
(2004) 09 CAL CK 0071

In the Calcutta High Court

Case No : C.R.R. No's. 2465 and 2803 of 2003

Bimal Kumar Kundu and Sudip Ghosh

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 22-09-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 465
Drugs and Cosmetics Act, 1940 — Section 16, 17A, 17B, 18, 25
Drugs and Cosmetics Rules, 1945 — Rule 4, 8
Penal Code, 1860 (IPC) — Section 274, 275, 279

Citation : (2005) 1 CHN 548

Hon'ble Judges : P.N. Sinha, J

Bench : Single Bench

Advocate : Milon Mukherjee and Sandipan Ganguly, in C.R.R. No. 2465 of 2003 and Kalika Banerjee, Debjani Ghosal and Monalisa Mitra, in C.R.R. No. 2803 of 2003, for the Appellant; Ashim Roy in C.R.R. No. 2465 of 2003 and R.S. Chattopadhyay in C.R.R. No. 2803 of 2003, for the Respondent

Judgement

P.N. Sinha, J.—As the points involved in these two revisional applications are identical, I intend to dispose of the revisional applications by a common judgment and order. Both these revisional applications arose out of Uttarpara P. S. Case No. 181 dated 27.10.02 and chargesheet No. 97 dated 3.7.03 submitted in the said case and the order dated 9.7.03 passed by learned Sub-Divisional Judicial Magistrate (in short SDJM), Serampore taking cognizance u/s 279 of Indian Penal Code (in short IPC) and Section 27 of the Drugs and Cosmetics Act, 1940 (in short Act) against the petitioners challenging which the two accused persons separately preferred these two revisional applications for quashing the chargesheet and criminal proceeding.

2. In C. R. R. No. 2465 of 2003 Dr. Bimal Kumar Kundu is the petitioner who is an accused in the aforesaid case against whom the chargesheet has been submitted u/s 279 of the IPC read with Section 27 of the Act. In C, R. R. No. 2803 of 2003 one Sudip Ghosh is the petitioner who is also an accused in the

aforesaid case against whom chargesheet under the same sections as stated above has been submitted.

3. The facts of the case as it appears from the FIR lodged by one Tarun Kumar Bhattacharjee with the O.C., Uttarpara P. S. is that, on 8.10.02. the de facto complainant had taken his minor son to the chamber of Dr. Bimal Kumar Kundu who pushed Polio, DPT and HIB vaccine from his own stock inside the body of the child. After returning home the child became very sick and started vomiting and became seriously ill and he was taken to doctor known to the informant and after treatment the child was cured. The informant noticed that in the vial both manufacturing date and expiry date were interpolated and manufacturing date 31st August, 1999 was converted by pen into 2000 and expiry date August, 2002 was converted into 2003. On 17.10.02 the son of brother-in-law of informant was taken to same doctor for HIB vaccine and after Dr. Kundu pushed the vaccine it was found that in the said vial there was no mention of manufacturing date, batch No. and no price and only it contained expiry date. The informant learnt from Dr. Kundu that the said vaccine was supplied to him by one Sudip Ghosh, Senior Scientific Promotion Executive of M/s. Aventice Pasteur. Accordingly, the informant lodged a complaint on 27.10.02 before the O. C., Uttarpara P. S. alleging that the doctor has used expired vaccine by pushing into the body of minor child and on the basis of the said FIR Uttarpara P. S. Case No. 181 dated 27.10.02 under Sections 274 and 275 of IPC read with Section 27 of the Act was started. It further appears that after completing the investigation the police submitted chargesheet u/s 279 of IPC read with Section 27 of the Act against Dr. Bimal Kumar Kundu and Sudip Ghosh and on the basis of such chargesheet learned SDJM, Serampore has taken cognizance of offence of 9,7.03.

4. Mr. Milon Mukherjee, learned Advocate in C. R. R. No. 2465 of 2003 contended that Dr. Kundu himself gave the vial of vaccine to the complainant. The doctor is innocent and that is why after pushing the injection into the body of the minor baby of the complainant he gave the vial to complainant. He would not have handed over the vial to the complainant if he had any dishonest intention or guilty mind. Seizure list shows that two used vials were seized from the complainant and four vials were seized from Sudip Ghosh. The said vials were not sent to the Forensic Science Laboratory (FSL) for opinion as to whether the vaccine contained in the seized vials are spurious or misbranded. If after receiving the injection on 8.10.02 the son of the complainant became ill, why the complainant again sent his brother-in-law's son to same doctor for pushing the same vaccine. The I. O. did not send the vials to chemical examiner for testing and report. Section 16 of the Act defines standard quality of drugs and Section 17 deals with misbranded drugs, Section 17A deals with adulterated drugs and Section 17B deals with spurious drugs. Section 18 deals with prohibition of manufacture and sale of certain drugs and cosmetics. In order to prove u/s 18(a) (i) that any drug which is not of a standard quality, or is misbranded, adulterated or spurious compliance of Section 25 of the Act is necessary as Section 25 lays down that the Government analyst to whom a sample of any drug has been

submitted for test or analysis shall deliver to the inspector a signed report in triplicate in the prescribed form. Rules 4 and 8 of the Drugs and Cosmetics Rules also deal with despatch of samples for test or analysis and certificate issued under these rules by laboratory shall be signed by Director or by an officer authorised by the Government by notification in the Official Gazette to sign such certificates.

