(2016) 01 AHC CK 0121

In the Allahabad High Court

Case No : Criminal Misc. Writ Petition No. 3777 of 2012 and Application U/S 482 No. 20418 of 2012

Kamla Singh and Others — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Arms Act, 1959 — Section 27
Constitution of India, 1950 — Article 20, Article 21, Article 22, Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 156 (1), Section 156 (3), Section 173 (8), Section 482
Penal Code, 1860 (I

Citation : (2016) 01 AHC CK 0121

Hon'ble Judges : Om Prakash-VII, J.

Bench : Single Bench

Advocate : Ashok Kumar Singh, A.N. Singh, Anil Tiwari, Vinod Kumar Rai and Pradeep Kumar Rai, for the Appellant; Govt. Advocate, Ali Hasan, H.P. Singh and Yogesh Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Om Prakash-VII, J.—1. The aforesaid writ petition has been filed with the prayer to issue a writ, order or direction in the nature of certiorari quashing the order dated 16.2.2012 passed by the Chief Judicial Magistrate, Jaunpur in case crime No. 479 of 2010 (State v. Suresh and others) under sections 302, 307, 34 IPC and section 27 Arms Act, Police Station Maharajganj, District Jaunpur. Further prayer has been made to direct the respondent No. 2 to further investigate in the aforesaid case crime.

2. The aforesaid application under Section 482 Cr.P.C. has been filed with a prayer to quash the order dated 3.5.2012 passed by the Chief Judicial Magistrate, Jaunpur in criminal case No. 76 of 2011 (Sanjai Singh v. State of U.P.) arising out of crime No. 36 of 2011 under sections 147, 148, 149, 307, 323, 504, 506 IPC, Police Station Maharajganj, District Jaunpur. Further prayer has

been made to stay the effect and operation of the aforesaid order passed by the learned Magistrate.

3. The above writ petition and application under section 482 Cr.P.C. were connected vide order dated 16.9.2014 passed by this Court in application u/s. 482 No. - 20418 of 2012 and have been heard together at length, therefore, without discussing this fact whether writ/application is maintainable or not, both are being decided together on merit by a common judgment and order.

4. Heard learned counsel for the petitioners/applicants, learned counsel for the respondent No. 4/opposite party No. 2 and learned A.G.A. for the State in both the cases.

5. Submission of the learned counsel for the petitioner in respect of the above-mentioned writ petition is that the investigating officer conducted the investigation in biased manner against the petitioners and the charge-sheet was filed hurriedly because of undue pressure and illegal interference of the A.G.A. in the investigation. At this stage, learned counsel for the petitioners has referred to the annexures 27, 28 (letter dated 23.2.2011) & 29 appended with the writ petition. Further submission is that the investigating officer submitted charge-sheet without taking into consideration the report submitted by the Forensic Science Laboratory regarding the testing of the alleged revolver said to have been used in commission of the present offence. Medical expert report was also not considered which also clearly belies the use of the said revolver in the present offence. Investigating officer has also not made part of the case diary the above reports. It was next contended that the investigating officer while submitting the charge-sheet against the petitioners has also not taken into consideration the statements of the independent witnesses. Since charge-sheet was submitted due to undue strenuous pressure and illegal interference caused, therefore, it was necessary to direct the investigating officer to make further investigation, but the court concerned illegally rejected the application moved by the petitioners in this behalf. It was further submitted that the police reached at the place of occurrence at 10:30 A.M. as is clear from the G.D. Entry, whereas the F.I.R was lodged at 11:30 A.M. Therefore, F.I.R., said to have been lodged in the matter, is suspicious document. Copy of F.I.R. was sent after a gap of six days to the Magistrate concerned and there is major contradiction in the timing of preparation of the inquest report and other police papers. Said eyewitnesses have denied their presence at the time of preparation of Fard. They were planted later-on by the investigating officer in collusion with the informant. Panch witnesses have also denied their presence at the time of preparation of the inquest report, therefore, preparation of the inquest report at the time mentioned in it becomes doubtful. It has also come in the prosecution evidence itself that the dead body of the deceased Jitendra Singh alias Babbu was missing for about 8 hours and protest & agitation had also been made. Therefore, also preparation of the inquest report at the time mentioned in it itself becomes doubtful. At this stage, reference was given by the learned counsel for the

