, J., concurring) found that contravention of Rule 27, sub-rule (2) made under section 84 of the Indian Railways Act, 1890, does not vitiate the trial. The Rule provides :—

"27 (1) Whenever an investigation is to be made by the railway police—

(a) in a case in which an accident is attended with loss of human life or with grievous hurt as defined in the Indian Penal Code, or with serious injury to property ; or

(b) in pursuance of a direction given under clause (c) of rule 30, the investigation shall be conducted by the officer-in-charge of the railway police, or, if that officer should be unable to conduct the investigation himself, then by an officer to be deputed by him.

(c) The officer deputed under sub-rule (1) shall ordinarily be the Senior officer available, and shall whenever possible be a Gazetted Officer, and shall in no case be of rank lower than that of Inspector :

Provided that the investigation may be carried out by an officer-in-charge of a police station—

(i) in such a case as is referred to in clause (a) of sub-rule (1), unless loss of life or grievous hurt has been caused to more

(1) I.L.R. 52 Bombay 238.

Krishan Kumar
v.
The State

Harnam Singh, J.

persons than one or injury to property has been caused to a value exceeding Rs. 10,000, or there is reason to suspect that any servant of the railway has been guilty of a neglect of rules, or

(ii) in the case referred to in clause (b) of sub-rule (1) if the District Magistrate so directs."

Section 537 of the Code provides, *inter alia*,

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or any inquiry or other proceedings under this Code, * * * * unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice."

In order to bring the case within section 537 of the Code the conditions specified hereunder must be satisfied—

(a) the finding, sentence, or order under review is one passed by a Court of competent jurisdiction ;

(b) the error or irregularity is not one which renders the proceedings void under the provisions of the Code contained before section 537 of the Code;

(c) the error or irregularity complained of was committed in proceedings under the Code before or during the trial; and

(d) the error or irregularity complained of has not in fact occasioned a failure of justice.

In an earlier part of this judgment I have found that investigation by a police officer of lesser rank than the Deputy Superintendent of Police without an order of the Magistrate of the first class does not prevent the Magistrate or the Special Judge from taking cognizance of offences under sections 161, 165 or 165-A of the Indian Penal Code or subsection (2) of section 5 of the Act. If so, the orders under appeal were passed by courts of competent jurisdiction.

But it is said that section 537 of the Code has no application to cases of disregard or disobedience of the *mandatory* provisions of the Code. I do not accept the validity of the argument.

Section 537 of the Code does not make any distinction between an *illegality* and an *irregularity*. In all such cases the point that arises for decision is whether the infringement of the provisions of the Code is such as to render the proceedings void under the provisions of the Code appearing before section 537 of the Code or whether the infringement is such as has in fact occasioned a failure of justice.

In *Abdul Rehman* versus *King Emperor* (1), Lord Philimore found that non-compliance with the *mandatory* provisions of section 360 of the Code " would not by itself be ground sufficient for quashing a conviction."

(1) A.I.R. 1927 P.C. 44

Krishan Kumar
v.
The State

Harnam Singh, J.

In *Zahir-ud-Din v. Emperor* (1), Lord Normand found that the contravention of the *mandatory* provisions of section 162 (1) of the Code does not vitiate the whole proceedings.

In *Tara Singh* v. *The State* (2), Bose, J., (Fazal Ali, Patanjali Sastri and Dass, JJ., concurring), held that contravention of the *mandatory* provisions of section 342 of the Code vitiates the trial "if prejudice occurs or is likely to occur."

In the provisions of the Code there is nothing which renders the proceedings void when the trial proceeds upon the investigation conducted by a police officer not empowered by law to make that investigation. In these circumstances the sole point that arises for decision is whether investigation by an officer not empowered by law to make investigation by itself affects the result of a trial.

In *Emperor* v. *Vinayak Damodar Savarkar* (1), a Full Bench of the Bombay High Court found that illegality of the arrest of an accused person is irrelevant in determining the guilt of the accused at the trial.

In *Emperor* v. *Shivbhat Manjunathbhat Matangadi* (4), Fawcett, J. (Mirza, J., concurring), said—

> "I think the main thing to bear in mind is that a conviction or acquittal does not depend upon the question what particular officer actually conducts the investigation which results in his trial.

