CASE NO.:
Appeal (crl.) 330 of 2006

PETITIONER:
Sankaran Moitra

RESPONDENT:
Sadhna Das & Anr.

DATE OF JUDGMENT: 24/03/2006

BENCH:
Y.K. SABHARWAL & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T

[ARISING SPECIAL LEAVE PETITION (CRIMINAL) NO. 3347 OF 2003]

P.K. BALASUBRAMANYAN, J.

1. Leave granted.
2. The husband of Respondent No.1 herein, met with his end on 10.5.2001. On 12.5.2001, Respondent No.1 (hereinafter referred to as the 'complainant') filed a complaint before the Deputy Commissioner of Police that she had come to know from the members of the public that while her husband was coming from Beliaghata Subhas Sarobar he was beaten to death by the police. She stated that she wanted the post-mortem examination of her innocent husband Robindranath Das to be held in the presence of a Magistrate and video recording of the portions of the body of her husband whereon it had been hit by the police. She demanded stern punishment for the murderer of her husband. On 28.5.2001, she filed a complaint in the court of the Chief Judicial Magistrate, Alipore in respect of offences, punishable according to her under Sections 302, 201, 109 read with Section 120-B of the Indian Penal Code. In the complaint, she stated that she was a house-wife and, that her husband Robindranath Das, was a businessman and a social worker. The antecedents of her husband were above board and he always acted on the right side of the law. He was also an active supporter of a particular political party. On 10.5.2001, the General Election to the Assembly in West Bengal was held. Her husband was in-charge of giving food packets to the polling agents of a contesting political party in the booth in C.I.T. office situated at Subhas Sarobar (Beliaghata Lake). When her husband did not turn up for lunch, before she left for casting her vote, she asked her brother to summon her husband for lunch. She was returning at about 1415 hours after casting her vote. While she was returning, a Tata Sumo Car came along, being driven at speed and in that car she found a local resident Anath sitting. When she reached the vicinity of Vivekananada Club, she found there assembled, a crowd of local people. When she enquired what had happened, one of those assembled said that the police had severely assaulted her husband with lathi in the lake, her husband had became unconscious, and he had been taken to the doctor in a Tata Sumo Car. On further enquiry, she was told that her husband was assaulted for no reason by the police with lathis on his head near the C.I.T. office at the Lake instigated by the "Bara Babu" of Phoolbagan Thana and Moitra Babu, previous "Barababu" of Beliaghata Thana at about 1400 hrs. Subsequently, she came to learn from various persons of the locality including her brother and her brother-in-law that her husband was talking near the outer gate of the C.I.T. office area at Subhas Sarobar with Mr. S.K. Kundu, the 'Barababu' of Phoolbagan Police station at about 1400 hours. At that point of time, the previous officer-in-charge of Beliaghata Police Station, at the time of the complaint, the

Assistant Commissioner of E.S.D.(Eastern Suburban Division), Calcutta came there by a police jeep and after talking with the Officer in charge, Phoolbagan Police Station ordered the beating up of her husband and accordingly the Officer in charge, Phoolbagan Police Station instigated the police constables who were accompanying them to beat her husband and to kill him. Thereupon, a constable, namely, Sudhir Sikdar assaulted her husband with a lathi and her husband tried to run away to save his life but the police personnel chased him. Her husband fell down in the water at the edge of the lake. He requested the chasing police personnel not to assault him and he told them that he did not know how to swim. In spite of repeated requests and begging for his life by her husband, the police constable Sudhir Sikdar struck successive blows on the head of her husband, and other different portions of his body with a lathi, as a result of which her husband became unconscious and fell in the lake. Then the police personnel left the place. Her brother and brother-in-law, with the help of others who were eye-witnesses to the incident pulled out her husband from the water. Thereafter, Anath a local person, with the help of others removed her husband in an unconscious state to the nearby Divine Nursing Home where the doctor declared him dead. The people seeing the atrocities of the police personnel in attacking an innocent person, became agitated. After a considerable lapse of time, the body of her husband was removed by the police from the Nursing Home. According the complainant, the accused persons had no legal authority to kill her husband, an innocent person, without any provocation from his end. Hence the accused, in collusion with each other and having a common intention and in pursuance of a conspiracy hatched up among themselves, have committed an offence punishable under Sections 302, 120-B, 109 read with Section 34 of the Indian Penal Code. They were guilty of violating of the provisions of law and they were liable for exemplary punishment. Accused Nos.1 and 2 further abetted the murderous assault on the victim by accused No.3 by instigating him openly to assault and kill her husband. The accused persons had taken advantage of their uniforms and had murdered her husband in a planned manner and hence were guilty of murder. She feels, from the available circumstances, that the death of her husband was the result of a deep rooted conspiracy and to fulfill the vested interest of some interested persons, which would be revealed at the time of trial. She therefore prayed that the learned Magistrate be pleased to take cognizance and issue process against the accused persons and after their appearance pass necessary orders in accordance with law. She arrayed the Assistant Commissioner Sankaran Moitra as Accused No.1, S.M. Kundu, Officer-in-charge, Phoolbagan Police Station, Calcutta as Accused No. 2 and Sudhir Sikdar, a police constable attached to Phoolbagan Police Station, Calcutta as Accused No.3.

