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VARINDER SINGH

v.

STATE OF PUNJAB & ANR.

(Criminal Appeal No. 147 of 2014)

B

JANUARY 16, 2014.

**[SUDHANSU JYOTI MUKHOPADHAYA AND
V. GOPALA GOWDA, JJ.]**

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Code of Criminal Procedure, 1973:

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s.482 – Petition seeking to quash FIR and criminal proceedings – Petitioner, a visitor to prison – On search, mobile phone and charger recovered from him – FIR for offences punishable u/ss 42 and 45 of the Prisons Act – High Court rejecting the petition – Held: Case of appellant clearly falls under category (1) of the grounds of quashing of FIR mentioned in the case of Bhajan Lal — On the date of alleged offence, mobile phone or charger was not listed as one of the prohibited articles under Punjab Prison Manual — Thus, no offence is made out u/s 42 of the Act, as there was no communication which was done or was attempted to being done contrary to the rules — Further, the appellant was not a prisoner on the date of the offence — Therefore, he could not have committed a prison offence as defined u/s 45 of the Act — The judgment of High Court is set aside — FIR and the proceedings against appellant are quashed –Prisoners Act, 1894 — ss.42,45 and 52-A.

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Prisons Act, 1894:

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s.52-A – Visitor to prison – On search found in possession of a mobile phone and its charger – FIR dated 24.9.2009 – Section enforced by Notification dated 8.3.2011 – Held: Notification will not apply to the case in hand, as the alleged offence was committed in 2009, and retrospective

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effect will not apply in the case of criminal laws — Therefore, there is no offence made out against appellant – Code of Criminal Procedure, 1973 – s.482. A

ss. 42 and 45 – Offences under the two provisions – Explained. B

A mobile phone and its charger were recovered, on search, from the appellant, who was a visitor to a Central Prison in Punjab. An FIR for offences u/ss 42 and 45 was registered against him on 24.9.2009. His petition u/s 482 CrPC seeking to quash the FIR and the criminal proceedings was dismissed by the High Court. C

In the instant appeal, the questions for consideration before the Court were: (i) Whether an offence was made out u/ss 42 and 45 (12) of the Prisons Act? and (ii) Whether the High Court was justified in rejecting the petition to quash the FIR? D

Allowing the appeal, the Court

HELD: 1.1. Section 45 of the Prisons Act, 1894 provides for acts which are declared to be prison offences when committed by a prisoner. Clause (12) makes *receiving, possessing or transferring any prohibited article* a prison offence. The appellant was not a prisoner on the date of the commission of the offence. He could thus, not have committed a 'prison offence' as defined u/ss 45 of the Act. Therefore, no offence is made out u/s 45 of the Act. [para 8-9] [501-D-F] E F

1.2. Insofar as s.42 of the Act is concerned, it provides that only that communication, which is contrary to the rules made u/s 59 of the Act is prohibited. The Punjab Jail Manual lists the prohibited articles in Punjab prisons. This list does not mention Mobile phone or charger as one of the prohibited articles. Thus, the communication, even if it was attempted to being done, was not contrary G H

A to the prison rules and, thus, is not an offence u/s 42 of the Act. [para 9-10] [501-F; 502-D; 503-C-D]

B 1.3. Section 52-A makes possession of mobile phone by the prisoner and its supply to him by any person an offence. The notification by the Punjab Government to bring the Section in force is dated 08.03.2011. The FIR for the offence was dated 24.09.2009. This notification will obviously not apply to the case in hand as the alleged offence was committed in 2009, and retrospective effect will not apply in the case of criminal laws. Therefore, there is no offence made out against the appellant. [para 11] [503-F-H]

D 2.1. In light of the settled legal principles, the High Court has erred in dismissing the petition to quash the FIR. Under s.482 CrPC, the High Court has the power to quash an FIR. This court in the case of *Bhajan Lal* has laid down the categories of cases in which the High Court can exercise its power u/s 482 and quash the FIR. [para 12-13] [504-B, D-E]

E *State of Haryana v. Bhajan Lal* 1990 (3) Suppl. SCR 259 =1992 Supp (1) SCC 335 – relied on

Sunder Babu v. State of Tamil Nadu (2009) 14 SCQ 244 – referred to.