(1) A.I.R. 1947 P.C. 75
(2) 1951 S.C.R. 729
(3) I.L.R. 35 Bombay 225
(4) I.L.R. 52 Bom. 238

That is determined mainly by the evidence that is given at the trial and considered ; and the question whether that evidence has, in the first place been elicited by an Inspector or by a Sub-Inspector is of very minor importance and does not really affect the result of a trial, except to this extent that the theory is that the higher the rank of the Police Officer investigating, the more careful and unimpeachable his enquiry is likely to be. I certainly can see, in a case of this kind, no sufficient reason why the irregularity should not be held to fall under section 537 of the Criminal Procedure Code."

In the authorities which have construed the proviso to section 3 of the Act there is conflict in the High Courts of Allahabad and Calcutta.

In *Sudhir Kumar* v. *The State* (1), *K.C.* Das Gupta, J. (Debabrata Mookerjee, J., concurring), found that non-compliance with the proviso to section 3 of the Act is an illegality vitiating the entire proceedings based on the report of police officer, not empowered by that provision of law to investigate.

In *Sudhir Kumar* versus *The State* (1) no reference is to be found to the provisions of section 537 of the Code and the decision in that case proceeds upon the assumption that non-compliance with the *mandatory* provisions of the Code in all cases vitiates the trial.

Finding as I do that the contravention of the provision of section 5-A of the Act is curable under Section 537 of the Code, I cannot persuade

(1) A.I.R. 1953 Cal. 226

Krishan Kumar
v.
The State

Harnam Singh, J.

myself to accept the rules laid down in *Sudhir Kumar* v. *The State* (1). *Tara Singh* v. *The State* (2), is an authority for the proposition that contravention of *mandatory* provisions of the Code does not vitiate the trial if no prejudice occurs or is likely to occur.

In *Promod Chandra Shekhar v. Rex* (3), Mootham, J. (Wanchoo, J., concurring) found that non-compliance with the proviso to section 3 of the Act is an irregularity coming within section 156(2) of the Code. In that case the opinion expressed In *Emperor* v. *Shivbhat Manjunathbhat Matangadi* (4) that a conviction or acquittal does not depend upon the question that particular officer conducts the investigation which results in his trial was cited with approval.

Section 156 (1) of the Code provides that any officer-in-charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial. Section 156 (2) of the Code provides that no proceedings of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under Section 156 (1) of the Code to investigate.

Section 551 of the Code provides that police officers superior in rank to an officer-in-charge of a police station may exercise the same powers throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

(1) A.I.R. 1953 Cal. 226
(2) 1951 S.C. R. 729
(3) A.I.R. 1951 All. 546
(4) I.L.R. 52 Bom. 238

Plainly, the irregularities in investigation which fall within section 156 (2) of the Code are :—

(1) When the powers to investigate a cognizable case given to a police officer-in-charge of a police station are exercised by him outside the territorial limits specified in section 156 (1) of the Code, and

(2) When the investigation in a cognizable case is made by a police officer inferior in rank to an officer-in-charge of a police station.

Section 156 (2) of the Code has no application to objections which do not fall within Section 156(1) of the Code.

In *Promod Chandra Shekhar* v. *Rex* (1), the Court found that the proviso to section 3 of the Act is *in effect* a proviso to section 156(1) of the Code. In order to bring the case within Section 156 (2) of the Code it was not sufficient to find that the proviso to section 3 of the Act was *in effect* a proviso to section 156 (1) of the Code. Section 156 (2) has no application to the contravention of the proviso to section 3 of the Act unless it is found that the proviso to section 3 of the Act *is in fact a part of section* 156 (1) *of the Code.* No indication is to be found in the Act or the Prevention of Corruption (Second Amendment) Act, 1952, justifying the conclusion that the proviso to section 3 of the Act was in fact a proviso to section 156(1) of the Code, or section 5-A of the Act is part of section 156 (1) of the Code.

From what I have said above, it is plain that the contravention of section 5-A of the Act does not fall within section 156 (2) of the Code.

(1) A.I.R. 1951 All. 546

Krishan Kumar *v.* The State

In these circumstances, the question that arises for consideration is whether contravention of section 5-A of the Act has in fact occasioned a failure of justice.

Harnam Singh, J.

In *Promod Chandra Shekhar* v. *Rex* (1), the Court held that investigation by a police officer of lower rank than that specified in the proviso to section 3 of the Act does not prejudice the case. In that case reliance was placed by the prosecution upon *Queen Empress* versus *Mehri* (2), but the Court found that case to be of little assistance as no reference was made in that case either to section 156 or section 537 of the Code.

In *Queen Empress* v. *Mehri* (2), Knox, J., found that contravention of section 561(2) of the Code, 1882, does not affect the merits of the trial. In my judgment, Knox, J., in deciding *Queen Empress* v. Mehri (2), was basing himself on the provisions of section 537 of the Code.