petitioners to the application moved before the District Magistrate by one Kailash Singh. Further submission is that there was no motive to commit the present offence against the petitioners. The said eyewitness accounts are also not actual eyewitnesses. They have been planted in the matter only to give colour to the case. It was further submitted that an F.I.R. at crime No. 36 of 2011 was lodged on behalf of one Sanjai Singh belonging to the petitioners'' side for the same transaction, but the investigating officer illegally submitted the final report within a period of six hours. Protest petition was also filed by the informant Sanjay Singh. The Magistrate concerned rejected the final report and directed the investigating officer for further investigation vide order dated 3.5.2012. Thus, referring to the papers annexed with the written submission, prayer was made to set-aside the order dated 16.2.2012 passed by the Chief Judicial Magistrate, Jaunpur.

6. Submission of the learned counsel for the applicants in respect of the aforesaid application under section 482 Cr.P.C. is that the investigating officer of crime No. 36 of 2011 without going through the legal position illegally submitted the final report hurriedly. The court concerned has rightly directed the investigating officer to make further investigation rejecting the final report.

7. In support of his contention, learned counsel for the petitioners has placed reliance on the following case laws :

"1. Babubhai Versus State of Gujarat & Others, , (2010) 12 Supreme Court Case 254.

2. Azija Begum Versus State of Maharashtra & Another, , (2012) 3 Supreme Court Cases 126.

3. Vinay Tyagi Versus Irshad Ali alias Deepak & Others, , (2013) 5 Supreme Court Cases 762"

8. While rebutting the arguments advanced by the learned counsel for the petitioners/applicants, learned A.G.A. as well as learned counsel for the complainant submitted that crime No. 479 of 2010 was registered on the information of the one Harish Chandra at concerned police station on the day of incident itself. There was sufficient evidence in the case diary for submission of the charge-sheet against the petitioners. No illegality or infirmity is found in submission of the charge-sheet. The court concerned has also rightly rejected the application moved by the petitioners for further investigation, as there was no need for further investigation. All the questions raised by the learned counsel for the petitioners have to be dealt with by the court dealing with the matter during trial and the issue raised by the petitioners will require leading of evidence, which cannot be done in a writ jurisdiction. It was next contended that lapses, said to have been made on the part of the investigating officer or contradictions said to have been occurred in the prosecution evidence are not sufficient at this stage to hold that no prima facie case is made out against the petitioners. Eye-account witnesses have clearly supported the case and that is

sufficient to hold a prima facie case for submission of the charge-sheet. Nothing wrong has been committed while rejecting the further investigation application by the Magistrate concerned. It was further submitted that police after making fair investigation has submitted charge-sheet, therefore, the version taken by the applicants in crime No. 36 of 2011 are false and the investigating officer has rightly submitted the final report. The court has wrongly rejected the final report and directed for further investigation.

9. I have considered the rival submissions made by learned counsel for the parties including the written submissions filed by the learned counsel for the petitioners as well as the case laws cited in support of their contentions and gone through the record carefully.

10. Before adverting to the submissions advanced by the learned counsel for the parties, I would refer to the factual aspect of the present matter.

