
(2011) 09 AHC CK 0073
In the Allahabad High Court
Case No : Application No. 26087 of 2011

Ilmas

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 21-09-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(8), 204, 482
Penal Code, 1860 (IPC) — Section 302, 506

Citation : (2011) 10 ADJ 315

Hon'ble Judges : Bala Krishna Narayana, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bala Krishna Narayana, J.—Heard Sri Brijesh Sahai, learned Counsel for the Appellant and Sri K.N. Bajpayee, learned A.G.A. for the State.

2. The order which is impugned in the instant application filed by the applicant u/s 482 Code of Criminal Procedure is dated 9.6.2011, passed by Additional Civil Judge (J.D.), Garh Mukteshwar, District Ghaziabad in Case No. 317 of 2011 State v. Ilmas arising out of Case Crime No. 35 of 2011 State v. Bablu and others u/s 302, 506 I.P.C., P.S. Simbhawali, Ghaziabad by which the applicant has been summoned to face trial for the offences punishable under Sections 302 and 506 Indian Penal Code.

3. The brief facts of the case are that the opposite party No. 2 Asif lodged a first information report at P.S. Simbhawali on 1.2.2011 (annexure No. 1 to the affidavit accompanying this application) at about 8.45 p.m. alleging therein that when on 31.1.2011 at about 6.00 pm the informant, his brother Chaman and one Rahat S/o Tahir after having their meal were going on a walk three persons, namely, Bablu, Nadeem and one unknown person, all armed with country made pistols appeared before them and Nadeem caught hold of Chaman while Bablu shot Chaman in his stomach with his country made pistol and the third person held the informant and Rahat away from Chaman at gunpoint. The injured

Chaman was taken to the hospital where he died. On the basis of the aforesaid FIR Case Crime No. 35 of 2011 was registered against Nadeem, Bablu and one unknown person. During the course of investigation the Investigating Officer apart from collecting other materials recorded the statements of informant Nadeem and Rahat and upon completion of investigation laid down charge sheet bearing No. 33 of 2011 dated 23.2.2011 u/s 302 and 506 I.P.C. (annexure No. 8) before the concerned Magistrate against Nadeem and Bablu. On the application moved by the complainant/opposite party No. 2 before the S.S.P., Ghaziabad the matter was directed to be investigated further by S.I.S., Ghaziabad by his order dated 25.2.2011 which has been brought on record by the applicant as annexure No. S.A.1 to the supplementary affidavit). During further investigation the S.I.S., Ghaziabad examined the informant Asif and two new witnesses Jan Mohammad @ Janu and Aftab who in their statements claimed that they had seen the applicant along with other co-accused armed with country made pistols running away from the place of occurrence on the relevant date after they had reached there upon hearing the sound of gun shot. Relying upon the statements of Jan Mohammad @ Janu and Aftab charge sheet bearing No. 33-A of 2011 dated 23.5.2011 was submitted against the applicant after completion of further investigation where upon the court below took cognizance and summoned the applicant by his order dated 9.6.2011 (annexure No. 12 to the affidavit accompanying this application).

4. Sri Brijesh Sahai, learned Counsel for the applicant vehemently submitted that the impugned order by which the applicant has been summoned by the court below is an absolutely non-speaking and cryptic order which does not reflect any application of judicial mind by the concerned Magistrate to the facts of the case and the materials on record and since before a Magistrate, upon receipt of a complaint or a police report or any other information showing commission of a cognizable offence, takes cognizance and issues process, it is imperative that it must be discernible from the order of the Magistrate that he has taken into consideration the charge sheet and the other papers submitted therewith for satisfying himself as to whether a prima facie case against the accused for the concerned offences is made out and since the impugned orders does not conform to the aforesaid requirement, the same cannot be sustained and is liable to be set aside.

5. Sri Brijesh Sahai, next submitted that the applicant having not been charge sheeted in the investigation which followed the registration of the FIR at the behest of the opposite party No. 2, the investigation pursuance to which charge sheet has been submitted against the applicant is without any sanction of law as the said investigation was not further investigation but reinvestigation which is forbidden under the Code of Criminal Procedure, as would be evident from the perusal of the charge sheet submitted against the applicant which has been described as charge sheet (mool) and not as supplementary charge sheet.

6. Sri Brijesh Sahai also submitted that even it is presumed that the impugned

investigation was further investigation, the same was bad on account of having been done without the permission of the concerned court.