In a criminal case the conviction or acquittal of the accused proceeds upon the evidence given at the trial. In case there is anything suspicious in the investigation it is for the Court to consider that matter in determining the truth of the charge. That being the position of matters, investigation by a police officer not empowered by law to investigate cannot prejudice the accused.

For reasons different from those given in *Promod Chander Shekhar* versus *Rex* (1), I find that failure to comply with the provisions of section 5-A of the Act does not vitiate the conviction of the offender in the trial based on the report of a police officer not empowered by section 5-A of the Act to investigate.

(1) A.I.R. 1951 All. 546
(2) 1895 All. W.N. 9

Then it is said that the arrest of the offender in each case without a warrant vitiated the trial.

In *Emperor* versus *Vinayak Damodar Savarkar* (1), a Full Bench of the Bombay High Court found that illegality of the arrest of an accused person is irrelevant in determining the guilt of the accused at the trial.

In *Parbhu* v. *Emperor* (2), the question arose whether the arrest of Parbhu who was a native of Jind State made by a Police Officer from British India for an offence committed in British India vitiated the trial. In delivering the judgment of their Lordships of the Privy Council Lord Macmillan observed that the validity of the trial and conviction of the appellant could not be affected by any irregularity in his arrest. Plainly, there is no substance in the argument that the arrest of an offender without warrant for an offence punishable under sections 161, 165 or 165-A of the Indian Penal Code or section 5 (2) of the Act vitiates the trial.

In the result, my answers to the points referred to us for decision are :—

(1) that non-compliance with the provisions of section 5-A of the Act in the matter of investigation does not bar the trial based on the report of a police officer not empowered by section 5-A of the Act to investigate ;

(2) that non-compliance with the provisions of section 5-A of the Act does not vitiate the proceedings based on the report of a police officer not empowered by section 5-A of the Act to investigate ;

(1) I.L.R. 35 Bom. 225
(2) A.I.R. 1944 P.C. 73

Krishan Kumar
v.
The State

Harnam Singh, J.

(3) that non-compliance with the provisions of section 5-A of the Act in the matter of investigation is curable within section 537 of the Code ; and

(4) that the arrest of an offender for an offence punishable under sections 161, 165 or 165-A of the Indian Penal Code or section 5 (2) of the Act without warrant does not vitiate the proceedings in the trial.

Lest there may be some confusion, I make it clear that nothing said in this judgment shall be construed as authorising the Courts to commit irregularities which do not occasion a failure of justice. Section 537 of the Code provides that where an irregularity is committed, such an irregularity is, in the absence of failure of justice, not a ground which can be urged in an appeal or revision or in proceedings under section 374 of the Code for the reversal or alteration of the finding, sentence or order passed by a Court of competent jurisdiction. Plainly, section 537 of the Code cannot be used by the Court of first instance to validate errors or irregularities committed in that Court.

DULAT, J. I agree.

Falshaw, J.

FALSHAW, J. The following question has been referred for decision by a Full Bench :—

"Whether the failure to comply with section 5-A of the Prevention of Corruption Act, 1947, in respect of investigation, is an illegality which vitiates the whole proceedings in the trial or bars a

trial, or whether it is merely an irregularity curable under the provisions of the Code of Criminal Procedure ? "

The reference has arisen out of two appeals pending in this Court, one by Krishan Kumar against his conviction by a Special Judge at Delhi under section 5(2) of the Act and sentence of one and-a-half years' rigorous imprisonment, which came up for hearing before me in the Circuit Bench at Delhi in November 1953, and the other by Mohinder Singh, who had been convicted under section 5 (2) of the Act by the Special Judge at Gurdaspur and sentenced to six months' rigorous imprisonment, his appeal coming up before Dulat, J., also in November 1953. In the case of Krishan Kumar the point was raised that the whole of the proceedings against the appellant were bad in consequence of the fact that the case had been investigated by a Sub-Inspector of Police and the accused had been arrested without a warrant by the Sub-Inspector in contravention of the provisions of section 5(4) of the Prevention of Corruption Act as it stood at the relevant period, which ran—

> "Notwithstanding anything contained in the Code of Criminal Procedure, 1898, a police officer below the rank of Deputy Superintendent of Police shall not investigate any offence punishable under subsection (2) without the order of a Magistrate of the first class or make any arrest therefor without a warrant."