3. On 31.5.2001, the Chief Judicial Magistrate, Alipore took the statements of the complainant and the witnesses produced by her which included her brother and her brother-in-law and issued process to the accused. The Chief Judicial Magistrate thus took cognizance of the offence. On 16.6.2001, the Chief Judicial Magistrate issued a warrant for the arrest of accused no.1. On 30.6.2001, accused no.1, the then Assistant Commissioner of Police, moved an application under Section 210 of the Code of Criminal Procedure. Therein, after referring to the complaint filed by the complainant, he submitted that on the self same matter on the written complaint of the complainant made on 12.5.2001, a case had been registered in the Phoolbagan Police Station as Case No. 112 of 2001 under Section 304 of the India Penal Code. The complainant had filed the said complaint addressed to the Deputy Commissioner of Police, Eastern Division, Calcutta on 11.5.2001 basing upon which the case was registered on 12.5.2001. Thereafter, one Fax message was sent addressed to the Joint Commissioner of Police, Calcutta concerning the death of Robindranath Das, wherein the place of occurrence was mentioned as

Beliaghata Lake and himself and two other persons above mentioned as the assailants with a prayer that a case be registered under Section 302, 506(II) and 114 of the India Penal Code, with a further prayer that the Fax message be treated as "First Information Report". That Fax was sent by a brother of the deceased. On the self-same incident under an order of Superiors, a case has been registered on 12.5.2001. The complaint was filed before the Magistrate on 28.5.2001 by the informant in the Phoolbagan Police Station case. An investigation by Police was in progress in relation to the offence which is the subject matter of the enquiry held by the Chief Judicial Magistrate. In view of this, he prayed that the proceedings in the enquiry held by the Chief Judicial Magistrate be stayed and a report on the matter from the Officer-in-charge of Phoolbagan Police Station be called for. By a separate application, he also prayed that the application under Section 210 of the Code of Criminal Procedure may be directed to be put up immediately for orders. The Chief Judicial Magistrate ordered that the application under Section 210 of the Code of Criminal Procedure be put up on 10.7.2001.

4. Meanwhile, accused No. 1 had filed an application for anticipatory bail before the High Court of Calcutta. On 20.6.2003, the High Court refused anticipatory bail. Accused No. 1 approached this Court challenging the order refusing anticipatory bail. This Court by order dated 28.7.2003 rejected the Petition for Special Leave to Appeal stating that there was no merit in it.