5. Mr. Mukherjee further contended that Section 27 of the Act deals with penalty for manufacture, sale etc. of drugs in contravention of this chapter. As the vials were not sent to the Government analyst for test and report provisions of Sections 27(a), (b) and (c) are not attracted. As there is no report that the vaccine which was used was either misbranded or, adulterated or spurious no case u/s 27 of the Act can lie against the petitioner Dr. Kundu.

6. Mr. Mukherjee further contended that Rule 49 defines qualification of inspectors. It is a special Act and in a case of such nature police has no power to investigate or to make any enquiry. Only the drug inspector can make necessary search and seizure and investigation and Section 32 of the Act clearly lays down that no prosecution under this chapter shall be instituted except by an inspector or by the person aggrieved or by a recognised consumer association whether such person is a member of that association or not and no Court inferior to that of Metropolitan Magistrate or Judicial Magistrate of first class shall try an offence punishable under this chapter. It clearly lays down that the Court is not competent to take cognizance unless there is report by drug inspector. In the instant case taking of cognizance by the learned SDJM on the basis of final report or chargesheet submitted by police is bad in law and the proceeding has been vitiated. The entire power of search, seizure, investigation and submission of report are vested with the drug inspectors and their powers have been defined in Section 22 of the Act. The allegation of complainant is that over the label of the vial dates of manufacture and expiry of the drug were tampered. There was no investigation regarding that point by the Investigating Officer sending the vials to any expert for opinion whether there was tampering as alleged or not. Dr. Kundu did not violate any provisions of the Act, submission of chargesheet against him u/s 279 of IPC is absolutely bad and illegal as Section 279 of IPC deals with driving or riding on a public way so rashly and negligently as to danger human life. In the instant case the allegation was that the doctor pushed expired vaccine into the body of minor son of complainant. Submission of chargesheet u/s 279 of IPC was, therefore, absolutely bad in law and taking cognizance by the learned SDJM over such chargesheet shows total non-application of mind by the learned SDJM. Therefore, taking of cognizance was bad in law and the alleged offence in respect of which chargesheet has been submitted does not lie at all against the petitioner Dr. Kundu and accordingly by continuation of criminal proceeding is an abuse of the process of Court and it should be quashed.

7. Mr. Kalika Banerjee, learned Advocate for the petitioner submitted that under the Act no police officer can search, seize, investigate and submit any report

before the learned Magistrate. The power of search, seizure, investigation and submission of report etc. lies with drug inspector. In the instant case the police officer made the search and seizure and search and seizure was made at odd hours of night on 27.10.02 between 00.50 hours to 01.15 hours in the chamber of Dr. Kundu and between 02.50 hours to 03.15 hours in the residence of Mr. Sudip Ghosh. Search and seizure at night is absolutely illegal and there was no prior permission of Magistrate to make search and seizure at such dead hours of night. As the search and seizure was illegal the entire proceeding has been vitiated and, not only that, the police officers were not authorised to make the search and seizure and to submit report. Provisions of Sections 21 and 32 of the Act were not followed and taking of cognizance on the basis of final report or chargesheet submitted by the police officer was absolutely illegal. The petitioner is a supplier of the said vaccine as he is the Senior Scientific Executive of M/s. Aventice Pasteur and said company only manufactures the said vaccine. The petitioner Mr. Sudip Ghosh in good faith supplied the medicine to the doctor on his requisition on receipt of price of the vaccine. There is nothing in the FIR against this petitioner disclosing commission of any offence.

8. Mr. Banerjee further contended that submission of chargesheet u/s 279 of IPC is bad in law and the learned Magistrate without applying any judicial mind took cognizance over such chargesheet and taking of cognizance u/s 279 of IPC being bad in law, the entire criminal proceeding has become non-maintainable. As there was no report from the drug inspector, taking of cognizance u/s 27 of the Act was bad being in violation of Section 32 of the Act. Accordingly, continuation of the proceeding u/s 27 of the Act is also bad in law.