It was admitted in that case that before the investigation took place or the accused was arrested the Sub-Inspector responsible for the investigation had not obtained the permission of any Magistrate.

Krishan Kumar v. The State

Falshaw, J.

In the case which came up before Dulat, J., which related to an offence committed in October 1952, the form of the law had been slightly changed by an amendment to the Act of 1947, though the effect was the same. Section 5-A of the Act had now taken the place of the old section 5 (4), and also the proviso formerly contained in section 3, which contained similar provisions regarding offences under sections 161 and 165, Indian Penal Code. The relevant portions of the new section 5-A read—

> "Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no police officer below the rank :—
>
> (a) in the presidency towns of Madras and Calcutta of an Asistant Commissioner of Police,
>
> (b) in the presidency town of Bombay, of a Superintendent of Police, and
>
> (c) elsewhere, of a Deputy Superintendent of Police, shall investigate any offence punishable under section 161, section 165 or section 165-A of the Indian Penal Code, or under subsection (2) of section 5 of this Act, without the order of a Presidency Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant."

It seems that in the case of Mohinder Singh the only permission obtained by the Sub-Inspector of Police to investigate the case was from a second class Magistrate, and the objection was taken in the appeal that this vitiated the whole proceedings.

In view of the existence of conflicting decisions of different High Courts on the effect of the failure to comply with these particular provisions of law both Dulat, J., and I considered that the point involved should be referred to a Division Bench, and by a singular coincidence both his order of reference written at Simla and mine written at Delhi were made on the 10th of November, 1953. The two cases originally came up before Dulat, J., and myself on the 15th February 1954, and we then decided that the point involved was one suitable to be dealt with by an even larger Bench.

I may at the outset mention the decisions which were referred to by both of us in our separate orders of reference. The first case is that of *Promod Chandra Shekhar* versus *Rex* (1). This was a revision petition by Promod Chandra Shekhar who had been convicted of an offence under section 161, Indian Penal Code, and, presumably after his appeal had been dismissed by the Sessions Judge, had gone in revision to the Allahabad High Court, among the points raised by him being the objection that the whole proceedings against him were vitiated by the fact that the proviso to section 3 of the Prevention of Corruption Act had not been complied with. Other points were also raised in the revision petition and three questions were referred for decision to a Division Bench, the only one with which we are concerned being the first, namely, "What is the effect of non-compliance with the proviso to section 3 of the Prevention of Corruption Act, 1947?" It was held by Mootham and Wanchoo, JJ., that the failure to comply with the proviso to section 3 is only an irregularity falling within section 156 (2), Criminal Procedure Code

(1) A.I.R. 1951 All. 546

Krishan Kumar v. The State

Falshaw, J.

and accordingly the proceedings of the investigating officer cannot be called in question. The reasons for this conclusion are contained in the following passage in the judgment, which was delivered by Mootham, J.—

> "Now if section 3, Prevention of Corruption Act, had done no more than place certain offences in the category of cognizable offences, then the investigation of those offences would have been governed by the provisions of section 156, Criminal Procedure Code, and could have been conducted subject to the jurisdictional limits prescribed by that section by any officer in charge of a police station without the order of a Magistrate. The proviso to section 3 in so far as it places a restriction on the powers of investigation of police officers below a certain rank is in effect therefore a proviso to subsection (1) of section 156 of the Code and is analogous to the proviso in subsection (2) of section 561 of the same Code that no police officer below the rank of Police Inspector shall be employed or take part in the investigation of the offence specified in subsection (1) of section 156.
>
> Subsection (2) of section 156 provides that no proceeding of a police officer in any such case as is referred to in subsection (1) shall at any stage be called in question on the ground that the case was one which such officer was not empowered under that section to investigate. This subsection is, in our opinion,

in terms wide enough to cover an investigation into an offence punishable under section 161 or section 165, Penal Code, which is conducted by a police officer not so authorised by the proviso to section 3, Prevention of Corruption Act. This also is the view tentatively expressed by the Bombay High Court in *Rustam Ardeshir* v. *Emperor* (1). In *Queen Empress* v. *Mehri* (2), a case under section 561, Criminal Procedure Code, it was contended that a contravention of subsection (2) of that section was a material irregularity affecting the merits of the case. That view was not accepted by the Court, but the case is of little assistance as no reference appears to have been made in the judgment either to section 156 or section 537, Criminal Procedure Code.

It is in our opinion difficult to see how an investigation conducted by a police officer of lower rank than that specified in the section can prejudice the accused. The adequacy of the investigation will be reflected in the evidence given for the prosecution at the trial, and it is by that evidence that the case against the accused will be measured. As was pointed out by Fawcette, J., in *Emperor* v. *Shivbhat* (3).

