

(1999) 01 OHC CK 0041

In the Orissa High Court

Case No : O.J.C. No. 17838 of 1997 with M.C. No. 6335, O.J.C. No. 9525,
Criminal M.C. No. 2281 of 1998

Jogendra Nahak and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 27-01-1999

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 439
Penal Code, 1860 (IPC) — Section 302

Citation : (1999) CriLJ 3051 : (1999) 16 OCR 312

Hon'ble Judges : S.N. Phukan, C.J;P.K. Tripathy, J

Bench : Division Bench

Advocate : A.K. Choudhury, A.K. Choudhury, J. Das and Bijan Ray, for the Appellant; S.K. Padhi, D. Mohapatra, S. Parida, B.K. Sahoo and S.K. Mohapatra for Opposite Party No. 6 and Additional Government Advocate, for Opposite Party Nos. 1 to 5, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Tripathy, J.—Above noted two writ applications under Articles 226 and 227 of the Constitution and the Criminal Misc. Case u/s 439 Criminal Procedure Code, 1973 (in short "the Code") were heard analogously and are disposed of by this common judgment.

2. O.J.C. No. 17838 of 1997 has been filed by the four petitioners stating that on 12-8-1997 one Balaram Mohanty and his son Hrusikesh Mohanty were brutally assaulted. Balaram Mohanty succumbed to the injuries and it became a sensational political murder case of the locality. On the basis of the F.I.R. (Annexure-1) Purusottampur P.S. Case No. 100(4) of 1997 was registered. It is stated in the writ petition that during the course of investigation several material witnesses including the petitioners were examined by the Investigating Officer, but being politically motivated and influenced, the Investigating Officer omitted to keep in record i.e. in the case diary, statements of such material witnesses.

Thus, petitioners prayed for issue of a direction to the Superintendent of Police (O.P. No. 3) and the officer-in-charge-cum-Investigating Officer (O.P. No. 4) to record the statement of such material witnesses u/s 161 of the Code, to direct the opposite party No. 4 to produce the material witnesses before the cognizance taking Magistrate i.e. the Judicial Magistrate First Class, Purusottampur for recording of their statements u/s 164 of the Code or in the alternative permit the petitioners to appear before the Magistrate and to give their statements u/s 164 with suitable direction to the Magistrate concerned to record such statement and to pass appropriate order for reinvestigation of the case by independent investigating agency, Secretary to the Government of Orissa, Home Department, Director General of Police, Superintendent of Police, Berhampur and the Officer-in-charge-cum-Investigating Officer, Purusottampur Police Station are arrayed as opposite parties 1 to 4 respectively.

3. Though the State did not file a regular counter it resisted the aforesaid writ application and the prayer thereof. Sri Bhugaban Mohanty who is the brother of the deceased and also the informant in that murder case appeared and permitted to participate as an intervenor. He also resisted the prayers made by the petitioners and inter alia alleged that petitioners are the persons set up by one of the principal accused, viz., Sri R. Jagadish Murty to build up a case of alibi in favour of that accused and therefore, the allegations of improper investigation and malice against the Investigating Officer is out and out false. Opposite parties have prayed to dismiss the writ applications both on law and facts.

4. In O.J.C. 9525 of 1998, wife of accused R. Jagadish Murty, viz., Smt. R. Kameswari has prayed for issuance of a writ of Habeas Corpus on the ground that her husband is innocent of the accusation and his detention in the jail custody is illegal and without jurisdiction. Informant Bhagaban Mohanty has been permitted to participate as an intervenor by adding him as opposite party No. 6. The opposite party No. 3 i.e., the Superintendent of Police has filed counter-affidavit on behalf of himself as well as opposite party Nos. 1 and 2. In that affidavit, he has denied to the allegations of mala fide actions taken by the Investigating Agency against accused R. Jagadish Murty and has asserted that the investigation conducted by the Investigating Officer and the supervision of the case made by the Additional Superintendent of Police, both reveal a prima facie case against the said accused besides others and the detention being neither illegal nor unjust the prayer for issuance of a writ of Habeas Corpus is not maintainable and that the said accused R. Jagadish Murty had already moved for bail u/s 439, Cr. P.C., and was granted interim bail in Criminal Misc. Case No. 2281 of 1998.