9. He further contended that the drug in question or the vials were not sent to chemical analyst or Government analyst for test to prove whether said vaccine was misbranded, adulterated or spurious. When the child became ill no test was done regarding blood and urine of the child to prove that due to the effect of the spurious, adulterated or misbranded drug the child became ill. There was no certificate of any doctor to prove that the minor baby of the informant became ill after vaccine was pushed into his body. The de facto complainant can move any Civil Court or Consumer Forum Court for damages or compensation but, no criminal offence has been established against the petitioner. The batch No. and the expiry date of the vial which was seized from complainant are different from the batch No. and expiry date of the vials which were seized from Sudip Ghosh. In the challan sent by Sudip Ghosh the expiry date was 08/2002 and was not 08/2003. After expiry no drug can be supplied to any medicine shop or doctor and these are returned to the manufacturer company. He contended that it is strange how a police officer in the rank of Deputy Superintendent of Police forwarded the final report. Section 36 of Cr. PC empowers police officers superior in rank to an officer in charge of a police station same powers in the local area to which they are appointed as may be exercised by such officers within limit of his station but, this power is for administrative purpose and it does not empower a senior police officer to conduct investigation. He further referred to provisions of

Sections 21, 22, 23, 25, 27 and 32 of the Act and Rule 65 of the Drugs and Cosmetics Rules and contended that the learned SDJM was not empowered to take cognizance u/s 27 of the Act against the petitioner when there was no report submitted before him by the drug inspector. Taking of cognizance u/s 279 of IPC was absolutely illegal and total non-application of mind by the learned Magistrate.

10. He further contended that the whole investigation starting from inception to filing of chargesheet by an inspector is bad in law and the present case is not a case which can be termed as rarest of rare case. This Court u/s 482 of Cr. PC can invoke its jurisdiction to quash the present criminal proceeding which is absolutely illegal and without foundation. In support of his contention he cited the decision reported in H.N. Rishbud and Inder Singh Vs. The State of Delhi, , Kehar Singh and Others Vs. State (Delhi Administration), , T. Barai Vs. Henry Ah Hoe and Another, , T. Barai v. Henry Ah Hoe and Anr., and contended that the judgment of the Supreme Court passed in this case make it clear that in the trial of offence under IPC or offence under Drugs and Cosmetics Act Central law will prevail over State law as Central Amendment Act is silent about State Act providing life imprisonment to offence under Sections 272 to 277 of IPC.

11. Mr. Ashim Kr. Roy appearing for the State of West Bengal in C.R.R. No. 1465/03 contended that there was amendment of Section 32 of the Act and after amendment Section 32 of the Act runs as follows :

"32. Cognizance of offences and arrest without warrant.--(1) All offences punishable under this Act shall be cognizable and non-bailable.

(2) Any police officer not below the rank of Sub-Inspector of Police may arrest without warrant any person against whom a reasonable complaint has been made or credible information has been received of his having been concerned in any of the offences punishable under this Act."

12. The amendment makes it clear that all offences punishable under this Act are cognizable and non-bailable and police officer not below the rank of Sub-Inspector of Police may arrest without warrant any person against whom complaint has been made or credible information has been received of his having been concerned in any of the offences punishable under this Act. In view of the amendment made in Section 32 any person aggrieved is competent to file a complaint. Tarun Bhattacharjee is the person aggrieved as his minor son became ill after Dr. Kundu pushed HIB vaccine into the body of the minor baby. When aggrieved person can lodge complaint and, any police officer not below the rank of S. I. of Police can arrest any person against whom there is allegation of committing offence under this Act, leads to the conclusion that the police has power to investigate and police can submit chargesheet also in respect of offence under this Act. Not only that, the FIR was started under the provisions of Sections 274 and 275 of IPC read with Section 27 of the Act. Sections 274 and 275 of the Act prescribes that the said offences are cognizable and non-bailable

and triable by Court of Sessions and the punishment is imprisonment for life with or without fine. Therefore, in this case the police has unfettered power to investigate the case and to submit chargesheet, The allegations were very serious as expired vaccine was pushed into the body of an infant of two months old. The doctor cannot be absolved from the responsibility as it was his duty to notice the expiry date of the vaccine printed on the vial before pushing the vaccine into the body of minor baby. The doctor had definitely vicarious liability in the incident. The I. O. sent a letter to doctor during investigation which is lying in the case diary and the doctor also sent a reply and the said reply is also lying in the case diary. Ultimately the doctor did not send any further reply. The statement of witnesses, the seizure list and the letters lying in the case diary clearly reveals that there were elements of offence against the petitioner. Violations of provisions of search and seizure is not a ground of quashing the proceeding and evidentiary value of search and seizure cannot be excluded on the ground of illegality. At best, it may be treated as irregularity curable under the provisions of Section 465 of Cr. PC. It is a case of pushing expired drug into body of a minor baby and automatically it would come within the definition of not a standard drug. From the materials lying in case diary it is clear that over the vials date of manufacture and expiry of the vaccine was tampered as found on the stickers attached to the vials. Submission of chargesheet u/s 279 of IPC is due to inadvertence and taking of cognizance by the learned SDJM over such report was also due to inadvertence. This itself cannot convert the present case as void ab initio and total nullity and not maintainable. At the time of consideration of charge the learned Court may correct the sections after going through the materials in case diary.

