
(1973) 03 PAT CK 0003
In the Patna High Court

Amal Chandra Bose (Basu) and Others APPELLANT
Vs
The State of Bihar and Others RESPONDENT

Date of Decision : 26-03-1973

Acts Referred:

Constitution of India, 1950 — Article 136, 226
Criminal Procedure Code, 1898 (CrPC) — Section 161, 173, 342
Penal Code, 1860 (IPC) — Section 148, 149, 307, 326, 338
Telegraph Act, 1885 — Section 5

Citation : (1973) CriLJ 1756

Hon'ble Judges : A.N. Mukharji, J

Bench : Single Bench

Judgement

A.N. Mukharji, J.

1 Criminal Miscellaneous No. 613 of 1972 arises out of an application u/s 561-A of the Code of Criminal Procedure (hereinafter to be referred to as "the Code") filed by Amal Chandra Bose and two others for setting aside the order dated the 22nd March, 1972 passed by the Sub-divisional Magistrate. Bhagalpur. rejecting the application of the petitioners for discharging them from bail bond and quashing the proceeding in case No, 23 (9) 67 which has been instituted against them on the basis of a first information report lodged by Sri Kailashpati Sharma, Sub-Inspector of Police, attached to Kotwali Police station on 13-9-1967 at 10 p.m.

2. Criminal Writ Jurisdiction Case No. 2 of 1973 arises out of an application under Article 226 of the Constitution of India filed by the same petitioners for issue of a writ in the nature of mandamus directing the Officer-in-charge of Kotwali Police station. Bhagalpur not to proceed with the investigation of the above case No. 23 (9) 67 so far as these petitioners are concerned and quash the criminal proceeding pending against them before the Sub-divisional Magistrate. Bhagalpur. Since both these applications arise out of the same matter, these are considered together and this judgment will govern both these applications.

3. Facts giving rise to these applications are that petitioner No. 1 of these applications. Amal Chandra Bose is a partner of Ashok Transport Agency, while petitioner Nos. 2 and 3 of these applications are employees of the said agency. A first information report was lodged against them by Sri Kailashpati Sharma, sub-inspector of police attached to the Kotwali Police station. Bhagalpur on 13-9-1967 at 10 P.M. to the effect that on receipt of a confidential information, he had gone to the office of the Ashok Transport Agency and found copper wires some of which were melted and some were kept in different gunny bags. The Police Officer further noticed aluminium wire and broken aluminium utensils inside the premises of the Transport Agency. A case under Sections 414 and 420 of the Indian Penal Code as also u/s 5 of the Indian Telegraphs Act was instituted against these petitioners and Kotwali P.S. case No, 23 (9) 67 was registered and investigation was taken up by the Police. These three petitioners were taken into custody.

4. The contention of the petitioners is that Ashok Transport Agency carries goods from one place to another in this State and also in West Bengal. The business of this agency is to carry goods consigned with them by the consignors in wooden box or gunny bags. These petitioners absolutely had no knowledge as to what goods are contained in the box or gunny bags consigned with them. The petitioners had applied for bail before the Sub-divisional Magistrate, Sadar. Bhagalpur but it was rejected. They had moved the Sessions Judge of Bhagalpur for bail but it was also rejected. Thereafter, petitioner No. 1 came up before this Court for bail and his application was registered as Criminal Miscellaneous No. 1002 of 1967. It was heard by this Court on 24-10-1967 and the application for bail was kept pending with a direction that the matter should be placed before the Court after one month and in the meantime the investigation of the case was directed to be completed. The application for bail was again put up before this Court on 27-11-1967 and since no report was received as to whether the investigation of the case against the petitioners had been completed or not. this Court enlarged petitioner No. 1 on bail. Subsequently petitioner Nos. 2 and 3 also were enlarged on bail by this Court on 22-12-1967.

5. The contention of the petitioners in both these applications is that 4½ years have passed but no final form has been submitted by the Police Officer in spite of repeated requests made on behalf of the petitioners and several directions given by the Sub-divisional Magistrate to the Investigating Officer from time to time. Subsequently, the petitioners filed applications on 5-11-1971, 13-11-1971 and 23-3-1972 before the Sub-divisional Magistrate. Bhagalpur, mentioning therein that the officer-in-charge of the Kotwali Police station had failed to submit the final form in spite of repeated reminders with a mala fide intention in order to harass the petitioners and so they should be discharged. The Sub-divisional Magistrate by the impugned order dated the 22nd March, 1972, rejected the application of the petitioners and directed that the Superintendent of Police, Bhagalpur, might be informed about this matter.

