

(2005) 01 OHC CK 0034

In the Orissa High Court

Case No : Original Jurisdiction Case No's. 9456, 12461 and 13305 of 1999

AB (name withheld), Dr. Suprava Kumari Das and Prasanta
Kumar Das

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 20-01-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 164, 173(1), 173(8), 190, 190(1)
Evidence Act, 1872 — Section 10
Penal Code, 1860 (IPC) — Section 120B, 292, 342, 354, 363
Prevention of Corruption Act, 1947 — Section 7A
Prevention of Corruption Act, 1988 — Section 22

Citation : (2005) 1 OLR 295

Hon'ble Judges : M.M. Das, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : M.S. Panda, In OJC 13305/99, S.K. Padhi, for the Appellant; A.
Routray, Additional Government Advocate, for the Respondent

Judgement

A.K. Patnaik, J.—During July 1999 some local dailies reported about a sex racket in which a Physical Training Instructor of Balasore was luring young girls on false pretence for high officials. A letter dated 29.7.1999 relating to the incident was received by the then Acting Chief Justice of this Court from AB (name withheld) and the letter was registered as a writ petition bearing O.J.C. No. 9654 of 1999. In the said writ petition, the State of Orissa through the Secretary to Government of Orissa, Home Department and the Orissa State Commission for Women were impleaded as opposite parties No. 1 and 2 respectively. A counter affidavit was filed on behalf of the Orissa State Women Commission, but no counter affidavit was filed on behalf of the State of Orissa, Home Department. Thereafter the said writ petition was heard and by order dated 24.8.1999 the Court closed the matter after considering the report of the Orissa State Women Commission. Thereafter, a fresh writ petition O.J.C. No. 12461 of 1999 was filed by one Dr. Suprava Kumari Das of Balasore, a social activist, for a direction to

the concerned authorities to complete the investigation and submit a charge sheet against those involved in the incident, Yet, another writ petition O.J.C. No. 13305 of 1999 was filed by Sri Prasanta Kumar Das praying for a direction to the Central Bureau of Investigation (for short, "the CBI") to register a case and take up the investigation into the alleged Balasore sex scandal. In a common order dated 9.5.2000 passed in the aforesaid three petitions, the Court held that in consideration of all the materials brought on record which were not earlier placed before the Courts at the time of hearing of O.J.C. No. 9654 of 1999, closing of the matter and not ordering an inquiry into the Balasore sex scandal would not be in the public interest. In the said order dated 9.5.2000, the Court found that despite the statement made by the Chief Minister on the floor of the Assembly that an F.I.R. shall be registered and despite a direction by the Home Secretary to that effect, an F.I.R. had not been registered and the inquiry report revealed that some high officials appeared to have been involved and accordingly directed that the matter be investigated by an independent agency, namely, the CBI.

2. Pursuant to the said order dated 9.5.2000 of the Court, the C.B.I registered a case No. RC-/S/2000-Cal and took up investigation of the case and submitted status reports from time to time. After the investigation was completed, the CBI filed a final status report (hereinafter referred to as "the first final status report") stating therein that charge sheet has already been filed in the Court of the Additional C.J.M. -cum- Special C.J.M., Bhubaneswar against three accused persons, Srimati Prabasini Kar, Sri Susanta Kumar Mohapatra and Dr. Sidhartha Patra but no evidence directly linking Sri Prasanta Kumar Nayak or any other person to the offences under investigation has come on record and investigation has therefore been concluded. On 7.3.2003, the Court passed orders recorded in the order sheet of O.J.C. No. 9456 of 1999 that the CBI can file the charge sheet before the appropriate Court and if any objection is to be taken, the same can be done before the concerned Court in terms of Section 173 of the Code of Criminal Procedure.

3. The petitioner in O.J.C. No. 13305 of 1999 Sri Prasanta Kumar Das then filed Misc. Case Nos. 689 and 690 of 2003. In Misc. Case No. 689 of 2003, the said petitioner prayed for modification of the aforesaid order dated 7.3.2003 and in Misc. Case No. 690 of 2003, the said petitioner prayed for stay of operation of the said order dated 7.3.2003. The CBI filed its counter to the misc cases and after hearing the counsel for the petitioner and the CBI, the Court passed orders dated 25.4.2003 modifying the order dated 7.3.2003. Paragraphs 8 and 9 of the said order dated 25.4.2003 passed in Misc. Case Nos. 689 and 690 of 2003 are quoted herein below:

"8. In the face of the above materials, we have no hesitation to hold that the conclusion reached by the investigating Agency that "no evidence directly linking NP or any other person with the offences under investigation has come on record" is faulty which necessitates further probe into the matter. In the circumstances, this Court has to monitor the further investigation. It is needless

to point out that even after laying of the final report, power of police to conduct further investigation is recognized u/s 173(8) of the Cr.P.C. It is also not necessary to hear any person (accused) when direction to police to conduct further investigation of the case is made (See Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs. State of Andhra Pradesh and Others,).