5. Accused No. 1, meanwhile, filed a Petition under Section 482 of the Code of Criminal Procedure before the High Court seeking a quashing of the complaint on the ground that the Chief Judicial Magistrate had no jurisdiction to entertain the complaint since the condition precedent for entertaining the complaint, a sanction under Section 197(1) of the Code of Criminal Procedure, had not been obtained. In that application, after referring to the proceedings before the Magistrate, he pleaded that he had filed an application on 30.6.2001 under Section 210 of the Code of Criminal Procedure before the Chief Judicial Magistrate seeking a stay of the proceedings in view of the pending investigation into the earlier complaint. But the Magistrate without passing any order thereon had kept it pending with a direction to serve copy on the other side. He submitted that the learned Magistrate had erred in issuing a warrant of arrest at the first instance without complying with the provisions of the Code of Criminal Procedure. An opportunity ought to have been given to him to appear before court by issuing summons at the first instance. In a case instituted on the basis of a complaint in terms of the provisions of Sections 61 and 62 of the Code of Criminal Procedure and by not adverting to these provisions, the Magistrate had acted contrary to law. He submitted that the incident was not as described by the complainant. He then stated as follows:

"It is stated that on 10.5.2001 at about 1410 hrs on getting an information of some disturbance at the Polling Station at C.I.T. Office. Subhas Sarobar, the Petitioner No.2 along with Police Force reached the spot and found violence inside and around the polling premises between the supporters of C.P.I. (M) and T.M.G. On reaching there, they tried to separate both the groups from each other to prevent serious cognizable offence as the mob ware in agitated condition over the issue of proxy voting, both Jamming etc. and there was every likelihood of a serious rioting. The purpose of the Police Personnel's being present at the spot was to control the mob free and fair election. In the meantime the petitioner also arrived at the spot and the agitated mob started throwing brick bats and bomb indiscriminately aiming towards the Police force. The Police stepped into action and chased

the unruly mob when a group dispersed towards two opposite directions.

It is therefore learnt that one/two persons while retreating at random jumped in Subhas Sarobar Lake and as result of which they might sustain injuries on their persons and out of aforesaid persons the victim Robindranath Das Topi was one of them.

That on the basis of the aforesaid incident a case was started by the Police Sumo to being Phoolbagan Police Station Case No. 111 dated 10.5.2001 against 20/30 persons including Robindranath Das under Section 148/149/336 of the India Penal Code and Section 3 and 5 of Explosive Substance Act.

That the Petitioner submits that initially the opposite Party No.1 lodged an information against some unknown Police Personnel as stated above but subsequently at the instance of some designing and interested persons implicated the Petitioner falsely in the present complaint case by introducing false, concocted and after thought story which was filed before the learned Court below 18 days after the alleged incident.

That the petitioner states that the learned Magistrate erred in taking cognizance on the basis of the aforesaid complaint in absence of Sanction for prosecution under Section 197 of the Code of Criminal Procedure as the petitioner being the Public servant being appointed by the Government of West Bengal and not removable from his office save by all with the sanction of the Government and for any purported act in discharge of his official duty cognizance without previous sanction is bad in the eye of law and liable to be set aside for the ends of justice.

That the petitioner submits that the learned Magistrate totally overlooked the provisions of Section 197 of the Code of Criminal Procedure i.e. no Court shall take cognizance of any offence alleged to have been made by a Public Servant in discharge of his official duty without the previous sanction from the Government and as such the order taking cognizance in absence of sanction mandatory is unsustainable in law as also all other consequential orders are also unsustainable in law."

6. The High Court by order dated 11.7.2003 dismissed the application. It overruled the contention of the accused based on Section 197 of the Code of Criminal Procedure thus:
"In its considered view Section 197 Cr.P.C. has got no manner of application in the present case. Under Section 197 Cr. P.C. sanction is required only if the public servant was, at the time of commission of offence, 'employed in connection with the affairs of the Union or of a State' and he was 'not removable from his office save by or with the sanction of the Government.' The bar under Section 197 Cr.P.C. cannot be raised by a public servant if he is removable by some authority without the sanction of the Government.

Committing an offence can never be a part of an official duty. Where there is no necessary connection between the act and the performance of the duties of a public servant, section 197 Cr.P.C. will not be attracted.

Beating a person to death by a police officer cannot be regarded as having been committed by a public servant within the scope of his official duties."

After referring to the some of the decisions cited, the Court further stated:

"Committing of an offence of murder can never be a part of an official duty. Where there is no necessary connection between the act and the performance of the duties of a public servant, Section 197 of the Code will not be attracted. Merciless beating by a police officer causing death of a person can never be said to be an act in discharge of his official duty."

