

(2007) 10 CAL CK 0015
In the Calcutta High Court
Case No : C.R.R. No. 2546 of 2005

Khirod Kumar Mahapatra

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 16-10-2007

Acts Referred:

Constitution of India, 1950 — Article 20(2)
Criminal Procedure Code, 1973 (CrPC) — Section 167(5), 173(2), 397, 482
Penal Code, 1860 (IPC) — Section 120B, 34, 409, 420, 468
Sea Customs Act, 1878 — Section 167(8)

Citation : (2008) 2 CHN 153

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : Milon Mukherjee, for the Appellant; Abhra Mukherjee, for O.P. No. 2 and Rabi Shankar Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Partha Sakha Datta, J.—By this application dated 30.7.2005 u/s 482 read with Section 397 of the Cr.PC quashing of the proceeding in Hura P.S. Case No. 19 of 2005 dated 30.07.2005 u/s 409/468/420/120B/34 of the IPC pending before the learned Chief Judicial Magistrate, Purulia Sadar along with the orders passed therein by the said learned Magistrate is prayed for on the grounds as would be found in the sequel.

2. One Ananda Mahato lodged an FIR with the Hura P.S. being FIR No. 19/05 dated 30.7.2005 against the petitioner and another Ashok Paik Choudhury (not the petitioner herein). Administrator of Kalibasa Junior High School and another Khagendranath Sahu (not the petitioner). Director of School Secondary Education, Purulia alleging the following.

3. The petitioner was appointed an Assistant Teacher of Kalibasa Junior High School on 2.1.1970 when his qualification was B.A. B.Ed. On 3.5.1970 the petitioner was appointed Headmaster of the school which was recognized upto

IInd class on 1.1.1971 and upto IVth class on 1.1.1974 and in terms of the qualification of the petitioner he was entitled to graduation scale. During the fixation of scale of pay as per ROPA-1981, the accused/petitioner submitted a marksheet of 1974 before the D.I of Schools claiming to have passed M.A examination and allegedly be entitled to a post-graduate scale of pay and thereafter in the year 1987 he placed a provisional certificate and both the documents were found forged on enquiry. Seeing the marksheet of Ranchi University the D.I of Schools passed an order sanctioning disbursement of the salary as per post-graduate scale of pay on and from April, 1981. Subsequently on enquiry from Ranchi University it was detected that the petitioner failed in M.A. Bengali 1974 examination and knowing that fact that he was an unsuccessful candidate in the M.A. examination in Bengali in 1974 of Ranchi University, he in collusion with the accused No. 3, D.I of Schools withdrew the marksheet and placed a provisional certificate in 1987 on 18.09.1987 before the said D.I of Schools. The matter was enquired into in consultation with the tabulation register of M.A. examination in Bengali held in November, 1974 and on detection it was revealed that the petitioner whose roll No. was 526 obtained only 239 marks and failed in the said examination. Again on further enquiry it revealed that the petitioner appeared in M.A. in Political Science of Ranchi University held in the month of September, 1981 but from the tabulation register it appeared that he did not sit in the examination On all papers and as such he failed in the said examination also. The provisional certificate of the petitioner submitted in 1987 showing himself to have passed in M.A. examination in Bengali was manipulated, tampered with and altered. The Administrator of the High School (accused No. 2) and the D.I. of the Schools (accused No. 3) were both informed of the matter but both of them turned a deaf ear. A mass deputation was also given in the year 2004 to the D.I of Schools but in vain. The D.I. of Schools being entrusted with the Government money and having dominion over the Government money committed breach of trust in collusion with the accused Nos. 1 and 2 by allowing the petitioner the post graduate scale of pay on and from April, 1981. Similarly, the accused No. 2, the Administrator of the school knowing fully well that the petitioner was not entitled to M.A. scale of pay permitted him to withdraw the salary in terms of post-graduate scale of pay. Accused No. 1 manufactured, manipulated and forged document for the purpose of drawing a scale of pay which he was not entitled to. On the basis of a forged provisional certificate showing him to have passed M.A. examination he dishonestly deceived the Government since 1981. It is further alleged that as first the petitioner in collusion with the accused No. 3 placed a forged marksheet in the year 1981 and obtained M.A. scale of pay since 1981 but when the marksheet was found to be forged he withdrew the marksheet and placed a new provisional certificate in the year 1987 thus drawing M.A. scale of pay.