9. For the reasons aforesaid, paragraph-2 of the order dated 7.3.2003 is hereby modified to the extent indicated in this order. By this direction, we may not be understood to have formed any opinion on the culpability of any person."

4. The aforesaid order dated 25.4.2003 passed in Misc. Case Nos. 689 and 690 of 2003 was thereafter challenged in the Supreme Court in SLP Nos. 10306 and 10307 of 2003 by Sri Prasanta Kumar Nayak who was referred to as "NP" in the said order dated 25.4.2003. But by order dated 25.8.2003 the Supreme Court dismissed the said S.L.Ps. with the observation that the case was not a fit case for interference at that stage. Thereafter the CBI made further investigation and filed the final status report (hereinafter referred as "the second final status report") on 12.2.2004 sating that the evidence collected during further investigation is not sufficient to launch prosecution to establish complicity of Sri Prasanta Kumar Nayak in the offence. In the second final status report, the CBI has however stated that the materials available point towards unbecoming conduct on the part of Sri Nayak and has recommended for initiating regular departmental action against Sri Nayak for major penalty. The petitioner in O.J.C. No. 13305 of 1999 Sri Prasanta Kumar Das then filed a protest/objection 18.3.2004 to the second final status report and the Court heard Mr. M.S. Panda, learned counsel for the said petitioner on 17.4.2004, 21.4.2004, 12.5.2004 and 15.9.2004 on the said protest/objection.

5. On 22.9.2004, the petitioner Sri Prasanta Kumar Das filed an affidavit in O.J.C. No. 13305 of 1999. Paragraphs 2, 3, 4, 5 and 6 of the said affidavit filed by the petitioner in O.J.C. No. 13305 of 1999 on 22.9.2004 are quoted herein below:

"2. That at present the Hon"ble Bench consisting of Hon"ble Justice Sri A.K. Patnaik and Hon"ble Justice Sri M.M. Das is in the seisin of the hearing from day to day on the final status report submitted by the C.B.I.

3. That it is pertinent to submit that after the transfer of Hon"ble Justice Sri A. K. Patnaik from Gauhati High Court to Orissa High Court, Hon"ble Justice Sri A. K. Patnaik has instructed the Registry of this Hon"ble Court not to list any of the cases of Sri Laxmidhar Pangari, Advocate in his Lordship's Bench as Sri Pangari was his Lordship's Junior Advocate during his Lordship's practising career. As such no case of Sri Pangari stands enlisted and he is barred from being heard by Hon"ble Justice Sri A. K. Patnaik.

4. That it is further pertinent to state that the C..B.I. in its status reports has indicated the involvement of Sri L. Panagari, Advocate in the criminal conspiracy

of the Balasore Sex Scandal for suppressing and wiping out the truth and evidences of involvement of influential persons like Sri P.K. Nayak, I.A.S., Sri S.K. Mohapatra and others into the said sex scandal.

5. That in view of the above facts and circumstances, the Counsel for the P.I.L. petitioner on 15.9.2004 orally submitted before the Hon"ble Bench that in view of the involvement of Sri L. Pangari, as appears from the C.B.I, status report, Hon"ble Justice Sri A. K. Patnaik may not like to hear the above case.

But, on the said oral submission of the Counsel for the petitioner, no judicial order was passed by this Hon"ble Bench.

6. That in view of the above, the P.I.L. petitioner files the present affidavit and submits that it would not be proper on the part of Hon"ble Justice Sri A. K. Patnaik to hear the above case."

Thus, it is stated in the aforesaid affidavit filed by the petitioner in O.J.C. No. 13305 of 2004 that one of us (A.K. Patnaik, J.) has instructed the Registry of the Court not to list any of the cases of his erstwhile Junior Advocate Shri Laxmidhar Pangari before him and as such no case of Shri Pangari is being listed before him and he has been barred from being heard by him. It is further stated in the aforesaid affidavit that the CBI in its status reports has indicated that Shri Pangari was involved in the criminal conspiracy of the Balasore Sex Scandal for suppressing and wiping out the truth and evidences of involvement of influential persons like Sri P.K. .Nayak, I.A.S., Sri S.K. Mohapatra and others into the said sex scandal. It is finally stated that in these facts and circumstances, it would not be proper on the part of one of us (A.K. Patnaik, J.) to hear this case. But we find that Shri Pangari is not an Advocate for any of the parties in these cases and thus the instructions to the Registry by one of us (A.K. Patnaik, J.) did not prohibit the listing of these cases before this Bench. Moreover, it is pursuant to orders passed by His Lordship the Chief Justice that these matters have been listed before this Bench for hearing. Paragraphs 8 and 8.1 of the first final status report and paragraphs 5.1., 5.20 and 5.29 of the second final status report in which references have been made to Sri L. Pangari, Advocate, are extracted herein below :