"the main thing to bear in mind is that a conviction or acquittal does not depend upon the question what particular officer actually conducts the investigation which

(1) A.I.R. 1948 Bom. 163
(2) 1895 All. W.N. 9
(3) A.I.R. 1928 Bom. 162

Krishan Kumar
v.
The State

Falshaw, J.

results in his trial. That is determined mainly by the evidence that is given at the trial and considered, and the question whether that evidence has in the first place been elicited by an Inspector or by a Sub-Inspector is of very minor importance and does not really affect the result of a trial, except to this extent that the theory is that the higher the rank of the police officer investigating the more careful and unimpeachable his inquiry is likely to be."

That was a case in which the investigation into a railway accident had not been—

> "conducted by an officer of the rank required by the rules made under the Railways Act, but the decision that this was an irregularity of the kind contemplated by section 537, Criminal Procedure Code, is also not of assistance in the present case as the rules contained no provision corresponding to subsection (2) of section 156 of the Code."

The next case to be considered is that of *Sudhir Kumar* v. *The State* (1). This was a revision petition brought by Sudhir Kumar challenging the proceedings then being taken against him in a case under section 161, Indian Penal Code, on the ground that the investigation had been carried out by a Sub-Inspector of Police without the permission of a Magistrate in violation of the provisions in the proviso to section 3 of the Prevention of Corruption Act. The decision in *Promod Chandra Shekhar's case* (2), was

(1) A.I.R. 1953 Cal. 226
(2) A.I.R. 1951 All. 546

relied on on behalf of the State, but it was held by K. C. Das Gupta and Debabrata Mookerjee, JJ., that the effect of the proviso was that section 156, Criminal Procedure Code, was made inapplicable to the investigation of an offence under section 161, Indian Penal Code, and the concluding portion of the judgment reads—

> "It is difficult to see however how the fact that the proviso to section 3 of the Prevention of Corruption Act, 1947, operates as the limitation to the powers of investigation given to police officers in charge of Police Stations can attract the provision of subsection (2) of section 156, Criminal Procedure Code. Certainly that would have been the position if the proviso to section 3 of Act II of 1947 had in fact been incorporated by the Legislature in section 156, Criminal Procedure Code. This was not done and instead very clear words were used by the Legislature to ensure that such offence shall not be investigated by any police officer below the rank of Deputy Superintendent of Police without the order of a Magistrate, first class. In my opinion, we are not treating the Legislature seriously if we are to ignore such words and take the view that even though a command of this nature is disobeyed, it is mere irregularity.
>
> In my judgment the failure to comply with the provisions of the proviso to section 3 of Prevention of Corruption Act is an illegality, the effect of which has been that the entire proceedings based on the

Krishan Kumar v. The State

charge-sheet reported by the officer who was not competent to investigate must fail and accordingly I direct the proceedings be quashed."

Falshaw, J.

Both these decisions were cited before me in the case *State* v. *Madan Lal* (1), which I decided on the 18th of August 1953. This was case in which the accused Madan Lal was being prosecuted in the Court of a Special Judge at Hissar for an offence punishable under section 5 (2) of the Prevention of Corruption Act and in the preliminary stages he had raised the objection that the proceedings should be quashed because the provisions of section 5 (4) had not been complied with. His objection was accepted by the learned Special Judge, who passed an order quashing the proceedings. In dealing with the case I was of the opinion that the view of the learned Judges of the Allahabad Court that the proviso to section 3 amounted to no more than a proviso to subsection (1) of section 156, Criminal Procedure Code, was not sound, and that the view expressed by the learned Judges of the Calcutta Court was more correct. Even so, however, I did not uphold the order of the learned Special Judge quashing the proceedings, which I did not consider he had any power to pass, and which I did not think it necessary for this Court to pass. What I said was--

"In my opinion it will still be open to the prosecution to institute the case against the respondent afresh after complying with the provisions of section 5 (4), i.e., either by having the case re-investigated by a Deputy Superintendent of Police or re-investigated by an officer of a lesser rank after obtaining an order of a Magistrate of the first class. It will,

(1) 55 P.L.R. 475

however, be necessary to submit a fresh charge-sheet, and the poceedings cannot certainly continue on the present one."