13. Mr. Roy further contended that the FIR cannot be overlooked and the FIR would reveal under which section the case was started. If after completing investigation a police officer submits chargesheet mentioning a wrong section and the learned Magistrate takes cognizance over that wrong section of offence, the criminal proceeding cannot be quashed for that erroneous taking of cognizance when the FIR and the materials in case diary reveal establishment of completely different section. The Magistrate after going through the case diary, case record and FIR can correct the section subsequently. This is not a fit case to quash the criminal proceeding when the allegation was very serious and materials in case diary established prima facie elements of offence against both the petitioners.

14. Mr. R. S. Chattopadhyay, learned Advocate appearing for the State of West Bengal in C. R. R. No. 2803/03 submitted that Section 32 of the Act has been amended in West Bengal and after such amendment police can investigate the case. Not only that, Section 32 empowers aggrieved person to lodge FIR or to institute any complaint. In the instant case the aggrieved person is Tarun Kumar Bhattacharjee, whose son became ill after accused Dr. Kundu pushed HIB vaccine into body of the minor son of the complainant. The aggrieved person being the complainant himself has lodged the complaint and accordingly the complaint is

maintainable and after amendment of Section 32 of the Act police is empowered to investigate into the case. Materials lying in case diary reveals prima facie elements of offence and disclose that there are sufficient materials to continue with the criminal proceeding. Submission of chargesheet u/s 279 of IPC is definitely bad in law. The learned Magistrate is empowered to go through the case diary and materials lying therein which were collected during investigation and after perusing case diary, if the learned Magistrate finds that, elements of other offence has been disclosed during investigation learned Magistrate may take necessary action and take cognizance over the other sections which transpires from materials collected during investigation. The Magistrate is not bound to follow the police report blindly and Magistrate has to exercise his own mind. In the instant case, the learned Magistrate may be directed by this Court to look into the case diary and to find out after investigation what elements of offence has been disclosed and learned Magistrate thereafter may proceed in accordance with law. Submission of chargesheet u/s 279 of IPC was a mere irregularity which is curable and this Court can also direct the learned Magistrate to apply judicial mind on the basis of materials lying in case diary. In support of his contention he cited the decisions reported in Raghunath Bhagat and Another Vs. The State of Bihar and Another, , Public Prosecutor Vs. Hatam Bhai and Others, , Public Prosecutor v. Hatam Bhai.

15. After carefully perusing both the revisional applications, the annexures made with the said revisional applications, materials in case diary and considering the submissions of learned Advocates of both the petitioners in the revisional applications and the submissions of the learned Advocates for the State of West Bengal in both the matters, I find from the FIR that the case was started under Sections 274 and 275 of IPC read with Section 27 of the Act, 1940 for violation of Sections 9 and 17 of the said Act.

16. Provisions of Section 274 of IPC runs as follows :

"Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

17. In West Bengal it was amended by W. B. Act No. 42 of 1973, Section 3(iii) (w.e.f. 29.4.1973) and in its application in West Bengal the words "of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both", has been substituted by the following words :

"for life with or without fine :

Provided that the Court may, for adequate and special reasons to be mentioned

in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."

18. Provisions of Section 275 of IPC runs as follows :

"Whoever, knowing any drug or medicinal preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation. Or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may be extend to one thousand rupees, or with both."

19. In West Bengal it has been amended by W. B. Act No. 42 of 1973, Section 3(iv) (w.e.f. 29.4.1973) and the words "of either description for a term which may extend to one thousand rupees or with both", has been substituted by the words "for life with or without fine :

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment which is less than imprisonment for life."

20. It is evident from the chargesheet submitted by the Investigating Officer that he has submitted chargesheet u/s 279 of IPC read with Section 27 of the Act. Section 279 of IPC runs as follows :

"Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

21. The definitions of abovequotedars of IPC, i.e. 274, 275 and 279 of IPC make it clear that Section 279 of IPC has no connection at all with the ingredients of offence under Sections 274 and 275 of IPC. Elements of Section 279 of IPC are driving of a vehicle or riding on a public way and such driving or riding is in a manner which is so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person. Section 274 of IPC deals with adulteration of drug and Section 275 of IPC deals with sale of adulterated drugs. Sections 274 and 275 do not contain any ingredient or element relating to driving of a vehicle or riding on a public way rashly and negligently to endanger human life or to be likely to cause hurt or injury to any other person. The conclusion of the Investigating Officer in the chargesheet does not show as to how he came to the conclusion that elements of Section 279 of IPC transpired in this case when the FIR was started under Sections 274 and 275 of IPC. It shows total non-application of mind on the part of the Investigating Officer and his failure to grasp the serious nature of the case. Had the Investigating Officer

applied mind and intelligence into nature of the case and materials collected during investigation he would have found that offence of other sections transpired and there was no element of Section 279 of IPC to file chargesheet under that section of IPC.