Paragraphs 8 and 8.1 of the First Final Status Report

"8. Harapriya Barik has stated that before and after swearing of the affidavit in the Court of the Executive Magistrate, Cuttack on 28.7.99, she and her mother were kept waiting in the cases in front of a house bearing the name plate of one Pangari. While they were waiting, Prabasini Kar and Dr. Siddhartha Patra had gone inside the house. Harapriya Barik also led the CBI team to the said house which was found to be of Laxmidhar Pangari, advocate, Cuttack.

8.1 Subsequently, Harapriya Barik had also identified Laxmidhar Pangari as the advocate who had taken her to the chamber of Chief Justice of Orissa High Court, Cuttack on 29.7.99 for filing the letter petition in which she denied the incident

and also sought action against Lopamudra Mohanty for submitting a false and baseless report without examining her.

Enquiry has disclosed that Laxmidhar Pangari is an advocate at Orissa High Court. Laxmidhar Pangari was examined and he stated that Prashant Kumar Nayak is known to him since his college days when they were studying together in Delhi University. He had also worked as Special Counsel in Commercial Tax Department, Orissa and Prashant Kumar Nayak was instrumental in this appointment when he was Special Secretary to the Chief Minister, Orissa. He denied having accompanied Harapriya Barik to the chamber of the Chief Justice of the Orissa High Court and also denied having helped Prashant Kumar Nayak in any manner in the Balasore sex scandal case. He however, stated that Sushant Kumar Mohapatra is his distant relative and as such, if at all he had helped Harapriya Barik in filing the said letter petition, it cannot be conclusively established that it was done at the behest of Prashant Kumar Nayak only. Moreover, no supportive evidence was found to corroborate the statement of Harapriya Barik."

Paragraphs 5.1. 5.20 & 5.29 of the Second Final Status

Report

"5.1. Shri Prashanta Kumar Nayak, IAS was re-examined in detail regarding his plea/alibi dated 09.07.99 and 29.07.99. Shri Prashanta Nayak stated that he went to Hon"ble Orissa High Court, Cuttack on 8th and 9th of July, 1999 to file ? a petition in connection with Criminal Miscellaneous Case No. 336/99 arising out of OJC No. 8712/94. Particularly on 09.07.99 he had visited the Hon"ble Orissa High Court, Cuttack in connection with the above edition along with his two friends namely Shri Umacharan Nayak, the then Additional Commissioner, Sales Tax and Shri Sudarshan Nayak, the then Deputy Secretary, School and Mass Education, The car used by them was brought by his friends. At Cuttack, he had met Shri Laxmidhar Pangari, his friend, who was an Advocate by profession. The petition was filed by Shri Bikash Jena, a Junior Advocate of Shri Laxmidhar Pangari on the same day. He further stated that he returned to Bhubaneswar by the evening on the same day i.e. around 05/06 p.m. and remained at his residence thereafter. On being asked he explained that as the Chief Minister was away at New Delhi, therefore, he did not go to office thereafter. At the residence of Shri Prashanta Nayak, his wife Smt. Monalisa Ray and his mother Smt. Sumitra Nayak and three minor daughters were present.

5.20. Shri Laxmidhar Pangari, an Advocate of Orissa High Court, Cuttack and a friend of Prashanta Nayak was re-examined to verify the statement of Prashanta Nayak and related issues. He denied having ever met Harapriya Barik. Thus, he denied the contention of Harapriya Barik that she was taken to the residence of Laxmidhar Pangari by Prabasini Kar and her son Dr. Sidhartha Patra.