When the matter was raised before me in the appeal of Krishan Kumar at Delhi, not unnaturally reliance was placed on my decision in *Madan Lal's case* (1), together with the Calcutta decision, but as I have pointed out in my order of reference there was a difference between the cases dealt with by the Allahabad and Calcutta High Courts of which I was not unaware at the time, though I did not refer to it, since I thought it better only to deal with the point if and when it actually arose in a case before me, this difference of course being that in the Calcutta case, as in the case with which I was dealing, the objection had been taken by the accused at a preliminary stage, whereas in the Allahabad case the point was only raised for the first time in revision after the accused had been convicted at his trial and also his appeal had been dismissed by the Sessions Judge. I was, and still am, of the opinion that different considerations may arise where an illegality or irregularity of this kind is pointed out at an early stage from those which arise where the point is only raised for the first time in appeal or revision. It seems to me obvious that where an irregularity or illegality of this kind is pointed out at an early stage, it is better to set it right at that stage than to allow the proceedings to continue with the defect in existence, and when I passed my order in *Madan Lal's case* (1), I fully realised that the fresh investigation either by a Deputy Superintendent of Police or a Sub-Inspector with permission from a Magistrate would only be a mere formality in the sense that it would involve only a formal checking of the existing material.

(1) 55 P.L.R. 475

Krishan Kumar
v.
The State

Falshaw, J.

In my view on this point I appear to have anticipated by a few days the view taken by my learned brother Harnam Singh, J., in the two revision petitions, 109-D and 122-D of 1953, decided by him while in the Circuit Bench at Delhi on the 24th of August 1953. The first of these cases is a case which was registered and investigated under section 420, Indian Penal Code, and section 7 of the Essential Supplies (Temporary Powers) Act against H. N. Risbud and another accused on a report made on the 30th of April, 1949, the investigation being completed in December 1950. Thereafter it was apparently decided that the accused should be prosecuted for an offence under section 5 (2) of the Prevention of Corruption Act, and with this view an Inspector of the Special Police Establishment formally applied on the 15th of March 1951 to a First Class Magistrate for permission under section 5 (4) of the Act to investigate the offence under section 5 (2), and permission was granted by the Magistrate. In due course the necessary sanction under section 6 of the Act was obtained and the recording of evidence in the Court of the Magistrate began in October 1951. Before the case ended, Act XLVI of 1952 came into force and the case was sent to the Court of a Special Judge, before whom the objection was raised that the mandatory provisions of the Act regarding the investigation had not been complied with and after examining evidence which showed that in fact there had not been any fresh investigation after the Magistrate's permission had been obtained in March 1951, and that in presenting the case to the Court only the material collected in the investigation which had been completed in December 1950 had been used, the learned Special Judge accepted the objection and discharged the accused.

In the other case, Cr. R. 122-D of 1953, although the details were some-what different, the facts were substantially the same, namely, that a case which was investigated against the same Mr. H. N. Risbud on a report registered on the 29th June 1949, under sections 120-B and 420 and section 7 of the Essential Supplies (Temporary Powers) Act, and also section 5 (2) of the Prevention of Corruption Act, but it was only on the 2nd of February 1951, after the investigation was completed that the Sub-Inspector of Police who eventually submitted the challan in the Court of a Magistrate formally obtained the permission of the First Class Magistrate to investigate the case. As in the other case, when the case was eventually sent to the Court of the Special Judge the same objection was raised, and after the Sub-Inspector had stated that no witness was examined by him after the Magistrate's permission had been obtained, the learned Special Judge again accepted the objection of the accused that the mandatory provisions of section 5 (4) of the Prevention of Corruption Act had not been complied with and discharged him.

In both these cases, in spite of the fact that the investigation had been completed before the permission of a First Class Magistrate was obtained, and there really was no fresh investigation after the permission had been obtained, Harnam Singh, J., held that the provisions of the Act had been sufficiently complied with and accepted the revision petitions filed by the State and ordered that the trials in the Court of the Special Judge should proceed.

Before us Mr. Ram Lal Anand, arguing on behalf of Krishan Kumar, appellant, has attempted to adopt the extreme position that under sectoin 5 (4) of the Act, as it then stood, since the

Krishan Kumar v. The State

Falshaw, J.

case was investigated by a Police Officer of lesser rank than Deputy Superintendent of Police without the permission of a First Class Magistrate the Court had no jurisdiction to try the case. If this were so, however, I find it difficult to understand why a provision to this effect was not embodied in the Act, as has been done in section 6 regarding the sanction necessary for prosecution which opens with the words—

> "No Court shall take cognizance of an offence punishable under section 161 or 165 of the Indian Penal Code or under subsection (2) of section 5 of this Act, alleged to have been committed by the public servant, except with the previous sanction * * * *."