F 2.2. The case of the appellant clearly falls under category (1) of the grounds of quashing of FIR mentioned in the case of *Bhajan Lal* i.e. where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not prima-facie constitute any offence or make out a case against the accused. The appellant was not a prisoner and as there was no communication which was done or was attempted to being done contrary to the rules on 24.9.2009, he cannot be said to have committed any prison

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offence. The judgment of the High Court is set aside. FIR A
dated 24.09.2009 and the proceedings against the appellant
are quashed. [para 13, 15-16] [504-E-F; 505-G; 506-A-C]

Case Law Reference:

1990 (3) Suppl. SCR 259 relied on para 13 B

(2009) 14 SCC 244 referred to para14

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 147 of 2014.

From the Judgment and Order dated 19.07.2013 of the C
High Court of Punjab & Haryana at Chandigarh in Crl. Misc. No.
M - 13296 of 2011 (O&M).

R.K. Dhind, Surinder Singh, Balbir Singh Gupta, for the D
Appellant.

V. Madhukar, AAG, Anvita, Kuldip Singh, Naresh Bakshi,
for the Respondents.

The Judgment of the Court was delivered by E

V. GOPALA GOWDA, J. Leave granted.

2. This appeal is filed by the appellant questioning the
correctness of the judgment and final order passed by the High
Court of Punjab and Haryana at Chandigarh in petition Crl. Misc. F
No. M-13296 of 2011 (O & M) urging various facts and legal
contentions in support of his case.

3. Necessary relevant facts are stated hereunder to
appreciate the case of the appellant and also to find out whether
the appellant is entitled to the relief prayed for in this appeal. G

The appellant had gone as a visitor to the Central Jail,
Ferozepur on 17.09.2009. There, on being searched, a mobile
phone was recovered from his turban and a charger was
recovered from his shoes. An FIR dated 24.09.2009 was filed H

A at the Police Station Ferozepur, under Sections 42 and 45 (12)
of the Prisons Act, 1894 (in short "the Act"). The Chief Judicial
Magistrate of Ferozepur charged him on 01.05.2010 under
Sections 42 and 45 of the Act. The appellant approached the
High Court of Punjab and Haryana by way of a petition under
B Section 482 of the Code of Criminal Procedure, 1973, praying
that the FIR be quashed. The High Court of Punjab and Haryana
by way of impugned judgment and final order dated 19.07.2013
dismissed the petition, and *inter alia* held that "*...the accused
is at liberty to take all pleas available to him during the trial*"

C 4. The High Court in its impugned order has interpreted
Section 42 of the Act, and held that whoever communicates or
attempts to communicate with any prisoner is liable for
punishment. It said that the appellant herein was entering the
jail with a mobile phone and its charger, apparently to enable
D communication with a prisoner. It was held that "*After
presentation of challan, charges have already been framed
against the petitioner. In these circumstances, at this stage,
no ground for quashing of the FIR in question is made out.*"

E 5. The learned counsel for the appellant contended that the
High Court had not appreciated the contention that the offence
under Sections 42 and 45 of the Act is not made out, and that
mobile phone and charger are not included in the list of the
prohibited articles. It was also contended that section 52-A,
F which prohibited the carrying of a mobile phone, has not been
notified yet, and that it is still a Bill. It was further contended that
even if the notification were to be taken as implementable, it
was dated 08.03.2011. The offence is admittedly of 2009, and
thus, this notification will not apply to the case as the same is
G prospective in nature.

6. The learned counsel for the respondents contended that
the appellant was hiding a mobile phone in his turban and a
charger in his shoe, thus, *prima facie*, the case under Section
42 of the Act has been made out against him. The counsel also
H contended that the sections mentioned in the charge sheet are

attracted, and that there is no reason for the courts to interfere at this stage. A

7. We have heard the rival legal contentions and perused the documents produced on record. Two issues arise for our consideration: B

- (1) Whether an offence is made out under Sections 42 and 45 (12) of the Prisons Act?
- (2) Whether the High Court was justified in rejecting the petition to quash the FIR? C

Answer to Point no.1

8. We have to examine Sections 42 and 45 of the Act in detail in order to understand the issue at hand. Section 45 of the Act provides for acts which are declared to be prison offences when committed by a prisoner. Clause (12) makes *receiving, possessing or transferring any prohibited article* a prison offence. D

9. The appellant was not a prisoner at the date of the commission of the offence. He could thus, not have committed a 'prison offence' as defined under Section 45 of the Act. Hence, no offence is made out under Section 45 of the Act. Insofar as Section 42 of the Act is concerned, it provides that only that communication, which is contrary to the rules made under Section 59 of the Act is prohibited. Section 42 of the Act reads as under : E