5.29. Similarly, there is another piece of evidence in the statement of Ms. Harapriya Barik itself that on 29.7.99 Harapriya Barik was taken to High Court by

Smt. Prabasini Kar where she was forced to swear an affidavit that no incident as alleged had taken place on 9.7.99. Haraprtya Barik has stated that Sri Prashant Kumar Nayak, IAS was also present in the High Court complex and she saw Prabasini Kar talking to him. Sri Laxmidhar Pangari, advocate who filed the affidavit of the victim girl in the High Court is a friend of Sri Prashant Kumar Nayak. Merely because he was present in the High Court complex and was seen talking to Prabasini Kar when the affidavit of Ms, Harapriya Barik was filed in the* High Court it cannot be established conclusively that Sri Nayak was also a party to the conspiracy"

Thus, the CBI in its status reports has not stated that Shri L. Pangari, Advocate, was involved in the criminal conspiracy of the Balasore Sex Scandal for suppressing and wiping out the truth and evidences of involvement of influential persons like Sri P.K. Nayak, I.A.S., Sri S.K. Mohaptra and Ors. into the said sex scandal. The charge sheet has been filed by the CBI against three accused persons on 27.9.2001 in the Court of the Additional C.J.M.-cum-Special C.J.M., Bhubaneswar and the records of the case from the said Court have been called for by order dated 20.11.2001 passed in CR.M.C. No. 8479/2001 which is being heard along with these cases and are lying in this Registry as a result of which the trial against the accused persons against whom charge sheet has already been filed by the CBI has been held up. Not to hear these cases after hearing the cases at length for some days for the so-called reasons stated in the affidavit filed by the petitioner in O.J.C. No. 13305 of 1999 Sri Prasanta Kumar Das would not be in the interest of justice. The case requires disposal as early as possible and for this reason, we proceeded to hear these cases on 22.3.2004, 29.9.2004, 17.10.2004. 11.11.2004 and 17.11.2004 notwithstanding the said affidavit filed by the petitioner in O.J.C. No. 13305 of 1999.

6. At the hearing, Mr. M.S. Panda, learned counsel for the petitioner, submitted that the investigation by the CBI was into the offence under Sections 120-B, 292, 342, 354, 363, 376 read with Section 511 of the Indian Penal Code and out of the aforesaid alleged offences, criminal conspiracy u/s 120-B to commit rape was the major offence. He submitted that a conspiracy from its very nature is generally hatched in secret and it is therefore extremely rare that any direct evidence to prove conspiracy would be available and for this reason, the Courts have held that conspiracy can be proved by circumstantial evidence. He submitted that law is well settled that for considering as to whether an accused is guilty of the offence of conspiracy, surrounding circumstances and antecedent and subsequent conduct among other factors are relevant and for this proposition cited the decisions of the Supreme Court in S. Rajagopalaswami Naidu Vs. The Bank of Karaikudi Ltd., ; Ram Narain Poply, Pramod Kumar Manocha, Vinayak Narayan Deosthali and Harshad S. Mehta Vs. Central Bureau of Investigation and Others, and Nazir Khan and Others Vs. State of Delhi, He also cited the decision of the Supreme Court in Kehar Singh and Others Vs. State (Delhi Administration), in which the provisions of Section 10 of the Indian Evidence Act have been interpreted as well as the ingredients of the offence of

criminal conspiracy have been stated and the manner in which an offence of criminal conspiracy is proved by even circumstantial evidence has been discussed. Para 272 of the said judgment of the Supreme Court as reported in the AIR is quoted herein below :

"272. Generally, a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution will often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution will also more often rely upon circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence direct or circumstantial. But the Court must enquire whether the two persons are independently pursuing the same end or they have come together in the pursuit of the unlawful object. The former does not render them conspirators, but the latter does. It is, however, essential that the offence of conspiracy requires some kind of physical manifestation of agreement. The express agreement, however, need not be proved. Nor actual meeting of two persons is necessary. Nor it is necessary to prove the actual words of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. Gerald Orchard of University of Canterbury, New Zealand (Criminal Law Review 1974, 297 at 299) explains the limited nature of this proposition :

"Although it is not in doubt that the offence requires some physical manifestation of agreement, it is important to note the limited nature of this proposition. The law does not require that the act of agreement take any particular form and the fact of agreement may be communicated by words or conduct. Thus, it has been said that it is unnecessary to prove that the parties "actually came together and agreed in terms" to pursue the unlawful object; there need never have been an express verbal agreement, it being sufficient that there was "a tacit understanding between conspirators as to what should be done"."