11. The first information report was lodged at crime No. 479 of 2010 at police station concerned on 18.6.2010 at 11:30 A.M. regarding the offence said to have been committed on the same day at about 12:30 A.M. Place of occurrence was shown as village Majeethi on a joint family property. The allegations were that the petitioners were erecting boundary wall on the disputed land without obtaining any partition. When the informant and other family members objected, petitioner Smt. Kamla Singh took out the revolver from her house on the instigation of petitioner Suresh Singh and gave it to Suresh Singh, who, on the exhortation of Kamla Singh and Vinay Singh alias Pintu, opened fire from his revolver, which hit the deceased Jitendra alias Babbu, who died on the spot. Another F.I.R. was also lodged at crime No. 36 of 2011 on the basis of order passed by the Magistrate concerned at police station concerned on 23.1.2011 showing the date of offence as 18.6.2010 at 10:00 A.M. wherein the place of occurrence was shown as the frontal door of the informant. The allegations levelled in this F.I.R. were that the informant''s uncle Suresh Singh (petitioner) was erecting the boundary wall on his own land. The accused persons of this F.I.R. came there with deadly weapons i.e. firearms, lathi, danda, bhala etc. and objected him from constructing the wall and hurled abuses. They also threatened the labourers present there with dire consequences. When the informant reached at the place of occurrence hearing the noise, accused Kailash Singh opened fire from his gun, but the informant escaped unhurt. Again on the exhortation of accused Gyan Prakash, accused Rohit Singh opened fire from country made pistol, but the informant saved himself and the fire hit to Upendra alias Jitendra Singh alias Babbu Singh Son of Harish Chandra Singh, who was standing besides the informant. He received injuries and died on the spot. The informant could not go to the police station concerned to lodge the F.IR. due to fear of the accused-persons. He also could not medically examine his injuries on the same day. His medical examination was done on 21.6.2010 at Badlapur Hospital. An information was also given to the Superintendent of Police concerned through registered post, but no action was taken. Thereafter, an application under section

156 (3) Cr.P.C. was moved by the informant before the Magistrate concerned.

12. Perusal of the records clearly goes to show that in the F.I.R. of crime No. 479 of 2010, dispute arose when the petitioner Suresh Singh was constructing the boundary wall. As per informant, when they objected to the petitioners, they committed present offence causing death of Jitendra alias Babbu. The F.I.R. relating to crime No. 36 of 2011 discloses the same place of occurrence. Time of incident was only 30 minutes before, but the origin and genesis of the incident was same. The version taken in the F.I.R. of crime No. 36 of 2011 is that the informant''s side of crime No. 479 of 2010 opened fire upon the informant''s side of crime No. 36 of 2011 which hit to Jitendra alias Babbu. Meaning thereby, in both the F.I.R.s, place of occurrence and origin of the incident are almost same.

13. It is settled legal position that not only the fair trial, but fair investigation is also part of the constitutional rights carried under Article 20 and 21 of the Constitution of India. Therefore, investigation must be fair and transparent as it is the minimum requirement of rule of law. It is also well settled that the investigating agency can not be permitted to conduct the investigation in a tainted and biased manner. Possibility of fabrication of evidence must be ruled out. Thus, impartial conduct of the investigating officer shall be reflected during investigation.

14. In the case of Vinay Tyagi (supra), Hon''ble Apex Court has held as under :

"20. Having noticed the provisions and relevant part of the scheme of the Code, now we must examine the powers of the Court to direct investigation. Investigation can be ordered in varied forms and at different stages. Right at the initial stage of receiving the FIR or a complaint, the Court can direct investigation in accordance with the provisions of Section 156 (1) in exercise of its powers under Section 156 (3) of the Code. Investigation can be of the following kinds :

(i) Initial Investigation.

(ii) Further Investigation.

(iii) Fresh or de novo or re-investigation.

22. ''Further investigation'' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173 (8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a ''further investigation''. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as ''supplementary report''. ''Supplementary report'' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out

directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a ''reinvestigation'', ''fresh'' or ''de novo'' investigation.