22. It is well-known that a Magistrate is not bound to accept the final report submitted by the police after completing investigation. Materials in case diary clearly reveal some of the alleged offence with which the FIR was lodged and there may be other offence also. The prosecution case was that minor baby of two months old only of informant was brought before Dr. Bimal Kundu for pushing DPT, Polio and HIB injection and Dr. Kundu himself pushed the injection from the stock of his chamber. The vial of the vaccine was given to the informant and it was with him. After reaching home the two months old baby became seriously ill and started vomiting and convulsion. He was taken to a nearby nursing home and the doctors of nursing home after treatment cured the baby. Thereafter, the informant inspecting the vial of the vaccine noticed that the said vial was of batch No. R-8530 whose manufacturing date was 31st August, 1999 and expiry date was 08/2002, but using the pen both the manufacturing date and expiry date were interpolated and manufacturing year 1999 was converted into 00 and expiry year 2002 was converted into 2003. After starting of the case the police seized six vials from Dr. Bimal Kundu bearing batch No. 8530 manufacturing date 31st August, 99 and expiry date 09/ 2003 and I. O. mentioned in the seizure list that the expiry date appears to have been tampered. The Investigating Officer seized four vials from Sudip Ghosh another accused petitioner who is the supplier of the said vaccine being Senior Scientific Executive of M/s. Aventice Pasteur and the vials seized from him also bear batch No. R-8530 manufacturing date 31st August, 1999 and expiry date 08/2003 and I. O. noted in the seizure list that expiry date appears to be tampered. During investigation the invoice-cum-delivery challan dated 3.6.02 of Aventice Pasteur was seized and it shows that batch No. was R-8530 and its expiry date was August, 2002 and this challan was sent to Dr. Bimal Kundu for Aventice Pasteur Limited by Sudip Ghosh. Prima facie materials, therefore, reveals that all the said vaccines i.e. vials seized from the informant, from Dr. Bimal Kundu and the supplier Sudip Ghosh were of batch No. R-8530 whose expiry date was August, 2002 but in all the seized vials of vaccine the expiry date by interpolation was made 2003. It is manifestly clear that the doctor pushed one expired vaccine into body of only a two months old baby.

23. The doctor pleaded his innocence as submitted by Mr. Milon Mukherjee for doctor petitioner and it is the case of the doctor that he being innocent without any malice handed over the vial to the informant. That will not save the doctor from the criminal prosecution because, as a doctor he had the duty and responsibility to check the manufacturing date and expiry date of the vaccine before pushing it into the body of one innocent and infant baby of only two months old. The doctor was the last person who could have saved pushing of an expired drug into body of a minor baby. Vicarious liability of the doctor is

manifestly transparent and clear in this case and he cannot be absolved of the criminal responsibility in this matter.

24. Similarly the vials seized from Sudip Ghosh also shows that the expiry date of the vaccines were interpolated and expiry date of August, 2002 by using pen or something over the sticker of the vaccines was made August, 2003. He was the supplier of the medicines being the Senior Scientific Promotion Executive of M/s. Aventice Pasteur and it was also his responsibility to check the manufacturing date and expiry date of the vaccines before supplying the same to doctor through invoice-cum-delivery challan. Materials collected during investigation particularly from the seizure list, from the invoice-cum-delivery challan and statement of witnesses make it clear that both the doctor and Sudip Ghosh, supplier were in possession of expired drug and the doctor pushed the expired vaccine into the body of an infant of two months old and the offence which has been committed was product of action or parts played by both accused persons.

25. On the basis of FIR case under Sections 274 and 275 of IPC read with Section 27 of the Act was started against both the accused petitioners, but there was no element of Section 279 of IPC against them in the instant matter. It is clear, therefore, the Investigating Officer has caused mischief in this case and has almost single handedly destroyed the prosecution case. It is a fit case in which necessary action should be taken against the Investigating Officer who conducted the investigation and submitted chargesheet. Submission of chargesheet u/s 279 of IPC was bad in law and taking of cognizance u/s 279 of IPC by the learned Magistrate was also bad in law. Submission of chargesheet in this case u/s 279 of Cr. PC is hereby set aside.

26. The Supreme Court recently in the case known as Best Bakery case in *Zahira Habibullah H. Sheikh v. State of Gujarat*, reported in 2004(3) SC 210 : AIR 2004 SCW 2325, observed that "In the case of defective investigation the Court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to Section 311 or at a later stage also resorting to Section 391 instead of throwing hands in the air in despair. It would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective." I intend to cite another decision of the Supreme Court in *Dhanraj Singh v. State of Punjab*, reported in 2004(3) All India Criminal Law Reporter (SC) 353, where the Supreme Court has observed that, "In case of a defective investigation the Court has not circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the I.O. if the investigation is designedly defective. [See *Karnel Singh v. State of M.P.* 1995(5) SCC 578 : 1995(3) C L R (SC) 162.]"