7. Mr. Panda vehemently contended that the statement of Harapriya Barik recorded u/s 164 Cr.P.C. and the materials collected by the CBI as discussed in the different status reports submitted to this Court would show that on 9.7.1999 Harapriya Barik was brought from Balasore to the Krishna Tower at Bhubaneswar by Srimati Prabasini Kar for sex with Sri Prasanta Kumar Nayak, but as she was not willing for such sex with Sri Prasanta Kumar Nayak, she locked herself up inside the bathroom in the room of the apartment and thereafter escaped from the room when Srimati Prabasini Kar and Sri Susanta Kumar Mohapatra were asleep in the room. He further submitted that the status reports submitted by the CBI from time to time reveal that calls were made from the house of Srimati Prabasini Kar to Sri Prasanta Kumar Nayak on 7.7.1999, 8.7.1999, 9.7.1999 and 15.7.1999 and that Harapriya Barik had also heard Srimati Prabasini Kar and Sri Susanta Kumar Mohapatra talking about the arrival of one Prasanta, the P.S. to the Chief Minister when she was inside the bathroom on 9.7.1999. He further submitted that there were also materials in the status reports of the CBI to show that Sri Prasanta Kumar Nayak was putting pressure for suppressing the case

and for withdrawal of the case from the High Court. He submitted that the surrounding circumstances, antecedents and subsequent conduct and other factors go to show that Sri Prasanta Kumar Nayak was also involved in the offence of conspiracy of rape on Harapriya Barik and yet the CBI has taken a view that the evidence collected during investigation is not sufficient to launch prosecution to establish complicity of P.K. Naik in the offence and has recommended only initiation of a regular departmental action for major penalty against him for unbecoming conduct on his part.

8. Mr. Panda referred to the letter dated 28.10.2003 of Harapriya Barik addressed to the Director, CBI, copy of which is annexed to Misc. Case No. 2374 of 2003 wherein the victim girl has complained of the pressure put on her by Sri M.S. Khan, D.S.P., CBI in course of investigation not to pursue the case against influential persons. He explained that earlier Sri M.S. Khan, D.S.P., CBI was entrusted with the investigation of the case but had to be changed as he did not make sufficient progress in the investigation but thereafter one Sri A.K. Sahay, D.S.P., CBI was entrusted with the investigation who made good progress of the investigation, but subsequently Shri A.K. Sahay was replaced by Shri M.S. Khan and it is Shri M.S. Khan who completed the investigation giving a report absolving Sri Prasanta Kumar Nayak from the offences because Sri Nayak was an IAS Officer and was a highly influential person.

8. Mr. S.K. Padhi, learned counsel for the CBI, on the other hand, submitted that the High Court while monitoring an investigation into a case by the police in exercise of its power under Article 226 of the Constitution cannot consider whether there are materials collected by the CBI in course of investigation to establish that Sri Prasanta Kumar Nayak was also involved in the offence of conspiracy of rape on the victim girl and cannot direct that charge sheet be filed against Sri Prasanta Kumar Nayak. He submitted that the power to take a decision on whether or not charge sheet will be filed against the accused is that of the investigating agency and not of the Court. He however explained that the competent Court before whom the police report is filed can form an opinion different from that of the investigating agency and take cognizance of an offence against an accused person and summon him in exercise of powers u/s 190 of the Code of Criminal Procedure, 1973. In support of this submission, Mr. Padhi cited the decisions of the Supreme Court in *Union of India and Others Vs. Sushil Kumar Modi and Others*, *Union of India (UOI) Vs. Prakash P. Hinduja and Another*, and *M.C. Abraham and Another, A.K. Dhote and J.F. Salve and Another Vs. State of Maharashtra and Others*. Mr. Padhi further submitted that Section 319 of the Code of Criminal Procedure, 1973 also provides that where in course of any inquiry or trial of an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed. He submitted that in case the competent Court trying the charge sheet and the accused persons in these cases, namely, Srimati Prabasini Kar, Sri Susanta Kumar Mohaptra and Dr. Sidhartha

Das, finds that there is evidence to show that any offence has been committed by Sri Prasanta Kumar Nayak, the trial Court can proceed against Sri Prasanta Kumar Nayak u/s 319 of the Cr.P.C. Mr Padhi submitted that the complaint of the victim girl against Shri M.S. Khan in her letter dated 28.10.2003 addressed to the Director, CBI has been found to be baseless. He also submitted that after the investigation is over, the final decision whether to file a charge sheet against any accused person is taken by the higher authorities of the CBI and not by the Investigating Officer. Mr. Padhi finally submitted that although charge sheet has been filed in the Court of the Additional C.J.M.-cum-Special C.J.M., Bhubaneswar in the year 2001, the trial has been held up as the records of the Court of Additional C.J.M.-cum-Special C.J.M., Bhubaneswar have been called for in the connected cases and are lying in the Registry of this Court and unless the records are sent back early after disposal of these cases, evidence may be destroyed and witnesses may be gained over.