A similar provision could easily have been added barring the Court in taking cognizance of a case if the provisions of section 5 (4) had not been complied with, and its absence, in my opinion, leaves the effects of non-compliance with section 5 (4), or of section 5-A, which has superseded it, open to be considered by this Court.

The provisions of these sections are mandatory, but so in fact are the provisions of very many sections in the Code of Criminal Procedure, and a breach of any of these mandatory provisions is undoubtedly an illegality in the strict sense of the word. There is, however, equally no doubt that while the breaches of some mandatory provisions of law have been held to be illegalities which go to the root of a case and vitiate a trial, there are many other breaches of mandatory provisions of law which have been held to be mere irregularities which do not vitiate a trial unless it is shown that they have resulted in prejudicing the case of the accused. This principle has been

recognised and embodied in section 537 of the Code of Criminal Procedure, the relevant words of which read :—

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—
>
> (e) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or any inquiry or other proceedings under this Code, * * unless such error, omission, or irregularity has in fact occasioned a failure of justice."

To this is added the explanation—

> "In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

It will be seen that this explanation is the basis of distinction which I drew in my referring order between the conflicting decisions of the Allahabad and Calcutta High Courts.

The general powers of a Court to take cognizance of cases as contained in section 190 (1), Criminal Procedure Code, are as follows:—

> "(a) upon receiving a complaint of facts which constitute such offence ;

Krishan Kumar
v.
The State

Falshaw, J.

(b) upon a report in writing of such facts made by any police officer;

(c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed."

Since these are cases instituted by the Police, we are concerned with 1 (b), and even assuming that a Special Judge in taking cognizance of a case is on the same footing as the Magistrates mentioned in the opening words of section 190, which to my mind is doubtful, to say the least it would not appear that the power of the Court to take cognizance of a case is limited to cases based on the report of a Police Officer competent to investigate the case. Under the earlier provisions of the Code it seems that the present words in subsection (1) (b) were substituted by an amendment in 1923 for the words "upon a police report of such facts". This form of words had apparently given rise to a considerable controversy in the Courts, doubts being felt as to whether these words merely meant a report made on a case investigated under the provisions of Chapter XIV or whether they included reports made by the Police in cases which a police officer had been ordered to investigate by a Magistrate. Although it is observed by Chitaley in his commentary, Volume I, at page 1080, that the present form of words 'upon a police report of such facts made by any Police Officer' is not much clearer, it is clear from his discussion of the decisions of the various Courts that the general view, with which I agree, is that the words "report of any Police Officer" have a wide meaning and include any report of a Police Officer as to an offence, whether the case is one which he can investigate or not, and whether the report is in any particular form or not.

It seems to me, however, that this discussion is academic since all cases of this kind now have to be tried by Special Judges whose Courts were set up by Act XLVI of 1952. The effect of this Act is to make all cases, the trial of which is governed by the provisions of the Prevention of Corruption Act, triable only by Special Judges, and section 7 reads :—

> " (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, or in any other law the offences specified in subsection (1) of section 6 shall be triable by Special Judges only.
>
> (2) Every offence specified in subsection (1) of section 6 shall be tried by the Special Judge for the area within which it was committed, or where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the State Government."

I am of the opinion that the Special Judges in these cases took cognizance of the cases under the provisions of this section and not under the provisions of section 190, Criminal Procedure Code.

Although, as I have said above, I do not altogether agree with the view of the learned Judges of the Allahabad High Court that the proviso to section 3 of the Prevention of Corruption Act, amounts to a proviso to subsection (1) of section 156 of the Criminal Procedure Code, and therefore is governed by subsection (2) of section 156, I am of the opinion that the provisions of subsection (2) of section 156 must seriously be taken into consideration in deciding the question whether a breach of the provisions of the proviso

Krishan Kumar v. The State

Falshaw, J.

to section 5 (4) of the Prevention of Corruption Act is an illegality which goes to the root of the trial, or is merely an irregularity curable under the provisions of section 537 of the Code. The provisions of section 156 are—

> "(1) Any officer in charge of a police station may without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.
>
> (2) No proceeding of a polcie officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate."

The second subsection certainly appears to embody the principle that the merits of a case are not affected by the fact that it has been investigated by a police officer not empowered to do so, and this seems to me to have some bearing on the question before us.