The Court stated that since from the statement of the doctor who conducted the post-mortem examination it appeared that the victim had suffered as many as six serious injuries and in the opinion of the doctor, the death was due to the injuries to the head inflicted on the deceased, it was justified in the view it had taken. The learned Judge wound up by stating that it was not a fit case for interference by the High Court and if the Court interferes with the proceedings on any of the grounds urged by the accused, people will lose their confidence in the administration of justice. The High Court directed the Magistrate to proceed with the matter with utmost expedition and in accordance with law.

7. Accused No.1 challenged this order before this Court by way of this Petition for Special Leave to Appeal. In the Petition for Special Leave, Accused No. 1, the appellant, also referred to the warrant of arrest pending against him and prayed for a stay of further proceedings. On 22.8.2003, this Court while issuing notice also stayed further proceedings before the Chief Judicial Magistrate, pending further orders. It appears that, as of now, neither accused No.1 has been arrested nor the investigation completed. Learned counsel appearing on behalf of the State of West Bengal could only say that the investigation has not been completed. Learned counsel for the complaint, on the other hand, submitted that the attitude adopted was one of helping the accused since they were police officers. What is relevant for our purpose is to notice that investigations into the two crimes registered, namely, Case No. 111 under Sections 148, 149, 336 IPC read with Sections 3 and 5 of Explosive Substances Act and Case No. 112, registered on the complaint made by the complainant herein on 11.5.2001, have not been completed.

8. It is true that at the time the complaint was made before the Chief Judicial Magistrate by the complainant on 28.5.2001, there would have been no material before him about the investigation pending on the two cases registered in the Phoolbagan Police Station as Case Nos. 111 and 112. The Magistrate took cognizance of the complaint filed before him after recording the statements of witnesses on 31.5.2001 and issued process and also issued warrant for arrest of the appellant on 16.6.2001. Therefore, at that stage, it is possible, as contended by the learned counsel for the complainant, that there was no occasion for the Chief Judicial Magistrate to consider the applicability of Section 197 of the Code of Criminal Procedure. The occasion had not arisen. In this context, learned counsel for the complainant submitted that the contention sought to be raised by the appellant based on Section 197 of the Code of Criminal Procedure need not be decided at this stage and it may be open to the appellant to raise that objection after he has appeared and while raising his defenses. Learned counsel relied on the observations of the Varadachariar, J. in the decision in Dr. Hori Ram Singh Vs.

Emperor [1939 FCR 159]. He relied on the passage:
"As the consent of the Governor, provided for in that Section, is a condition precedent to the institution of proceedings against a public servant, the necessity for such consent cannot be made to depend upon the case which the accused or the defendant may put forward after the proceedings had been instituted, but must be determined with reference to the nature of the allegations made against the public servant, in the suit or criminal proceeding. If these allegations cannot be held to relate to "any act done or purporting to be done in the execution of his duty" by the defendant or the accused "as a servant of the Crown," the consent of the authorities would, prima facie, not be necessary for the institution of the proceedings. If, in the course of the trial, all that could be proved should be found to relate only to what he did or purported to do "in the execution of his duty," the proceedings would fail on the merits, unless the Court was satisfied that the acts complained of were not done in good faith: S.270(2). Even otherwise, the proceedings would fail for want of the consent of the Governor, if the evidence established only official acts. As the Appellate Court has not pronounced any opinion on the evidence, we are not in a position to say whether on the facts proved, the proceedings could be held to fail on either of the above grounds"

Learned counsel further relied on the decision in H.H. B. Gill and another Vs. The King, (75 Indian Appeals 41) in an appeal from the decision in 1947 F.C. 9 to point out that there was no difference between Section 270 of the Government of India Act dealt with by Varadachariar, J. and Section 197 (1) of the Code. He also pointed out that the Privy Council had approved the view expressed by Varadachariar, J. in Dr. Hori Ram Singh Vs. Emperor (supra). Lord Simonds speaking for the Privy Council stated:

"In the consideration of S.197 much assistance is to be derived from the judgment of the Federal Court in 1939 F.C.R. 159, and in particular from the careful analysis of previous authorities which is to be found in the opinion of Varadachariar J. Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office."