6. Being dissatisfied with the aforesaid order passed by the Sub-divisional Magistrate on the 22nd March, 1972, the petitioners filed the application u/s 561-A of the Code which was registered as Criminal Miscellaneous No. 613 of 1972 praying to set aside the aforesaid order of the Sub-divisional Magistrate and to quash the investigation and for discharging the petitioners from bail bond. While Criminal Miscellaneous No. 613 of 1972 was being heard in this Court, an objection was raised that the prayer u/s 561-A of the Code could not be invoked in this case on the ground of mala fide investigation. Hence the petitioners thought fit to file an application under Article 226 of the Constitution which was registered as Criminal Writ Jurisdiction Case No. 2 of 1973 praying for issue of a writ in the nature of mandamus for the aforesaid relief.

7. Mr. Prem Shanker Sahai, learned Counsel appearing on behalf of the petitioners urged that the present case had been instituted against these petitioners on 13-9-1967 and since then the petitioners have been attending the court of the Magistrate on several dates which has resulted in causing a great harassment to them and even then final form has not been submitted and so it is prayed that in the interest of justice the investigation by the Police should be quashed as being mala fide. In support of this contention reference has been made to the case of S.N. Sharma Vs. Bipen Kumar Tiwari and Others, . In this case it was observed by their Lordships of the Supreme Court:

It appears to us that, though the Code of Criminal Procedure gives to the Police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a Police Officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers.

It has been seriously contended on the basis of this decision that this Court should quash the investigation pending before the Police Officer because it is urged that the police officer is delaying submission of the final form with a mala fide intention. Simply because the police has made a great delay in investigation of a case, it cannot be inferred that the investigation is mala fide or tainted. As an authority for this proposition, reliance may be placed on the case of Pala Singh and Another Vs. State of Punjab, .

8. It may be stated here that except the great delay in investigation of this case, there is no other material before this Court to hold that the Police is interested to prolong the investigation of this case with some ulterior motive. The learned Counsel for the petitioners has urged that the allegation of mala fide investigation has been made in the applications filed in this Court but it has not been controverted on behalf of the State and so it must be held that the investigation made by the Police in this case was mala fide. I do not agree with this contention. The onus to prove that the investigation by the police was mala

fide was on the petitioners and they do not discharge the onus by simply asserting that fact in their applications. The only material which has been placed before this Court to prove that the investigation was mala fide was) that there was an abnormal delay in the investigation of this case. But it has already been observed above that this material is insufficient to prove the mala fide nature of investigation. In this connection, the learned Counsel appearing on behalf of the petitioners has referred to the case of Jaichand Lall Sethia Vs. State of West Bengal and Others, where their Lordships have indicated as to what is mala fide exercise of power. It has been observed in that case that:

It may be stated in this context that a mala fide exercise of power does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended. In other words, the power conferred by the statute has been utilised for some indirect purposes not connected with the object of the statute or the mischief it seeks to remedy.

It has already been indicated above that the Police has unfettered power of investigating a cognizable offence and it has not been shown in the instant case that this power conferred by the statute on the police has been utilised for some indirect or ulterior motive not connected with the object of the statute.

9. The learned Counsel appearing on behalf of the State has, however, drawn our attention to letter No. 116 dated 23-2-1973 written by the Sub-divisional Magistrate to the Advocate General, Bihar, that charge-sheet has been submitted in this case by the police and that cognizance of the offence has been taken against these petitioners by the Sub-divisional Magistrate. The learned Counsel appearing on behalf of the petitioners contends that he has no information about the charge-sheet having been submitted against these petitioners in the instant case. But since the learned Counsel appearing on behalf of the State has produced before us the original letter written by the Sub-divisional Magistrate to the Advocate General, I have no doubt that the charge-sheet has already been submitted in this case and the cognizance of the offence has been taken against the petitioners by the Sub-divisional Magistrate. In this circumstance the learned Counsel appearing on behalf of the State has urged that the investigation which was made by the police and which has since been completed cannot be quashed as prayed for in these application. In support of this contention, reference has been made to the case of R.P. Kapur Vs. The State of Punjab, . In this case, there was a delay of about seven months in investigation of the case by the police. It was observed in this case:

It is of utmost importance that investigation into criminal offences must always be free from any objectionable features or infirmities which may legitimately lead to the grievance of the accused that the work of investigation is carried on unfairly or with any ulterior motive. Even so it is difficult to see how this conduct on the part of the police officer can materially assist the appellant in his prayer that the proceedings which have now reached the criminal court should be

quashed.