5. Application u/s 439, Cr. P.C., filed by the accused R. Jagadish Murty in G.R. Case No. 100 of 1997 in the Court of Judicial Magistrate First Class, Purusottampur arising out of Purusottampur P.S. Case No. 100 of 1997 has been registered as Misc. Case No. 2281 of 1998. After his application for bail was rejected by the Additional Sessions Judge, Berhampur in Criminal Misc. Case No.

234 of 1998 (397/98 CDC), he has approached this Court for bail u/s 439, Cr. P.C. State has opposed the prayer for bail, inter alia, on the grounds of existence of a prima facie case against Sri Murty and also on the ground of seriousness of the offence and severity of the punishment prescribed for the offence u/s 302, I.P.C.

6. At the stage of hearing on admission on the prayer made by the petitioner, on 22-12-1997, this Court passed order that petition shall be filed by the petitioners before the Judicial Magistrate First Class, Purusottampur regarding recording of statement u/s 164, Cr. P.C. and learned J.M.F.C. shall pass appropriate orders in terms of the law laid down by this Court in the case of Bhima Mallick v. State (1994) 7 OCR 413 and the order dated 31-10-1997 passed by this Court in O.J.C. No. 13998/97. After that petitioners filed application in the Court of J.M.F.C. Purusottampur but for the reasons recorded, learned J.M.F.C. did not find it relevant or necessary to record statements of the petitioners u/s 164 of the Code and accordingly rejected their petition. Thereafter, petitioners moved this Court and as per order No. 3 dated 24-3-1998, J.M.F.C. was directed to record their statement u/s 164 of the Code. Thereafter, the informant appeared as an intervenor and prayed to recall the order dated 24-3-1998 or else to issue suitable directions to make the statement u/s 164 of the Code of the petitioners ineffective so far as the prosecution case is concerned.

7. For the sake of convenience, O.J.C. No. 17838 of 1997 and the prayer thereof is taken up first for consideration before dealing with other two applications. In the writ application, as already noted, an unfair and mala fide investigation with a view to screen the real culprits has been alleged and in that respect, it is further alleged that the Investigating Officer though recorded statements of material witnesses but did not keep the same in the case diary. At the time of hearing, case diary was produced for perusal and this Court does not find any such misconduct, as alleged, against the Investigating Officer or the Investigating Agency regarding faulty investigation or suppression of records. It is not there in the F.I.R. nor the statement of the informant and the eye-witnesses that any of the petitioners were present at the time of occurrence and therefore, petitioners are neither material nor relevant witnesses, so far as the Investigating Agency and the prosecution is concerned. In view of that, this Court finds that contention of the informant is substantially correct that these four petitioners have been set up by accused R. Jagadish Murty to build up a plea of alibi in his favour through the statements of the petitioners recorded u/s 164 of the Code.

8. It is needless to say that when commission of a crime is reported to the Investigating Agency, it is the duty of the Investigating Agency to find out whether the crime as alleged has been committed, who is the culprit behind the crime and what are the relevant oral and documentary evidence and to collect the same during the course of investigation. During the course of investigation, the Investigating Agency/Investigating Officer may receive several informations

and at that stage he is to utilise his mind and intelligence for accepting the oral and documentary evidence which are necessary and helpful for detection of the crime and the criminals involved. The Investigating Officer or the prosecution cannot be compelled to examine or include a particular person as a witness. If mala fide partiality or unfairness during the course of investigation, is alleged and established the competent superior authority or Court, if moved, may direct for further or fresh investigation by that Investigating Agency or by any other agency like Crime Branch or C.B.I. etc.