9. We find that even if we were accept the submission of learned counsel for the complainant that the stage is not reached for considering whether sanction under Section 197(1) of the Code of Criminal Procedure is required in the present case or not, it would

only be postponing the consideration of that question. As we have noticed earlier, in his application filed before the Chief Judicial Magistrate invoking Section 210 of the Code of Criminal Procedure and praying for a stay of further proceedings, the appellant, has pleaded that the act was done by him in performance of his duty and in the application filed under Section 482 of the Code of Criminal Procedure before the High Court in addition to reiterating that the alleged offence was committed by him in the course of performance of his duty, he had also invoked Section 197(1) of the Code of Criminal Procedure and had pleaded that the proceedings cannot go on and would be without jurisdiction for want of sanction under Section 197(1) of the Code of Criminal Procedure. Of course, the High Court has taken the view that the complaint would not attract Section 197(1) of the Code and that was the reason for rejecting the prayer of the appellant to quash the proceedings as being without jurisdiction for want of sanction. Learned counsel for the complainant has made a submission that the whole investigation was being delayed and the whole process was being delayed in view of the fact that the accused involved were police personnel and the State was more interested in protecting them than in having justice done. When we take note of this submission, postponing a decision on the applicability or otherwise of Section 197(1) of the Code can only lead to the proceedings being dragged on in the trial Court and a decision by this Court, here and now, would be more appropriate in the circumstances of the case especially when the accused involved are police personnel and the nature of the complaint made is kept in mind.

10. We may first try and understand the scope of Section 197 and the object of it. This Court in Shreekantiah Ramayya Munipalli Vs. The State of Bombay [1955 (1) SCR 1177) explained the scope of Section 197 thus:

"Now it is obvious that if Section 197 of the Code of Criminal Procedure is construed too narrowly it can never be applied, for of course it is no part of an official's duty to commit an offence and never can be. But it is not the duty we have to examine so much as the act, because an official act can be performed in the discharge of official duty as well as in dereliction of it. The section has content and its language must be given meaning. What it says is ----

"when any public servant \005. is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty\005"

We have therefore first to concentrate on the word "offence".

Now an offence seldom consists of a single act. It is usually composed of several elements and, as a rule, a whole series of acts must be proved before it can be established. In the present case, the elements alleged against the second accused are, first, that there was an "entrustment" and/or "dominion"; second, that the entrustment and/or dominion was "in his capacity as a public servant"; third, that there was a "disposal"; and fourth, that the disposal was "dishonest". Now it is evident that the entrustment and/or dominion here were in an official capacity, and it is equally evident that there could in this case be no disposal, lawful or otherwise, save by an act done or purporting to be done in an official capacity. Therefore, the act complained of, namely the disposal, could not have been done in any other way. If it was innocent, it was an official act; if

dishonest, it was the dishonest doing of an official act, but in either event the act was official because the second accused could not dispose of the goods save by the doing of an official act, namely officially permitting their disposal; and that he did. He actually permitted their release and purported to do it in an official capacity, and apart from the fact that he did not pretend to act privately, there was no other way in which he could have done it. Therefore, whatever the intention or motive behind the act may have been, the physical part of it remained unaltered, so if it was official in the one case it was equally official in the other, and the only difference would lie in the intention with which it was done: in the one event, it would be done in the discharge of an official duty and in the other, in the purported discharge of it."

This Court therefore held in that case that Section 197 of the Code of Criminal Procedure applied and sanction was necessary and since there was none, the trial was vitiated from the start.

11. Again in Amrik Singh Vs. The State of PEPSU [1955 (1) SCR 1302] this Court after referring to the decisions of the Federal Court and the Privy Council referred to earlier and some other decisions summed up the position thus:

"The result of the authorities may thus be summed up: It is not every offence committed by a public servant that requires sanction for prosecution under section 197(1) of the Code of Criminal Procedure; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution."

After noticing the facts of that case, their Lordships stated: "In our judgment, even when the charge is one of misappropriation by a public servant, whether sanction is required under Section 197(1) will depend upon the facts of each case. If the acts complained of are so integrally connected with the duties attaching to the office as to be inseparable from them, then sanction under Section 197(1) would be necessary; but if there was no necessary connection between them and the performance of those duties, the official status furnishing only the occasion or opportunity for the acts, then no sanction would be required."