In the instant case, there is no doubt that there was an extraordinary dilatoriness on the part of the police in investigating this case and that the police appears to have taken about five years time in completing the investigation. It is very much to be deplored that the police officers who were entrusted with the investigation of this case did not act diligently in this matter and their conduct is deplored as they took such an enormous time in completing the investigation. It is for the higher police authorities to take such action as they may deem fit and proper against the police officer or officers at fault for not investigating this case diligently. But since the investigation has already been completed and the matter has already reached the criminal court and the Sub-divisional Magistrate has already taken cognizance of the offence against the petitioners, the investigation done by the police in the instant case cannot be quashed.

10. The learned Counsel for the petitioners has also contended that the order of the Sub-divisional Magistrate taking cognizance of the offence against the petitioners should also be quashed as it will be an abuse of the process of the court to allow this proceeding to continue for such a length of time and that further continuance of this proceeding will mean more harassment to the petitioners. His contention is that the petitioners, who are accused in this case, cannot be kept in suspense for an indefinite period and so it is urged that the proceeding pending against the petitioners should be quashed. In support of this contention reliance is placed on the case of *Machander Vs. State of Hyderabad*, In this case before their Lordships of the Supreme Court, the appellant was arrested in December, 1950 and had been on trial for over 4½ years. The appellant was convicted by the Sessions Judge and the conviction was upheld by the High Court. It was found by their Lordships of the Supreme Court that the appellant was not properly examined u/s 342 of the Code by the Sessions Judge, It was prayed before their Lordships that the case should be remanded to the Sessions Judge for proper examination of the appellant and re-trial. It was in this circumstance that their Lordships set aside the conviction and sentence imposed on the appellant and observed:

We are not prepared to keep persons who are on trial for their lives under indefinite suspense because trial Judges omit to do their duty.

It will thus appear that the facts of *Machander Vs. State of Hyderabad*, are entirely different from the facts of the present case. The case reported above is no authority for the view that a proceeding pending in criminal court should be quashed simply because a case is pending since a long time. It is difficult to accept this view as has been urged on behalf of the petitioners. In many places, it will be seen that criminal cases are pending for a long time on account of dearth of officers. If such a view as propounded is taken, then all those cases pending for trial for such a long time for dearth of officers have to be quashed. Such a course is not sanctioned by law.

11. Mr, Sahai. learned Counsel appearing on behalf of the petitioners has referred to the case of Ramekbal Tiwary Vs. Madan Mohan Tiwary and Another, in support of his contention that it would be an abuse of the process of the Court if the proceeding against the petitioners be allowed to continue for such a long time after the lodging of the first information report against the petitioners. The case just now referred to above appears to have a chequered history. In this case, the police submitted charge-sheet against the appellant and others in respect of offences under Sections 307 148 and 149 of the Indian Penal Code. The Magistrate, who was in seisin of the case, started enquiry under Chapter XVIII of the Code, examined witnesses, heard argument of the parties and then decided to try appellant u/s 251A of the Code for offences under Sections 326 and 338 of the Indian Penal Code because, in his opinion, the evidence did not make out an offence u/s 307 of the Indian Penal Code. This order was passed by the Magistrate on 19-3-1960. The Magistrate held regular trial with regard to the charge under Sections 326 and 338 of the Indian Penal Code and acquitted the appellants by his order dated 13-7-1960. The prosecution filed a revision application before the Sessions Judge which was disposed of by the Additional Sessions Judge who allowed the revision application, set aside the two orders of the Magistrate dated 19-3-1960 and 13-7-1960 and directed the magistrate to commit the appellants to the court of session on charges under Sections 307 and 148 as also u/s 307 read with Section 149 of the Indian Penal Code. Thereafter, the appellants took the matter in revision to the High Court which by its judgment dated 8-5-1964 held that the appellants were improperly discharged by the Magistrate and that the order of the Additional Sessions Judge for the commitment of the appellants u/s 307 of the Indian penal Code was justified. When the matter came up before their Lordships of the Supreme Court, the following observation was made in the judgment dated 17-1-1967:?

For these reasons, we are satisfied that the order of the High Court dated May 8. 1964 is not defective in law. But in the circumstances of this case we think that it is not expedient that the appellant should be tried after this lapse of time before a Sessions Court for an offence committed as long back as September 30, 1958, We accordingly set aside the order of the Additional Sessions Judge. Arrah dated December 20, 1960 ordering the commitment of the appellant and also the judgment of the Patna High Court dated May 8, 1964 which affirms the order of the Additional Sessions Judge. The appeal is accordingly allowed.

12. It will thus appear that the facts of the case of Ramekbal Tewary reported above are entirely different from the facts of the present case In Ramekbal Tiwary Vs. Madan Mohan Tiwary and Another, the appellant was already tried and convicted on charges under Sections 326 and 338 of the Indian Penal Code and acquitted of these charges. Thereafter, there was a revision to the Additional Sessions Judge and then to the Patna High Court and thereafter the matter was heard in 1967 by their Lordships of the Supreme Court. It was in these circumstances that their Lordships observed that it was not expedient that the appellant should be tried again after the lapse of such a long time before a court

of Session. The aforesaid observation of their Lordships is inapplicable in this case because the present petitioners have now been put on trial only recently.