23. However, in the case of a ''fresh investigation'', ''reinvestigation'' or ''de novo investigation'' there has to be a definite order of the court. The order of the Court unambiguously should state as to whether the previous investigation, for reasons to be recorded, is incapable of being acted upon. Neither the Investigating agency nor the Magistrate has any power to order or conduct ''fresh investigation''. This is primarily for the reason that it would be opposed to the scheme of the Code. It is essential that even an order of ''fresh''/''de novo'' investigation passed by the higher judiciary should always be coupled with a specific direction as to the fate of the investigation already conducted. The cases where such direction can be issued are few and far between. This is based upon a fundamental principle of our criminal jurisprudence which is that it is the right of a suspect or an accused to have a just and fair investigation and trial. This principle flows from the constitutional mandate contained in Articles 21 and 22 of the Constitution of India. Where the investigation ex facie is unfair, tainted, mala fide and smacks of foul play, the courts would set aside such an investigation and direct fresh or de novo investigation and, if necessary, even by another independent investigating agency. As already noticed, this is a power of wide plenitude and, therefore, has to be exercised sparingly. The principle of rarest of rare cases would squarely apply to such cases. Unless the unfairness of the investigation is such that it pricks the judicial conscience of the Court, the Court should be reluctant to interfere in such matters to the extent of quashing an investigation and directing a ''fresh investigation''.

24. In Manu Sharma v. State (NCT of Delhi) (SCC p. 80, para 199), the Court stated that it is not only the responsibility of the investigating agency, but also that of the courts to ensure that investigation is fair and does not in any way hamper the freedom of an individual except in accordance with law. An equally enforceable canon of the criminal law is that high responsibility lies upon the investigating agency not to conduct an investigation in a tainted or unfair manner. The investigation should not prima facie be indicative of a biased mind and every effort should be made to bring the guilty to law as nobody stands above law de hors his position and influence in the society. The maxim contra veritatem lex numquam aliquid permittit applies to exercise of powers by the courts while granting approval or declining to accept the report.

43. At this stage, we may also state another well-settled canon of criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct ''further investigation'', ''fresh'' or ''de novo'' and even ''reinvestigation''. ''Fresh'', ''de

novo'', and ''reinvestigation'' are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection.

45. The power to order/direct ''reinvestigation'' or ''de novo'' investigation falls in the domain of higher courts, that too in exceptional cases. If one examines the provisions of the Code, there is no specific provision for cancellation of the reports, except that the investigating agency can file a closure report (where according to the investigating agency, no offence is made out). Even such a report is subject to acceptance by the learned Magistrate who, in his wisdom, may or may not accept such a report. For valid reasons, the Court may, by declining to accept such a report, direct ''further investigation'', or even on the basis of the record of the case and the documents annexed thereto, summon the accused.

46. The Code does not contain any provision which deals with the court competent to direct ''fresh investigation'', the situation in which such investigation can be conducted, if at all, and finally the manner in which the report so obtained shall be dealt with. The superior courts can direct conduct of a ''fresh''/''de novo'' investigation, but unless it specifically directs that the report already prepared or the investigation so far conducted will not form part of the record of the case, such report would be deemed to be part of the record. Once it is part of the record, the learned Magistrate has no jurisdiction to exclude the same from the record of the case. In other words, but for a specific order by the superior court, the reports, whether a primary report or a report upon ''further investigation'' or a report upon ''fresh investigation'', shall have to be construed and read conjointly. Where there is a specific order made by the court for reasons like the investigation being entirely unfair, tainted, undesirable or being based upon no truth, the court would have to specifically direct that the investigation or proceedings so conducted shall stand cancelled and will not form part of the record for consideration by the Court of competent jurisdiction.

48. What ultimately is the aim or significance of the expression ''fair and proper investigation'' in criminal jurisprudence? It has a twin purpose. Firstly, the investigation must be unbiased, honest, just and in accordance with law. Secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication. Thus, it is inevitable for a court of law to pass a specific order as to the fate of the

investigation, which in its opinion is unfair, tainted and in violation of the settled principles of investigative canons."