9. Considering the aforesaid submissions of Mr. Panda and Mr. Padhi, we will first have to examine the power of the Police and the Courts under the Code of Criminal Procedure, 1973 after the police report is filed by the police after investigation as well as the power of the High Court under Article 226 of the Constitution on completion of investigation where the police decides not to file a charge sheet against an accused person for insufficiency of evidence against him.

10. In *Abhinandan Jha and Others Vs. Dinesh Mishra*, Dinesh Mishra lodged a First Information Report on 3rd June, 1965 at the Rajoun Police Station that he saw one thatched house of one Uma Kant Misra situated on the northern side of his house burning and Abhinandan Jha and Ors. were running away from the scene. The police after investigation submitted a final report u/s 173(1) of the Criminal Procedure Code, 1898 to the effect that the offence complained of was false. Dinesh Mishra filed a protest petition challenging the correctness of the report submitted by the police. The Magistrate perused the police diary and after hearing the counsel for Dinesh Mishra and the Public Prosecutor passed an order on 27th February, 1975 directing the police to submit a charge sheet against Abhinandan Jha and Ors.. Thus, a question arose for consideration before the Supreme Court as to whether a Magistrate can direct the police to submit a charge sheet when the police after completion of investigation into a cognizable offence submitted a final report under the Criminal Procedure Code, 1898 and the Supreme Court held :

".....There is certainly no obligation, on the Magistrate to accept the report, if he does not agree with the opinion formed by the police. Under those circumstances, if he still suspects that an offence has been committed, he is entitled, notwithstanding the opinion of the police, to take cognizance, u/s 190(1) (c) of the Code. That provision, in our opinion, is obviously intended to secure that offences may not go unpunished and justice may be invoked even where persons individually aggrieved are unwilling or unable to prosecute, or the police, either wantonly or through bona fide error, fail to submit a report, setting out the

facts constituting the offence. Therefore, a very wide power is conferred on the Magistrate to take cognizance of an offence, not only when he receives information about the commission of an offence from a third person, but also where he has knowledge or even suspicion that the offence has been committed. It is open to the Magistrate to take cognizance of the offence, u/s 190(1)(c), on the ground that, after having due regard to the final report and the police records placed before him, he has reason to suspect that an offence has been committed. Therefore, these circumstances will also clearly negative the power of a Magistrate to call for a charge-sheet from the police, when they have submitted a final report. The entire scheme of Chapter XIV clearly indicates that the formation of the opinion, as to whether or not there is a case to place the accused for trial, is that of the officer in-charge of the police station and that opinion determines whether the report said to be u/s 170, being a "charge-sheet", or u/s 169, "a final report". It is no doubt open to the Magistrate, as we have already pointed out, to accept or disagree with the opinion of the police and, if he disagrees, he is entitled to adopt any one of the courses indicated by us. But he cannot direct the police to submit a charge-sheet, because, the submission of the report depends upon the opinion formed by the police, and not on the opinion of the Magistrate. The Magistrate cannot compel the police to form a particular opinion, on the investigation, and to submit a report, according to such opinion. That will be really encroaching on the sphere of the police and compelling the police to form an opinion so as to accord with the decision of the Magistrate and send a report, either u/s 169, or u/s 170, depending upon the nature of the decision. Such a function has been left to the police, under the Code."

11. In *Union of India and Ors. v. Sushil Kumar Modi and Ors.* (supra), the Supreme Court explained the nature of proceedings before the High Court under Article 226 of the Constitution while monitoring the investigation into a case by the C.B.I. The relevant portion of the said decision of the Supreme Court is quoted herein below :

"At the outset, we would indicate that the nature of proceedings before the High Court is somewhat similar to those pending in this Court in *Vineet Narain v. Union of India* and *Anukul Chandra Pradhan v. Union of India* and, therefore, the High Court is required to proceed with the matter in a similar manner. It has to be borne in mind that the purpose of these proceedings is essentially to ensure performance of the statutory duty by the CBI and the other government agencies in accordance with law for the proper implementation of the rule of law. To achieve this object a fair, honest and expeditious investigation into every reasonable accusation against each and every person reasonably suspected of involvement in the alleged offences has to be made strictly in accordance with law. The duty of the Court in such proceedings is, therefore, to ensure that the CBI and other government agencies do their duty and do so strictly in conformity with law. In these proceedings, the Court is not required to go into the merits of the accusation or even to express any opinion thereon, which is a matter for

consideration by the competent Court in which the charge-sheet is filed and the accused have to face trial....."