13. Mr. Sahai, learned Counsel for the petitioners has further relied on the case of State of U.P. Vs. Kapil Deo Shukla, in support of his contention that this proceeding which is pending for a long time should be quashed. In this case the respondent was an employee in the then Imperial Bank of India at Allahabad. A first information report was lodged against him On 9-8-1946, Proceeding started against the respondent, who was tried by the Sessions Court at Allahabad with the aid of jury under Sections 408 and 477A of the Penal Code. The sessions trial ended in acquittal of the respondent. The State of U. P. preferred an appeal to the High Court which by its judgment dated 12-8-1953 set aside the order of acquittal and convicted the respondent under Sections 408 and 477A of the Penal Code and imposed a sentence of imprisonment as well as a fine on the respondent. The respondent thereafter filed an appeal before the Supreme Court. Their Lordships' judgment is reported in Kapil Deo Shukla Vs. The State of Uttar Pradesh, . Their Lordships of the Supreme Court set aside the High Court's order of conviction and sentence. In doing so their Lordships observed that it would be open to the State Government if it was so advised to take steps for retrial. In the meantime, the jury system was abolished and some time was lost in deciding as to whether the respondent should be retried with the aid of jury or without the aid of jury. When the retrial of the respondent commenced before the Sessions Judge without the aid of jury, the respondent filed two applications, one was that in view of the decision in the case of Ram Swarup Vs. The State, he should be tried with the aid of jury. The second application was u/s 173(4) of the Code for supply of copies of necessary police papers and documents. Both these applications were dismissed by the Sessions Judge. The respondent came up before the High Court of Allahabad against the decision of the Sessions Judge ordering that the trial should proceed without the aid of jury. The respondent further came up before the High Court against the order of the Sessions Judge refusing to supply copies of documents on the ground that they are not traceable. Both these applications were rejected by the Allahabad High Court. Having failed to get any relief in the High Court, the respondent made an application on 12-2-1955 to the State Government for withdrawal of the case against him. The Government informed the respondent that it would consider the withdrawal of the case provided he was prepared to deposit the amount said to have been embezzled by him. It was agreed that the Government would consider the withdrawal of the case provided the respondent paid Rs. 4,000/- out of the embezzled amount. The respondent deposited the sum of Rs. 4,000/- on 29-1-1966. This payment was made by cheque. The Government got the cheque cashed and credited to its account and thereafter it changed its mind and said that the trial should proceed. Thereafter the respondent filed a fresh application u/s 561-A of the Code before the Allahabad High Court for quashing the trial before the Sessions Judge. The High Court was of the view that it would be an abuse of the process of the Court if the trial which protracted for about 18 years

were allowed to go on particularly in view of the fact that the documents on which the prosecution sought to rely were already mutilated and the copies of the statement u/s 161 of the Code could not be furnished to the respondent as a result of which the respondent was denied the right to cross-examine witnesses. In these circumstances, the High Court allowed the application u/s 561-A of the Code and quashed the proceeding. Thereafter the State of U. P. came up before the Supreme Court. Their Lordships of the Supreme Court observed?

In these circumstances, we have come to the conclusion that it is neither expedient nor in the larger interest of justice that the trial with all the aforesaid possible deficiencies should be allowed to proceed. In any event, this is, in our view, not a case where this Court should interfere with the orders of the High Court in an appeal under Article 136 of the Constitution.

14. It will thus appear that the facts of these decisions referred to above are easily distinguishable from the facts of the instant case. None of these decisions is an authority for the view propounded by the learned Counsel for the petitioners that criminal proceeding which was taken cognizance of by a Magistrate should be quashed if the criminal proceeding is pending since a long time. Moreover, it will appear from the record that this criminal proceeding is not pending before the Magistrate since a long time. Cognizance of the offence against the petitioners appears to have been taken recently as will appear from the letter written by the Sub-divisional Magistrate to the Advocate-General which has been shown to us at the time of argument, I do not find any cogent material on the record to quash the proceeding which is pending in the court of the Magistrate nor do I find any material for issue of a writ in the nature of mandamus on the officer-incharge. Kotwali Police Station, Bhagalpur not to proceed with the investigation of the case because in this case the investigation has already been completed.

15. For the reasons mentioned above, there does not appear to be any merit in either of these applications which are accordingly dismissed.

Shambhu Prasad Singh, J.

16. I agree.