27. The arguments canvassed by the learned Advocates for petitioners that

provisions of search and seizure were not followed are not acceptable as it is well-known that if search and seizure was not in accordance with law it is an irregularity curable u/s 465 of the IPC. In this connection I refer the decisions reported in *Bai Radha Vs. The State of Gujarat*, 2002(3) All India Criminal Law Reporter 583, *Kusum Devi Kothari and Ors. v. Superintendent of Police (C.B.I.) and Ors.* AIR 2004 SCW 2828, *State v. N.M.T. Joy Immaculate*; 1987 CrI.LJ 284, *State of Maharashtra Vs. Natwarlal Damodardas Soni*, .

28. In *Bai Radha* (supra) the Supreme Court observed that non-compliance with provisions of power to search is irregularity curable u/s 537 of Cr. PC. The corresponding Section of 537 of old Code is Section 465 under the Code of 1973.

29. In *State of Orissa* (supra) there was search and seizure and one witness who was a Government employee was examined in Court. It was held by the Orissa High Court that, "Even if for any reason search is held to be not in accordance with law and is irregular, then the seizure of articles if supported by evidence cannot be held to be illegal. In *State of Maharashtra* (supra) there was search and seizure of gold which was alleged to be smuggled. It was held by the Supreme Court that, "Assuming arguendo, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authority or the validity of the trial which followed on the complaint of the Assistant Collector of Customs."

30. Another argument that complaint was filed with mala fide intention is not acceptable at all when materials lying in case diary including the seizure list, statement of witnesses and the in voice-cum-challan prima facie establishes that expiry date of the vaccines were August, 2002 and using some device it was interpolated and shown as August, 2003. The arguments for the learned Advocates for the petitioners that the drug and cosmetic inspector can make search and seizure and investigation are not acceptable in view of the amendment of Section 32 of the Act and according to Section 32 any person aggrieved may lodge complaint and any police officer not below the rank of Sub-Inspector of Police can investigate into the case. Moreover, I have earlier observed that offence under the Indian Penal Code namely Sections 274 and 275 of IPC were there in the FIR which are triable by Court of Sessions and cognizable and non-bailable and accordingly police officer was empowered to investigate case.

31. The definition of standard drug as defined in Section 16 of the Act does not include expired drug. In the instant case from the seizure list, from the statement of witnesses and from the invoice-cum-challan it has been prima facie established that expired drug was used and expired drug cannot be included within definition of standard drug. Due to defect of investigation as the Investigating Officer did not send the seized vials to chemical analyst for examination for the report as to whether said vaccine were misbranded or adulterated or spurious drug there is no report of Government or public analyst so far in this case, but it has been established prima facie that standard drug was

not used at the time of pushing the vaccine into the body of a minor infant baby of two months old. This is sufficient to make out a prima facie case for continuance of the criminal proceeding and the learned Magistrate after rejecting final report submitted by the Investigating Officer could have taken cognizance under appropriate sections or could have directed for further investigation. At the time of trial the defects of investigation may play a vital role and to reveal the truth for ends of justice further investigation is necessary and I think further investigation should be conducted by a competent officer above the rank of Inspector of Police, or at least by an officer in the rank of Inspector and the Superintendent of Police must monitor over the matter of investigation.

32. Perusing the case diary I find that the Investigating Officer did not send any of the vial to the Government analyst or chemical analyst for examination and report whether the said drugs are spurious, adulterated or misbranded. Investigating Officer did not examine the doctor and other persons of the nursing home where the baby was taken for treatment after the said baby became very seriously ill after the injection was pushed into his body. Treatment sheet, prescription and other relevant papers were not seized from the nursing home or from the doctor who examined the infant baby and took steps for treatment nor he asked the informant to produce the papers of such treatment of the baby when the baby became ill. Investigating Officer did not examine responsible persons of M/s. Aventice Pasteur to verify the batch No. of the vaccines relating to its manufacturing date and expiry date though a bill in the name of Dr. Kundu with expiry date August, 2002 was seized. It is not a fit case at all for quashing the proceeding and it is a fit case for further investigation and learned SDJM, Serampore is directed to instruct the Officer-in-Charge concerned for further investigation. It appears from case diary that previous I.O. Tapas Kumar Ghosh was proceeding with the matter of investigation properly and at page 97 of the case diary he noted some points over which further investigation was necessary. The subsequent I.O. Inspector S.R. Dana even did not go through the case diary properly and did not apply his mind at all into the points of further investigation which was necessary as mentioned in page 97 of the case diary.

33. It is not clear whether any extraneous matter was the factor behind the submission of chargesheet u/s 279 of IPC in this case by the Investigating Officer. It clearly proves that either the Investigating Officer had no knowledge at all about the facts and circumstances of the case and does not know A.B.C. of investigation or deliberately or designedly submitted chargesheet with some ulterior motive and cause of such submission of chargesheet may be on a completely different matter as indicated above to save the accused persons. In this way the Investigating Officer has played a dual role and pleased the informant and State Administration that chargesheet has been submitted and equally pleased the accused persons paving their way for acquittal by filing chargesheet u/s 279 of IPC which offence does not lie at all in this case and keeping defects in investigation for offence u/s 27 of the Act.