7. Sri Brijesh Sahai lastly submitted that evidence on the basis of which the court below has taken cognizance and summoned the applicant does not disclose the commission of any offences by the applicant and the same is not at all sufficient for his conviction for the offences with which he has been charge sheeted.

8. Sri Brijesh Sahai in support of his submissions placed reliance upon *Fakhruddin Ahmad v. State of Uttaranchal* 2008 (3) JIC 855 , *K. Chandrasekhar Vs. The State of Kerala and Others*, , *Virender Prasad Singh Vs. Rajesh Bhardwaj and Others*, *Ram Chandra v. Adya Kumar and Ors.* 2008 (3) JIC 484 (SC) and *Hasan Bhai Vali Bhai Qureshi v. State of Gujarat* AIR 2004 SC 207.

9. Sri K.N. Bajpayee, learned A.G.A. appearing for the state-Respondents submitted that it is trite law that No. detailed order is required to be passed at the stage of summoning, No. meticulous examination of facts is required to be done at that stage and what Section 204 of the code ordains is that if in the opinion of a Magistrate for taking cognizance of an offence there is sufficient ground for proceeding, he shall issue summons for the attendance of the accused and the aforesaid section No. where requires the Magistrate to record reasons for summoning. He further submitted that reasons for summoning can be had from the entire material on record and it is not a legal requirement of statute that a Magistrate must record reasons for summoning a person as accused. In support of his aforesaid submission Sri Bajpayee placed reliance on *U.P. Pollution Control Board v. Mohan Meakins Ltd.*, AIR 2000 SC 1456 and a Single Judge decision of this Court reported in LXXIII 2011 ACC 750 Mohd. Sayeed v. State of Uttar Pradesh Repelling the second and the third contentions raised on behalf of the applicant's counsel Sri Bajpayee submitted that from the perusal of the order of the S.S.P., Ghaziabad dated 26.2.2011 passed on the application moved before him by the complainant by which further investigation was directed to be done by S.I.S., Ghaziabad and pursuant to completion of such further investigation the applicant was charge sheeted, it is crystal clear that by the said order No. reinvestigation was directed as "further investigation" can be held to be fresh investigation only where from the surrounding circumstances and the materials on record, it appears that reinvestigation is started ab initio wiping out the earlier investigation altogether and in the present case there is nothing on record which may show that while ordering further investigation the S.S.P., Ghaziabad had directed for wiping out the earlier investigation. He also submitted that Section 173 (8) Code of Criminal Procedure clearly stipulates further investigation after investigation is completed and a police report is filed, if it appears to the investigating agency that further evidence is required and No. permission of the court is required for conducting further investigation. In support of the submissions advanced by him in this regard he has placed reliance on *State of Andhra Pradesh v. K.S. Peter* 2008 (2) JIC 439 SC as well as the Apex Court decision rendered in the case of *Hasan Bhai Vali Bhai* (supra) upon which the

learned Counsel for the applicant is also relying.

10. Sri K.N. Bajpayee replying to the applicant's fourth and the last contention, submitted that from the perusal of the statements of Jan Mohammad @ Janu and Aftab prima facie the presence of the applicant armed with country made pistol at the place of incident was established and hence the summoning of the applicant cannot be held to be bad for the reason that there was No. incriminating material on record against the applicant.

11. I have very carefully examined the submissions advanced by the learned Counsel for the parties present and perused the impugned order as well as the other materials brought on record and the law cited by them on the issues arising in the case.

12. Coming to the first submission made by the learned Counsel that the impugned order by which the cognizance has been taken and the applicant has been summoned by the court below is fraught to be quashed on the ground of it being a non-speaking order, I am of the considered view that Section 204 of the Code of Criminal Procedure No. where requires recording of reasons by a Magistrate for summoning a person as accused. On this aspect authoritative support can be drawn from the decision of the Apex Court in U.P. Pollution Control Board (supra) wherein the Apex Court held as follows:

My attention has been drawn to Section 204 of the Code of Criminal Procedure and it has been argued that No. reasons for summoning an accused person need be given. I feel that u/s 204 aforesaid, a Magistrate has to form an opinion that there was sufficient ground for proceeding and, if an opinion had to be formed judicially, the only mode of doing so is to find out express reasons for coming to the conclusions. In the impugned order, the learned Magistrate has neither specified any reasons nor has he even formed an opinion much less about there being sufficient ground for not proceeding with the case.