In the aforesaid case of Sushil Kumar Modi and Ors., after investigation the CBI filed the charge sheet and yet the High Court monitoring the investigation of the case gave some further directions and also made some general observations and the order containing the said directions and observations was challenged before the Supreme Court in Union of India and Ors. v. Sushil Kumar Modi and Ors. [supra) and the Supreme Court held that once charge sheet is filed in the competent Court after completion of investigation, it is only the competent Court in which the charge sheet is filed which is to deal with all matters relating to the trial of the accused and hence the impugned order passed by the High Court cannot be sustained.

12. In Union of India v. Prakash P. Hinduja and Anr. (supra), the Supreme Court considered at length all its earlier decisions as well as the provisions of the Code of Criminal Procedure, 1973 and held ;

"13. The provisions referred to above occurring in Chapter XII of the Code show that detail and elaborate provisions have been made for securing that an investigation takes place regarding an offence of which information has been given and the same is done in accordance with the provisions of the Code. The manner and the method of conducting the Investigation are left entirely to the officer-in-charge of the police station or a subordinate officer deputed by him. A Magistrate has no power to interfere with the same. The formation of the opinion whether there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the case to a Magistrate or not as contemplated by Sections 169 and 170 is to be that of the officer-in-charge of the police station and a Magistrate has absolutely no role to play at this stage. Similarly, after completion of the investigation while making a report to the Magistrate u/s 173, the requisite details have to be submitted by the officer-in-charge of the police station without any kind of interference or direction of a Magistrate and this will include a report regarding the fact whether any offence appears to have been committed and if so, by whom, as provided by Clause (d) of Sub-section (2)(i) of this section. These provisions will also be applicable in cases under Prevention of Corruption Act, 1947 by virtue of Section 7-A thereof and Prevention of Corruption Act, 1988 by virtue of Section 22 thereof.

14. The Magistrate is no doubt not bound to accept a final report (sometimes called as closer report) submitted by the police and if he feels that the evidence and material collected during investigation justifies prosecution of the accused, he may not accept the final report and take cognizance of the offence and summon the accused but this does not mean that he would be interfering with the investigation as such. He would be doing so in exercise of powers conferred by Section 190. Cr.P.C. The statutory provisions are, therefore, absolutely clear that the Court cannot interfere with the investigation."

13. In *M. C. Abraham and Anr. v. State of Maharashtra and Ors.* (supra), a writ petition was filed by the Maharashtra Antibiotics and Pharmaceuticals Employees Association and Ors. stating that the Provident Fund Commissioner had lodged a complaint against several Directors of the Maharashtra Antibiotics and Pharmaceuticals Ltd., but investigation into the said complaint has not made any progress on account of the fact that the Directors are government servants and enjoy considerable influence and the High Court passes several orders on 10.1.2002, 11.1.2002 and 16.1.2002 which were challenged before the Supreme Court. In the order passed on 16.1.2002, the High Court observed, *inter alia*, "Our anxiety is to see that the State concludes the investigation of the case and files a charge sheet." The Supreme Court held that the function to file a charge sheet is that of the investigating agency and neither the Magistrate exercising powers under the Code of Criminal Procedure, 1973 nor the High Court exercising the powers under Article 226 of the Constitution can direct the investigating agency to file a charge sheet. Paragraphs 17 and 18 of the said judgment of the Supreme Court are quoted herein below :

"17. The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to disagree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation.

18. In the instant case the investigation is in progress. It is not necessary for us to comment on the tentative view of the investigating agency. It is the statutory duty of the investigating agency to fully investigate the matter and then submit a report to the Magistrate concerned. The Magistrate will thereafter proceed to pass appropriate order in accordance with law. It was not appropriate for the High Court in these circumstances to issue a direction that the case should not only be investigated, but a charge-sheet must be submitted. In our view the High Court exceeded its jurisdiction in making this direction which deserves to be set aside. While it is open to the High Court, in appropriate cases, to give directions for prompt investigation etc, the High Court cannot direct the investigating agency to submit a report that is in accord with its views as that would amount to unwarranted interference with the investigation of the case by inhibiting the exercise of statutory power by the investigating agency."