"42. Penalty for introduction or removal of prohibited articles into or from prison and communication with prisoners.—Whoever, contrary to any rule under section [59] introduces or removes, or attempts by any means whatever to introduce or remove, into or from any prison, or supplies or attempts to supply to any prisoner outside the limits of a prison, any prohibited article, F

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A and every officer of a prison who, contrary to any such rule, knowingly suffers any such article to be introduced into or removed from any prison, to be possessed by any prisoner, or to be supplied to any prisoner outside the limits of a prison,

B and whoever, contrary to any such rules, communicates or attempts to communicate with any prisoner,

and whoever abets any offence made punishable by this section,

C shall, on conviction before a Magistrate, be liable to imprisonment for a term not exceeding six months, or to fine not exceeding two hundred rupees, or to both.”

D 10. The Punjab Jail Manual lists the prohibited articles in Punjab prisons. Para 606 of the Manual lists the following Prohibited Articles:

“.....

E (1) Spirituous liquors of every description

(2) Tobacco and all other substances whatsoever which are or may be intended to be used for the purpose of smoking, chewing or snuffing, and all instruments and appliances whatsoever, which may be used for or in connection with smoking, chewing or snuffing,

(3) All explosive, intoxicating or poisonous substances, and chemicals whether fluid or solid of whatever description.

(4) All arms and weapons, and articles which are capable of being used as weapons of whatever description.

H (5) All bullion, metal, coin, jewellery, ornaments,

currency notes, securities and articles of value of every description. A

(6) All books, paper and printed or written matter and materials and appliances for printing or writing of whatever description.

(7) String, rope, chains and all materials, which are capable of being converted into string or rope or chains, of whatever description. B

(8) Wood, bricks, stones and earth of every description.” C

This list does not mention Mobile phone or charger as one of the prohibited articles. Thus, the communication, even if it was attempted to being done, was not contrary to the prison rules, and thus, is not an offence under Section 42 of the Act.

11. The Prisons (Punjab Amendment) Bill, 2011 provides for the addition of section 52-A to the Act. This Section reads thus : D

“52-A. (1)-Notwithstanding anything contained in this Act, if any prisoner is found guilty of possessing, operating or using a mobile phone or their component parts as like SIM card, memory card, battery or charger or if the prisoner or any other person assists or abets or instigates in the supply thereof, he shall be punished with imprisonment for a term, not exceeding one year or with fine not exceeding Rs 25,000 or with both.....” E F

This Section, thus, makes the possession of the mobile phone by the prisoner and supplying the phone by any person an offence. The notification by the Punjab Government that this section is in force is dated 08.03.2011. The FIR for the offence was dated 24.09.2009. This notification will obviously not apply to the case in hand as the alleged offence was committed in 2009, and retrospective effect will not apply in the case of criminal laws. Hence, there is no offence made out against the appellant and we cannot accept the reasoning of the High Court H

A in the impugned judgment. We hereby hold that this section cannot be made applicable to the facts of the present case.

Answer to point no.2

B 12. It is our view that in light of the settled legal principles, the High Court has erred in dismissing the petition to quash the FIR.

13. Section 482 of the Code of Criminal Procedure reads as under :-

C “482. **Saving of inherent powers of High Court:** Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.”

D Under this Section, the High Court has the power to quash an FIR. This court in the case of *State of Haryana v. Bhajan Lal*¹ has laid down the following categories of cases in which the High Court can exercise its power under Section 482 and quash the FIR:-

E “1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

F 2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

G 3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the

H 1. 1992 Supp (1) SCC 335.

same do not disclose the commission of any offence and make out a case against the accused. A

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code. B

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused. C

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party. D E

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."² F

14. These principles were further reiterated by a three judge bench of this Court in the case of *Sunder Babu v. State of Tamil Nadu*³.

15. The case of the appellant clearly falls under category (1) of the grounds of quashing of FIR mentioned in the case of G

2. Ibid/Para 102.

3. (2009) 14 SCC at para 7. H

- A *Bhajan Lal* (supra). On the date of the offence, mobile phone was not listed as one of the prohibited articles under the Punjab Prison Manual. Thus, no offence is made out under Section 42 of the Act, as there was no communication which was done or was attempted to being done contrary to the rules. Further, the
- B appellant was not a prisoner on the date of the offence. Hence, he could not have committed a prison offence as defined under Section 45 of the Act.

C 16. In view of the foregoing reasons, the appeal is allowed and the impugned judgment of the High Court is set aside. The FIR dated 24.09.2009 and the proceedings against the appellant are quashed. There will be no order as to costs.

R.P.

Appeal allowed.