9. In this case, petitioners have miserably failed to prove any mala fide action of the Investigating Officer so as to not to investigate the case properly or to screen any offender. Therefore, the anxiety of the petitioners to examine themselves, is not with a view to help the investigating agency or the prosecution but to favour a person who has been charge-sheeted as an accused. Under such circumstances, the writ application is devoid of merit. It thus appears that petitioners did not file the writ application for securing fair justice but to play tricks so as to get their statements u/s 161 and/or 164 of the Code recorded to help a charge-sheeted accused. Prayers made in the writ application is without any reasonable and probable cause in furtherance or booking or prosecuting the persons charge-sheeted for the alleged crime. There is least hesitation for this Court to hold that petitioners did not hesitate to come to this Court with a frivolous and vexatious petition. Therefore, it is a fit case, what exemplary cost should be saddled with the petitioners. Accordingly, while rejecting the writ application in O.J.C. No. 17838 of 1997, each of the petitioners is directed to pay a cost of Rs. 2,500/- (two thousand five hundred) which the opposite party members shall take steps for realisation, if not paid within a month and the cost so realised be forfeited to the State Exchequer.

10. Statements of the petitioners recorded u/s 164, Cr. P.C., since not relied upon by the prosecution, if of no consequence to grant any benefit from that to any of the accused persons. This fact if necessary, may be brought to the notice of the trial Court at the time of trial of the murder case.

11. So far as O.J.C. No. 9525 of 1998 is concerned, after perusal of the case diary and the statement of witnesses, this Court finds that accused R. Jagadish Murty has been charge-sheeted as an accused in the murder case and has been remanded to judicial custody. After hearing of the argument, petitioner has filed a list of citations. It may be noted here that the facts and ratio in the cited cases are quite distinguishable from the facts and circumstances and the provisions of law applicable in this case. It is not felt necessary to make this judgment bulky by stating the cited decisions and showing their non-applicability to facts of the present case. It will suffice the purpose if it will be noted here that in the present case a prima facie case exists against the petitioner for the offences for which charge-sheet in the murder case has been filed and petitioner is seeking for bail, by filing petition u/s 439 of the Code. When there is a prima facie case as against him, his detention cannot be regarded as illegal. Thus, the writ application for

issuance of a writ of Habeas Corpus is found to be devoid of merit and accordingly, the writ petition is dismissed.

12. So far as the application u/s 439 of the Code is concerned (Criminal Misc. Case No. 2281 of 1998) after perusal of the case diary and the rejection order passed by the Additional Sessions Judge, this Court is not inclined to allow the petitioners to go on bail since a prima facie case is available against him in the aforesaid murder case. The bail application is accordingly, rejected and Criminal Misc. Case No. 2281 of 1998 is dismissed.

13. At this stage, it may be noted that in the counter-affidavit filed by the Superintendent of Police, it has been mentioned in paragraph 9 that "Sri R. Jagadish Murty had moved this Hon"ble Court vide Criminal Misc. Case No. 2281 of 1998 and was released on interim bail." We find from the order sheets in Criminal Misc. Case No. 2281 of 1998, that no order has been passed allowing the petitioner to go on interim bail. Therefore, if accused R. Jagadish Murty alias Jagu Kama was released on any interim bail on the basis of any order produced, the Presiding Officer shall submit a report in that connection along with the copy of that order for verification and further orders, if necessary, in that connection.

14. To sum up, it may be noted that--

(i) O.J.C. No. 17838 of 1997 is dismissed with costs against the petitioner for filing frivolous and vexatious petition and accordingly, each of the petitioners shall pay a cost of Rs. 2,500/-(two thousand five hundred) and it is to be realised in the manner noted, if not paid within a period of one month hence;

(ii) Since detention of accused R. Jagadish Murty is not illegal, as alleged, therefore, there is no necessity of issuance of writ of Habeas Corpus and accordingly, the writ application is dismissed;

(iii) In view of existence of a prima facie case, against the petitioner in the murder case and keeping in view the nature and gravity of the offence and the punishment thereof this Court is not inclined to allow him to go on bail and accordingly, the bail application of accused R. Jagdish Murty is rejected.

S.N. Phukan, C.J.

15. I agree.