Their Lordship then quoted with approval the observations in the decision in Shreekantiah Ramayya Munipalli Vs. The State of Bombay (supra).

12. A Constitution Bench of this Court had occasion to consider the scope of Section 197 of the Code of Criminal Procedure in Matajog Dobey Vs. H.C. Bhari [1955 (2) SCR 925], after holding that Section 197 of the Code of Criminal Procedure was not violative of the fundamental rights conferred on a citizen under Article 14 of the Constitution of India, this Court observed:

"Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard. It was argued that Section 197, Criminal Procedure Code vested an absolutely arbitrary power in the government to grant or withhold sanction at their sweet will and pleasure, and the legislature did not lay down or even indicate any guiding principles to control the exercise of the discretion. There is no question of any discrimination between one person and another in the matter of taking proceedings against a public servant for an act done or purporting to be done by the public servant in the discharge of his duties. No one can take such proceedings without such sanction."

On the test to be adopted for finding out whether Section 197 of the Code was attracted or not and to ascertain the scope and meaning of that Section, their Lordships stated:

"Slightly differing tests have been laid down in the decided cases to ascertain the scope and the meaning of the relevant words occurring in Section 197 of the Code; "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". But the difference is only in language and not in substance. The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. No question of sanction can arise under Section 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merit. What we must find out is whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation."

After referring to the earlier decisions of the Federal Court, Privy Council and that of this Court, their Lordships summed up the position thus :

"The result of the foregoing discussion is this: There must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

Their Lordships then proceeded to consider the stage at which the need for sanction under Section 197 (1) of the Code had to be considered. Their Lordships stated:

"The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may

establish the necessity for sanction. Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case."

13. In the light of the above decision it does not appear to be necessary to multiply authorities. But we may notice some of them briefly. In Pukhraj Vs. State of Rajasthan & Another [(1973) 2 SCC 701], this Court held:

"While the law is well settled the difficulty really arises in applying the law to the fact to any particular case. The intention behind the section is to prevent public servants from being unnecessarily harassed. The section is not restricted only to cases of anything purported to be done in good faith, for a person who ostensibly acts in execution of his duty still purports so to act, although he may have dishonest intention. Nor is it confined to cases where the act, which constitutes the offence, is the official duty of the official concerned. Such an interpretation would involve a contradiction in terms, because an offence can never be an official duty. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in execution of duty. The test appears to be not that the offence is capable of being committed only by a public servant and not by anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of and act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the "capacity in which the act is performed", "cloak of office" and "professed exercise of the office" may not always be appropriate to described or delimit the scope of section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty."

In B. Saha & Ors. Vs. M.S. Kochar [(1979) 4 SCC 177], this Court held:

"In sum, the sine qua non for the applicability of this section is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him."

In Bakhshish Singh Brar Vs. Gurmej Kaur & Anr. [(1987) 4 SCC 663], this Court stated that it was necessary to protect the public servants in the discharge of their duties. They must be made immune from being harassed in criminal proceedings and prosecution, and that is the rationale behind Section 196 and Section 197 of the Code. But it is equally important to emphasize that rights of the citizens should be protected and no excesses should be permitted. Protection of public officers and public servants functioning in discharge of their official duties and protection of private citizens have to be balanced in each case by finding out as to what extent and how far is a public servant working in discharge of his duties or purported discharge of his duties, and whether the public servant has exceeded his limit. In

the recent decision in Rakesh Kumar Mishra Vs. State of Bihar & Others [(2006) 1 SCC 557], this Court after referring to the earlier decisions on the question stated:

"The Section has, thus, to be construed strictly, while determining its applicability to any act or omission in the course of service. Its operation has to be limited to those duties which are discharged in the course of duty. But once any act or omission has been found to have been committed by a public servant in the discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned."