14. It will thus be clear from the aforesaid decisions of the Supreme Court that

the High Court while monitoring the investigation into a case by the police under Article 226 of the Constitution has only to ensure performance of statutory duty by the police in accordance with law for the proper implementation of the rule of law and to ensure that the police carries out a fair, honest and expeditious investigation into every reasonable accusation against each and every person reasonably suspected of involvement in the alleged offences, but the High Court is not required to look into the merits of the accusation or even to express any opinion thereon. In these cases, an accusation was made against Srimati Prabasini Kar, Sri Susanta Kumar Mohapatra, Dr. Sidhartha Patra and Sri Prasanta Kumar Nayak and the CBI after investigation submitted charge sheet against Srimati Prabasini Kar, Sri Susanta Kumar Mohapatra and Dr. Sidhartha Patra and in the first final status report filed in Court stated that it did not find evidence linking Sri Prasanta Kumar Nayak to the offences. This Court, however, passed orders on 25.4.2003 in Misc. Case Nos. 689 and 690 of 2003 holding that the conclusion reached by the CBI that there was no evidence directly linking Sri Prasanta Kumar Nayak was faulty and thereafter the CBI carried out further investigation, but even after such further investigation has filed the second final status report on 12.2.2004 before this Court stating that the evidence collected during further investigation is not sufficient to launch prosecution to establish complicity of Sri Prasanta Kumar Nayak in the investigation though the materials available point towards unbecoming conduct on his part. One of the contentions of Mr. Panda, learned counsel for the petitioner in O.J.C. No. 13305 of 1999 is that this conclusion was reached by the CBI because Shri M.S. Khan who was all through trying to protect Sri Prasanta Kumar Nayak and had in fact pressurized Harapriya Barik not to pursue the case any longer against high officials was entrusted with the further investigation of the case. The reply of Mr. Padhi, learned counsel for the CBI, to this contention of MR. Panda is that this allegation against Shri M.S. Khan has been scrutinized and found to be baseless and in any case the results of the investigation carried out by a particular Investigating Officer are not accepted straight away but are subject to further examination by the higher officials of the CBI and only thereafter a final decision is taken by the CBI whether to file a charge sheet against an accused person or not. After applying our mind to the aforesaid contentions of the learned counsel for the parties, we are not in a position to hold that the investigation as against Sri Prasanta Kumar Nayak has not been honest or fair.

15. We find from the submissions of Mr Panda that his objection is really to the final opinion formed by the CBI after investigation that the evidence collected is not sufficient to launch prosecution to establish complicity of Sri Prasanta Kumar Nayak in the offence of conspiracy for committing rape on Harapriya Barik. But it is clear from the aforesaid decisions of the Supreme Court that on completion of investigation of the case, it is for the CBI as the investigating agency to form an opinion on the basis of the materials collected by it during investigation whether or not there were sufficient materials for prosecuting Sri Prasanta Kumar Naik and this Court monitoring the investigation of the case by the CBI under Article

226 of the Constitution cannot express an opinion that the materials collected by the CBI in course of investigation disclose commission, by Sri Prasanta Kumar Nayak, of the offence of conspiracy for committing rape on Harapriya Barik and cannot direct the CBI to file a charge sheet against Sri Prasanta Kumar Nayak.

16. This is not to say that the opinion formed by the CBI that the materials collected by it during investigation are not sufficient to launch prosecution against Sri Prasanta Kumar Nayak for the offences is final. As has been held by the Supreme Court in the aforesaid decisions, there is not obligation on the Magistrate before whom the police report is filed to accept the opinion of the police and if he finds from the materials collected during investigation and available in the police report placed before him that Sri Prasanta Kumar Nayak should be prosecuted, he may summon Sri Prasanta Kumar Nayak in exercise of his powers u/s 190(1) of the Code of Criminal Procedure, 1973. Moreover, u/s 319(1) of the Code of Criminal Procedure, 1973, if it appears in course of the trial from the evidence adduced that Sri Prasanta Kumar Nayak has committed any offence for which he could be tried together with Srimati Prabasmi Kar, Sri Susanta Kumar Mohapatra and Dr. Sidhartha Patra, the trial Court may proceed against Sri Prasanta Kumar Nayak for the offence which he appears to have committed. The word "may" in Sections 190(1) and 319(1) of the Code of Criminal Procedure, 1973 however indicates that a discretion has been vested with the Magistrate and the Court. Such a discretion has to be used by the Magistrate and the Court in a judicious manner to ensure that wherever there are sufficient materials collected in course of investigation or sufficient evidence received during trial to show that an offence has been committed by a person, such a person does not escape trial as otherwise the Rule of Law will be in jeopardy. The majesty of law can be upheld by our Magistrates and Courts, only if no one, howsoever high and influential he may be, is held above the law.

With the aforesaid observations and directions, these matters are finally disposed of. A copy of this order be sent to the Court of the Additional C.J.M.-cum-Special C.J.M., Bhubaneswar before whom the police papers have been filed by the CBI.

M.M. DAS, J.

17. I agree.