13. A single Judge of this Court in the case of Mohd. Sayeed (supra) after considering a catena of decisions of the Apex Court as well as of this Court on the point held has hereunder:

21. After going through the several decisions of Hon''ble Supreme Court as well as of this Court on the subject in issue, I am of the view that once the Magistrate takes cognizance of an offence either without discussing what are the reasons behind it, it shall be presumed that on the basis of material available before him he is satisfied that there is sufficient material for taking cognizance and if he is satisfied with those materials for taking cognizance, the detail discussion of those materials by the learned Magistrate is not required. Further once he issues process, even without writing word "cognizance is taken" it is presumed that he has taken cognizance, the writing of word "cognizance is taken" is not necessary. The reason is that by issuance of process he proceeds with the case and the accused who has been summoned for trial have sufficient opportunity to defend himself at the appropriate stage provided in code. In response of issuance of

process/summons it is not open for the accused to challenge the summoning order on the ground that No. cognizance has been taken or No. satisfaction has been shown or there is No. detail discussion of the material available rather he has to follow the next step of the process.

The case of Fakhruddin (supra) upon which the learned Counsel for the applicant has placed extensive reliance is of No. help to him as the Apex Court in the case of Fakhruddin (supra) was examining the validity of the order passed by Uttaranchal High Court by which it had declined to quash the charge sheet a on the ground that it had No. power to look into the documents and papers which were filed along with charge sheet for the purpose of considering the prayer for quashing of prosecution, and the Apex Court, while disagreeing with the reasons spelt out by the High Court for refusing to quash the charge sheet set aside the order of the Uttaranchal High Court and remitted the matter back to the High Court for deciding the accused's prayer for quashing of his prosecution afresh in accordance with law.

I have very carefully gone through the judgment of the Fakhruddin Ahmad (supra) case and there is nothing in the said judgment which may be said to lend any support to the aforementioned submission of the learned Counsel for the applicant.

Consequently, the first ground of challenge to the impugned order on behalf of the applicant is bereft of any merits and is hereby repelled.

Now I advert to the second ground on which the impugned order has been castigated that further investigation which was directed by the S.S.P., Ghaziabad after charge sheet had been submitted against the Nadeem and Bablu was infact reinvestigation which is not permissible under the Code of Criminal Procedure, and summoning of the applicant on the basis of charge sheet filed by the Investigating Officer on completion of such illegal investigation was invalid. The reliance placed by the learned Counsel for the applicant for persuading this Court to accept that what was done in pursuance of the order of the S.S.P., Ghaziabad was reinvestigation and not further investigation on the nomenclature of the charge sheet which was submitted upon completion of further investigation, is also of No. assistance to the learned Counsel for the applicant. Merely, because the charge sheet filed on completion of further investigation was described as "mool charge sheet" and not as "charge sheet titimba" (supplementary charge sheet) it cannot be said that there has been reinvestigation.

Paragraph No. 25 of the case of K. Chandrashekharan (supra) upon which the learned Counsel for the applicant has strongly relied and which is being reproduced hereinbelow is of No. help to the applicant:

25. From a plain reading of the above Section it is evident that even after submission of police report under Sub-section (2) on completion of investigation, the police has a right of "further" investigation under Sub-section (8) but not "fresh investigation" or "re-investigation". That the Government of Kerala was

also conscious of this position is evident from the fact that though initially it stated in the Explanatory Note of their notification dated June 27, 1996 (quoted earlier) that the consent was being withdrawn in public interest to order "reinvestigation" of the case by a special team of State police officers, in the amendatory notification (quoted earlier) it made it clear that they wanted a "further investigation of the case". The dictionary meaning of "further" (when used as an adjective) is "additional", more supplemental. "Further" investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation be started ab initio wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that Sub-section(8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a "further" report or reports - and not fresh report or reports - regarding the "further" evidence obtained during such investigation. Once it is accepted - and it has got to be accepted in view of the judgment in Kazi Lhendup Dorji, (AIR 1994 SCW 2190) (supra) that an investigation undertaken by C.B.I. pursuant to a consent granted u/s 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that "further investigation" is a continuation of such investigation which culminates in a further police report under Sub-section (8) of Section 173, it is necessarily means that withdrawal of consent in the instant case would not entitle the State police, to further investigate into the case. To put it differently, if any further investigation is to be made it is the C.B.I. alone which can do so, for it was entrusted to investigate into the case by the State Government. Resultantly, the notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and unsustainable in law. In view of this finding of ours we need not go into the questions, whether Section 21 of the General Clauses Act applies to the consent given u/s 6 of the Act and whether consent given for investigating into Crime No. 246/94 was redundant in view of the general consent earlier given by the State of Kerala.