15. Where the Court comes to the conclusion that there was a serious irregularities in the investigation that had taken place, the Court may direct a further investigation in the matter. It is also settled legal position that unless an extraordinary case of gross abuse of power by those in charge of the investigation is made out, the Court should be quite loathe to interfere with the investigation. In extraordinary circumstances, the Court in order to prevent the miscarriage of justice, if feels necessary, may direct for investigation de novo wherein the case presents extraordinary circumstances. Where non-interference of the Court would ultimately result in failure of justice, the Court must interfere.

16. Main issue, which has been raised by the learned counsel for the petitioners for consideration in the matter, is that whether the investigation done in crime No. 479 of 2010 is tainted, unfair and biased, whether charge-sheet filed against the petitioners was the result of the interference of the A.G.A., whether there is no any evidence to hold a prima facie case to take cognizance against the petitioners and proceed with the trial, whether the order dated 16.2.2012 passed by the Magistrate concerned rejecting the prayer for further investigation is illegal? It is also to be seen whether the direction given by the Magistrate concerned in crime No. 36 of 2011 rejecting the final report submitted by the investigating officer and directing for further investigation is also illegal.

17. At the outset, it is made clear that crime No. 36 of 2011 is the cross version of the case pertaining to crime No. 479 of 2010. So far as the submission raised by the learned counsel for the petitioners regarding undue pressure said to have been made by the learned A.G.A. by sending the letter dated 23.2.2011 to the investigating agency is concerned, nothing was found in the said letter which substantiate the submission of the learned counsel for the petitioners. From perusal of the evidence annexed with the record and the observation recorded by the court concerned while passing the order dated 16.2.2012, this Court is of the view that it cannot be said that charge-sheet was the result of the pressure built up by the A.G.A., who was representing the State in the said writ petition and has simply addressed the letter to the investigating agency to enable him to file counter affidavit in the matter.

18. Scrutinizing the entire evidence available on record permissible at this stage, it cannot be said that the charge-sheet in the matter was submitted without any evidence. There are sufficient evidence in the case diary of crime No. 479 of 2010 in support of the prosecution case. The two distinct version of the same incident can be appropriately dealt with by the trial court after collecting the evidence. The evidence available in support of the charge-sheet are sufficient to hold a prima facie case at this stage. The Magistrate concerned, while rejecting the prayer for further investigation made by the petitioner, has considered the entire facts raised by the petitioners and has scrutinized the evidence available on record. Whether any lapses were done on the part of the investigating

agency, FSL Report/Medical Expert Report have not been made part of the case diary can be considered by the trial court at appropriate stage after giving sufficient opportunity to the other side for explaining the same facts. Contradictions and other discrepancies elucidated by the learned counsel for the petitioners are also not of such nature which are sufficient to set-aside the order dated 16.2.2012. The witnesses, who have not supported the prosecution version, may be examined by the petitioners at appropriate stage to rebut the prosecution evidence.

19. So far as the direction for further investigation rejecting the final report in crime No. 36 of 2011 is concerned, that may also not be taken as an illegal order. Specific version has been taken, which also requires evidence and which may be the defences of the petitioners and the same cannot be out rightly thrown out. The learned Magistrate, while directing for further investigation in crime No. 36 of 2011, has not committed any mistake or illegality.

20. Grounds taken by the petitioners in Writ Petition are not sufficient to allow the writ petition by issuing a writ of certiorari quashing the order dated 16.2.2012. Therefore, Writ Petition, being devoid of merit, is accordingly dismissed. Observations here-in-above have been made only for the purpose to decide the issue involved in the matter. The court concerned shall proceed with the matter without being influenced with the observations recorded here-in-above.

21. Similarly, Application under section 482 Cr.P.C. also having no force is liable to be dismissed and it is also dismissed.

22. Stay order, if any, stands vacated.