In the case, *Emperor* v. *Shivbhat Manjunathbhat Mattangadi* (1), a case under the Railway Act had been investigated by a Sub-Inspector of Railway Police although under the rules framed under the Act such an investigation was not to be carried out by an officer of a rank lower than the Inspector, and Fawcett, J., with whom Mirza, J., concurred had observed—

> "I think the main thing to bear in mind is that a conviction or acquittal does not depend upon the question what

(1) I.L.R. 52 Bom. 238

particular officer actually conducts the investigation which results in his trial. That is determined mainly by the evidence that is given at the trial and considered ; and the question whether that evidence has, in the first place, been elicited by an Inspector, or by a Sub-Inspector is of very minor importance and does not really affect the result of a trial, except to this extent that the theory is that the higher the rank of the Police Officer investigating, the more careful and unimpeachable his enquiry is likely to be. I certainly can see, in a case of this kind, no sufficient reason why the irregularity should not be held to fall under section 537 of the Criminal Procedure Code. There is, as has been pointed out by the Sessions Judge, authority for that view, in regard to a breach of the provisions of sub-section (2) of section 561 of the Code of Criminal Procedure, which says that certain investigations must be made by a Police Officer of at least the rank of a Police Inspector. The provision in sub-rule (2) of rule 27 is analogous to the present provisions in section 157 that an officer-in-charge of a police station can depute one of his subordinate officers not being below such rank as Local Government may, by general or special order, prescribe in this behalf, to proceed to the spot, to investigate an alleged offence; and if he was not an officer of that particular rank, I would be certainly disinclined to hold that in ordinary circumstances this fact would cause a failure of justice."

Krishan Kumar
v.
The State

Falshaw, J.

(The authority referred to in this passage is *Queen Empress* v. *Mehri* (1).

In *Rustom Ardeshir Banaji* v. *Emperor* (2), Rajadhyaksha and Gajendragadkar, JJ., held that the failure to comply with the proviso to section 3 of the Prevention of Corruption Act did not bar the jurisdiction of the Magistrate to try a case under that proviso. Admittedly the decision on this point was *obiter* in the sense that the learned Judges had already held that the proviso to section 3 did not apply in the Presidency Town of Bombay from which that particular case came, but at the same time it must be stated that the decision was deliberately given with a view to laying down the law for the rest of Bombay Presidency, as it then was.

Another case not without relevance is the decision of their Lordships of the Privy Council in *Parbhu* v. *Emperor* (3). The appellant in that case was a native of Jind State who had been arrested within the territory of Jind by Police from British India for an offence committed in British India and the objection was taken in his appeal that his conviction was bad because of the illegality of his arrest. It was held by their Lordships that the conviction of the accused could not be affected by any irregularity of his arrest.

The matter in my opinion may be summed up in this way. The object of the provisos in section 3 and section 5 (4) of the Prevention of Corruption Act, which have now been superseded and combined in the new section 5-A, would appear to be to save public servants from hasty action by the Police, and it was, therefore, enacted that if a case was to be investigated by a less responsible officer than a Deputy Superintendent,

(1) 1895 All. W.N. 9
(2) A.I.R. 1948 Bom. 163
(3) A.I.R. 1944 P.C. 73

Police, the facts should be disclosed to a Magistrate and his permission obtained before any investigation took place. The fact remains that a very large percentage of these cases are in fact investigated by Sub-Inspectors and the actual course of the investigation is not likely to vary in the slightest degree whether there is in existence a piece of paper bearing the signature of a Magistrate or not. In fact I have already pointed out in the course of my judgment that my learned brother Harnam Singh and myself have taken the view that the most formal re-checking of the material already assembled in an investigation already completed before the permission of a Magistrate was obtained is sufficient compliance with the law, and in my opinion it is quite impossible to hold that the mere failure to obtain the permission of a Magistrate before conducting an investigation can possibly prejudice the subsequent trial of an accused in any way, and I, therefore, consider the failure to comply with this provision of law is an irregularity curable under the provisions of Section 537, Criminal Procedure Code. In other words if the objection is taken by the accused in the preliminary stages of the case against him it ought to be set right by having the investigation formally checked by a Deputy Superintendent, Police, or by a Police Officer of lesser rank after obtaining the permission of a Magistrate, and if the objection is only taken by the accused at the stage of revision or appeal it should be held to be a mere irregularity which has not prejudiced the trial of the accused in any way and it has no effect on the jurisdiction of the Court to deal with the case, and I would answer the question referred to the Full Bench on the above lines and send back the cases out of which the question has arisen to the learned Single Judges for decision on the merits.