34. It is not clear how the Inspector S. R. Dana submitted a chargesheet in this case in such manner making investigation defective and not covering points of investigation which the previous I. O. thought was necessary for this case. But the manner in which designedly chargesheet has been submitted by the Investigating Officer u/s 279 of IPC which offence was not at all connected with this case according to elements of FIR, necessary action should be taken against the Investigating Officer and if he is still in service the authorities concerned should take necessary action against him for dereliction of duty and failure to discharge the duty of investigation with which he was entrusted and authorities should consider whether such officer would be entrusted with investigation of any case in future. Send relevant copy of this order to the Director General of Police, West Bengal for looking into the matter and to give necessary instruction to the Superintendent of Police to take necessary action against the Investigating Officer of this case who has motivatedly and designedly submitted chargesheet u/s 279 of IPC in a case where FIR was started under Sections 274 and 275 of IPC read with Section 27 of the Act with some purpose to help the accused persons paving their way for discharge or acquittal. The Director General of Police, West Bengal should also give necessary instruction to the Superintendent of Police so that further investigation in this matter is conducted by competent officer of the rank of Inspector as in view of provisions of Section 32 of the Act any police officer not below the rank of Sub-Inspector can investigate into a case under the Act. The Director General of Police should instruct the Superintendent of Police, Hooghly to monitor the further investigation to be taken up with urgency so that a fresh report or supplementary final report is submitted in Court at the earliest.

35. The language of Sub-section (8) of Section 173 of Cr. PC clearly indicates that even after submission of final report under Sub-section (2) of Section 173 of the Cr. PC forwarded to the Magistrate and even after taking cognizance by the Magistrate on the basis of such report, the Officer-in-Charge of the police station receiving further evidence, oral or documentary may submit further report to the Magistrate. It signifies that even after submission of report u/s 173(2) of Cr. PC further investigation can be made by the Officer-in-Charge of the police station on his own or upon the direction of the Magistrate. In this connection I rely upon a decision of the Supreme Court in *Hasanbhai Valibhai Qureshi v. State of Gujarat*, reported in 2004 AIR SCW 2063, where the Supreme Court has made it clear by observing that u/s 173(8) of Cr. PC further investigation can be made and it cannot be ruled out merely on the ground that it may delay the trial. Even after Court takes cognizance of offence on earlier report submitted by police, it is open to police conduct further investigation in a proper manner. On fresh facts coming to light police should seek permission of Court of further investigation. In this case accordingly there are grounds of further investigation and delay, if any, of trial cannot be a ground to rule out further investigation.

36. The learned SDJM, Serampore was also equally guilty in this matter as it appears that he completely remained blind or closed his eyes when the chargesheet was placed before him. The chargesheet is not placed before any

SDJM by the G. R. O. attached to Court separately but chargesheet is submitted along with the case record. Even at the top of the chargesheet starting of the P. S. Case showing FIR No. and date and mention of the alleged offence for which the case was started are mentioned. The learned SDJM even did not take pains to see the top of chargesheet as to under which sections the Uttarpara P. S. Case No. 181 dated 27.10.02 was started. The case record was placed before the learned SDJM in which he took cognizance and if he perused the case record from FIR, forwarding report and other materials lying in case record the learned Magistrate could have detected that Uttarpara P. S. Case No. 181 dated 27.10.02 was started under Sections 274 and 275 of IPC and punishment under both the said offence was imprisonment for life with or without fine and both the offence were cognizable, non-bailable and triable by Court of Sessions. The action of the learned SDJM clearly reveals his total non-application of mind and in a sessions triable case where punishment was imprisonment for life the learned SDJM took cognizance u/s 279 of IPC whose punishment is only imprisonment for six months or with fine. The I. O. may have made mistake but, how a Judicial Magistrate of the rank of SDJM could accept the chargesheet u/s 279 of IPC remains a mystery and it shows that learned SDJM was negligent in the matter and there was lack of devotion for duty with which he was placed in his posting as SDJM. Accordingly I caution the learned SDJM to be careful in future and if such lapses on his part again comes to the notice of this Court the matter would be severely dealt with and would be placed before the Administrative Committee of the High Court for taking necessary action against him.

37. It is also clear that this Court at this stage cannot enter into discussion of evidence like Trial Court or Appellate Court. Moreover, there are several decisions that the annexures appended with the revisional application or writ petition cannot be considered by the High Court in the matter of quashing of a proceeding as the said documents were not verified and were not admitted in evidence. In this connection I rely upon the decisions in *State of M.P. v. Awadh Kishore Gupta and Ors.*, reported in 2004 SCC (Cri) 353 and *State of Bihar and Another Vs. P.P. Sharma, IAS and Another*, .