14. From the bare reading of paragraph No. 25 of the K. Chandrashekhara's case (supra) where the Apex Court has examined what shall amount to further investigation and what shall be deemed to be reinvestigation the Apex Court has observed that further investigation is the continuance of the earlier investigation and not a fresh investigation or reinvestigation. Reinvestigation is an investigation which is to be started ab initio wiping out the earlier investigation altogether. In the present case the applicant has failed to demonstrate by bringing any material on record that as a result of further investigation the earlier investigation stood wiped out.

15. Similarly, the cases of Virendra Prasad Singh (supra) and Ram Chandra (supra) are also of No. help to the applicant.

16. In Virendra Prasad Singh (supra) the Supreme Court had quashed the order of the High Court passed on an application moved by the accused u/s 482 Code

of Criminal Procedure directing re-examination of completed investigation by officer of D.G.P. rank after filing of charge sheet and committal of proceedings to sessions court without assigning any reason.

17. In Ram Chandra (supra) the Apex Court held that it was not proper on the part of the High Court to have allowed the application filed by the accused before the High Court for re-investigation by C.B.C.I.D., holding that there could be only further investigation and not re-investigation or fresh investigation. The third contention of the learned Counsel for the applicant that No. further investigation could be done without the permission of the court is also devoid of any merit.

18. Reliance placed upon the case of Hasan Bhai Wali Bhai Qureshi (supra) by the learned Counsel for the applicant in support of his aforementioned contention is totally misplaced. Para 13 of the aforementioned judgment is reproduced hereunder:

13. In Om Prakash Narang and Anr. v. State (Delhi Admn.) it was observed by this Court that further investigation is not altogether ruled out merely because cognizance has been taken by the court. When defective investigation comes to light during the course of trial, it may be cured by further investigation if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that police should inform the court and seek formal permission to make further investigation should inform the court and seek formal permission to make further investigation when fresh facts come to light in stead of being silent over the matter keeping in view only the need for and early trial since and effective trial for real or actual offences found during course of proper investigation is as much relevant desirable and necessary as an expeditious disposal of the matter by the courts. In view of the aforesaid position in law if there necessity for further investigation the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand on the way of further investigation if that would held the court in arriving at the truth and do real and substantial as well as effective justice. We make it clear that we have not expressed any final opinion on the merits of the case.

19. The Apex Court in para 12 of the same judgment has observed as hereunder:

12. Sub-section (8) of Section 173 of the Code permits further investigation, and even de hors any direction from the court as such, it is open to the police to conduct proper investigation, even after the court took cognizance of any offence on the strength of a police report earlier submitted. All the more so, if as in this case, the Head of the Police Department also was not satisfied of the propriety or the matter and nature of investigation already conducted.

20. The observation made by the Apex Court in the case of Hasanbhai Valibhai Qureshi (supra) is based upon the observations made by the Apex Court in the case of Om Prakash Narang and Ors. v. State (Delhi Administration) 1999 (2) SCC 322, wherein the court was seized with the controversy as to whether

further investigation can be directed after cognizance has been taken by the court and the Apex Court held that when defective investigation comes to light during the course of trial it may be cured by further investigation, if circumstances so permitted. The Apex Court has No. where held in the aforesaid case that after charge sheet has been submitted further investigation cannot be conducted without the permission of the court. Thus, the third ground of challenge by the applicant to the impugned order also fails.

21. So far as the fourth and the last ground of challenge is concerned that there was No. evidence on record justifying the summoning of the applicant's is concerned the same is also without any merit. I have gone through the statement of Aftab recorded during further investigation (copy whereof has been brought on record as annexure No. 9 to the affidavit accompanying this application) and Aftab in his statement has stated in No. uncertain terms that he had reached the place of incident upon hearing sounds of gun shot and seen the applicant armed with a country made pistol running away from the place of occurrence along with other co-accused. Thus the submission of the learned Counsel for the applicant that the evidence on record was not sufficient for his summoning is also without any substance and is accordingly rejected.

22. For the aforesaid reasons, I am of the view that the applicant has failed to make out any case for quashing the impugned summoning order.

23. The application is accordingly dismissed.