14. Learned counsel for the complainant argued that want of sanction under Section 197(1) of the Code did not affect the jurisdiction of the Court to proceed, but it was only one of the defences available to the accused and the accused can raise the defence at the appropriate time. We are not in a position to accept this submission. Section 197(1), its opening words and the object sought to be achieved by it, and the decisions of this Court earlier cited, clearly indicate that a prosecution hit by that provision cannot be launched without the sanction contemplated. It is a condition precedent, as it were , for a successful prosecution of a public servant when the provision is attracted, though the question may arise necessarily not at the inception, but even at a subsequent stage. We cannot therefore accede to the request to postpone a decision on this question.

15. Coming to the facts of this case, the question is whether the appellant was acting in his official capacity while the alleged offence was committed or was performing a duty in his capacity as a police officer which led to the offence complained of. That it was the day of election to the State Assembly, that the appellant was in uniform; that the appellant traveled in an official jeep to the spot, near a polling booth and the offence was committed while he was on the spot, may not by themselves attract Section 197 (1) of the Code. But, as can be seen from the facts disclosed in the counter affidavit filed on behalf of the State based on the entries in the General Diary of the Phoolbagan Police Station, it emerges that on the election day information was received in the Police Station at 1400 hours of some disturbance at a polling booth, that it took a violent turn and clashes between the supporters of two political parties was imminent. It was then that the appellant reached the site of the incident in his official vehicle. It is seen that a case had been registered on the basis of the incidents that took place and a report in this behalf had also been sent to the superiors by the Station House Officer. It is also seen and it is supported by the witnesses examined by the Chief Judicial Magistrate while taking cognizance of the offence that the appellant on reaching the spot had a discussion with the Officer-in-charge who was stationed at the spot and thereafter a lathi charge took place or there was an attack on the husband of the complainant and he met with his death. Obviously, it was part of the duty of the appellant to prevent any breach of law and maintain order on the polling day or to prevent the blocking of voters or prevent what has come to be known as booth capturing. It therefore emerges that the act was done while the officer was performing his duty. That the incident took place near a polling booth on an election day has also to be taken note of. The complainant no doubt has a case that it was a case of the deceased being picked and chosen for illtreatment and he was beaten up by a police constable at the instance of the appellant and the Officer-in-charge of the Phoolbagan Police Station and at their behest. If that complaint were true it will certainly make the action, an offence, leading to further consequences. It is also true as pointed out by the learned counsel for the complainant that the entries in the General Diary remain to be proved. But still, it would be an offence committed during the course of the performance of his duty by the

appellant and it would attract Section 197 of the Code. Going by the principle, stated by the Constitution Bench in Matajog Dobey (supra), it has to be held that a sanction under Section 197 (1) of the Code of Criminal Procedure is necessary in this case.

16. We may in this context notice the decision in Rizwan Ahmed Javed Shaikh & Ors. v. Jammal Patel & Ors. [(2001) 5 SCC 7). This Court was dealing with officers who were brought within the protective umbrella of Section 197 of the Code by a notification issued under Section 197(3) thereof. Cognizance had been taken of an offence under Sections 220 and 342 of the Indian Penal Code and Sections 147 and 148 of the Bombay Police Act. The gravamen of the charge was the failure on the part of the accused police officers to produce the complainants before a magistrate within 24 hrs. of their arrest for alleged offences under the Indian Penal Code. The police officers having claimed the protection of Section 197(1) of the Code, this Court after referring to the earlier decisions held"

"The real test to be applied to attract the applicability of Section 197(3) is whether the act which is done by a public officer and is alleged to constitute an offence was done by the public officer whilst acting in his official capacity though what he did was neither his duty nor his right to do as such public officer. The act complained of may be in exercise of the duty or in the absence of such duty or in dereliction of the duty, if the act complained of is done while acting as a public officer and in the course of the same transaction in which the official duty was performed or purported to be performed, the public officer would be protected."

Going by the above test it has to be held that Section 197(1) of the Code is attracted to this case.

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

18. We thus allow this appeal and setting aside the order of the High Court quash the complaint only on the ground of want of sanction under Section 197(1) of the Code of Criminal Procedure. The observations herein, however, shall not prejudice the rights of the complainant in any prosecution after the requirements of Section 197(1) of the Code of Criminal Procedure are complied with.

JUDIS