38. The prayer of the accused petitioners in these two revisional applications for quashing the criminal proceedings does not arise at all and as I have directed that further investigation should be made, no question of quashing the criminal proceedings arises at all. It is manifestly clear that investigation and submission of chargesheet. was designedly defective and prima facie it appears that I. O. has done it intentionally to lay foundation path of either discharge or acquittal of accused persons. In view of the discussions made above there are sufficient materials of trial of both the accused persons as sell and use of expired drug i.e. vaccine is not a standard drug and this is sufficient to attract provisions of Section 27 of the Act. Regarding offence under IPC further investigation and further or supplementary report will disclose the particulars or results of further investigation. In view of the above discussion it is clear that it is not at all a fit case for quashing the criminal proceeding. Both the criminal revisional

applications are accordingly dismissed. Learned SDJM, Serampore is directed to instruct the Officer-in-Charge, Uttarpara P. S. for taking necessary steps for further investigation and to submit report in accordance with law in Court at the earliest.

39. Regarding the negligence, irresponsibility and conduct of the Investigating Officer in investigation of this case, Registrar General, High Court, Calcutta is directed to send a copy of this order to the Director General of Police, West Bengal and the Superintendent of Police, Hooghly for information and taking necessary action against the Investigating Officer who submitted chargesheet in this case completely in a different section not connected at all with the offence disclosed in FIR.

40. Registrar (Judicial Service) is directed to communicate the caution as indicated above by this Court to the learned SDJM Sri S. K. Joshi for his information and future guidance so that in future he may correct himself and while acting as SDJM, if he receives any chargesheet he becomes cautious and goes through the case record and case diary before taking cognizance.

41. The order of learned SDJM taking cognizance in this case u/s 279 of IPC being not in accordance with law and illegal is set aside. He is directed to pass necessary orders for further investigation and to instruct for its completion expeditiously and preferably within six months from the date of communication of this order to him.

42. This order will govern both the criminal revisional applications being C. R. R. No. 2465 of 2003 and C. R. R. No. 2803 of 2003.

43. Send a copy of the relevant portion of the order to the learned SDJM, Serampore for information and necessary action.

LATER:

44. After the judgment is pronounced in open Court Mr. Milon Mukherjee, learned Advocate for petitioner in C. R. R. No. 2465 of 2003 contended that after he pointed out defects of investigation, the direction of this Court for further investigation will cause serious prejudice to the accused as it would tantamount to remove the defects of investigation. Some benefits were accrued to the petitioner and that cannot be taken away by order of this Court in the form of further investigation to remove the defects of investigation. Accordingly, direction for further investigation may be modified, the revisional application may be dismissed and the learned Magistrate may be directed to proceed with the matter and objection of petitioner regarding his prejudice may be noted.

45. Learned Advocate appearing for the State Mr. Ashim Roy and Mr. R.S. Chattopadhyay submitted that this Court has ample power to direct further investigation. Whether the accused petitioner points but the defects of investigation or not is no consideration, and if the Court finds that there were defects in investigation, the Court may direct further investigation and the power

of the Court in this respect cannot be curtailed. Therefore, there is no ground at all for any modification of the order.

46. After hearing the submissions of the learned Advocates of the parties, I am of opinion that the defects in investigation is apparent on the face of the case diary which I have mentioned earlier. Page 97 of the case diary clearly indicates into what points further investigation was necessary when Tapas Kumar Ghosh was the Investigating Officer. The subsequent Investigating Officer Inspector S. R. Dana did not peruse the case diary properly and did not follow the actions relating to points of further investigation which was noted in page 97 of the case diary. Moreover, if the Court on perusal of the materials on record and case diary finds that there remains some defect or some grey portion of investigation into a case the Court may direct further investigation. It is true that the Court cannot interfere with the manner of investigation by the Investigating Officer, but the Court has definitely right and its supremacy for the ends of justice to point out defects of investigation. The duty of the Court is to find out truth and for ends of justice Court is empowered to direct further investigation. If the Court on perusal of case diary and nature of the offence mentioned in the FIR and the defective manner of submission of final report finds that, investigation was not proper, the Court is empowered to direct further investigation. This direction cannot at all cause prejudice to the accused. Prejudice, if any, that may be considered by the Trial Court and if during trial learned Trial Court finds that accused was prejudiced due to direction of further investigation, the Trial Court is definitely empowered to act in accordance with law and to consider the point whether any prejudice has been caused to the accused. At this stage during investigation there is no question of prejudice to the accused and question of prejudice, if any, may be decided at the time of trial during final judgment.

47. However, I make it clear that whatever I have stated above or observed should not be considered as opinion regarding merit of the main case and the concerned Courts at appropriate stage would act in accordance with law and the learned Courts below would arrive at their own conclusion and would not be guided by the observations made by this Court in this revisional application.

48. Urgent xerox certified copy be given to the parties, if applied for, expeditiously.