4. Mr. Milon Mukherjee, learned Advocate appearing for the petitioner submitted that on the basis of self-same allegations of facts made by one Madam Mahato a case was registered against the petitioner and others being Hura P.S. Case No.

4/87 dated 10.12.1987 u/s 468/420/120B of the IPC and on the basis of the said FIR the petitioner was arrested on 11.12.1987 and was granted bail and then on 1.7.1992 the petitioner was discharged from the case. It is submitted by Mr. Mukherjee that by suppressing these facts one Ananda Mahato filed the instant case on the self-same allegations of facts on 25.07.2005 just before the day of the retirement of the petitioner falsely out of personal grudge. It is further submitted that as the petitioner's salary was not fixed in terms of the post-graduate pay scale by the Secretary and D.I. of Schools, Purulia the petitioner moved writ petition twice being No. CR No. 16014 (W)/ 84 and CO. No. 6647(W)/95 and upon hearing certain orders were passed on 30.4.1986 and 3.4.1997 directing release of the petitioner's pay and refixation taking into consideration of the post-graduate pay scale. Thus, Mr. Mukherjee submits that when once the accused was discharged from a case and his pay was fixed under the order of the Hon'ble High Court according to post-graduate scale of pay the second complaint on the self-same facts is not maintainable.

5. Mr. Abhra Mukherjee, learned Advocate appearing for the de facto complainant Ananda Mahato (O.P. No. 2 herein) submitted that it is not a case where an accused was discharged on the ground of having transpired no evidence against him in course of investigation of the case. It is not a case where an accused has been put in double jeopardy or that an accused is put to face trial twice for the same offence. According to Mr. Mukherjee, the petitioner failed to produce a scrap of paper refuting allegations made in the FIR that his provisional certificates or marksheets showing him to have passed in M.A. examination are not false. Mr. Mukherjee on behalf of the O.P. No. 2 submits that in the earlier case the accused was discharged u/s 167(5) of the Cr.PC, and not acquitted of the charge.

6. Mr. R.S. Chattejee, learned Advocate appearing for the State of West Bengal (O.P. No. 1) submits that had it been a case that pursuant to investigation, in the earlier case it could be revealed that the allegations against the petitioner of having committed forgery or manipulation in the matter of obtaining marksheet and provisional certificate showing him to have passed M.A. examination in Bengali of Ranchi University were not a true one then and then it could be said that the second FIR is not maintainable in law.

7. I have gone through the order dated 1.7.1992 which shows that on 20.1.1992 the accused filed an application u/s 167(5) Cr.PC praying for discharge and the learned Magistrate found that since the investigation was not completed within the prescribed period of time he discharged the accused from the case and released from bail bonds. No order could be revealed wherefrom it could appear that in the earlier case the allegations against the petitioner were not found to have not been substantiated. Mr. Mukherjee, learned Advocate for the petitioner draw my attention to the order dated 11.12.1987 which was made by the then learned SDJM in the earlier case and wherein it was observed by the learned Magistrate that the University of Ranchi declared the accused to have passed and

the accused did not have any access to the tabulation sheet. I have minutely gone through the order and found that this was an order of grant of bail and the learned Magistrate observed that whether the marksheet was manufactured or manipulated should be investigated and the accused could not suffer for irregularity. This order cannot be capitalized primarily because of the fact that at the very early stage when the accused appeared to secure bail within a day after registration of case against him in 1987 the learned Magistrate observed prematurely that if there was any irregularity it was the irregularity of the University officers. This order of the learned Magistrate when investigation had not yet started pursuant to the earlier FIR cannot be taken into consideration and had it been an observation on the basis of closure of investigation and on the basis of any material to the effect that the petitioner had no fault of his own or that he did not commit forgery then and then only the order could have carried any force. It was an order of grant of bail where the learned Magistrate said that since there was no possibility of the abscondance of the accused he should be granted bail. A person can be shown to have passed M.A. examination on the basis of bogus and fraudulent marksheet. Therefore whether the marksheet is false or genuine was the subject-matter of investigation and when investigation did not start at all the learned Magistrate was absolutely unjustified in making uncalled for and uncharitable remarks only when he was about to grant bail to the accused. Since the investigation in the earlier proceeding did not commence the learned, Magistrate was without any jurisdiction to comment that if any irregularity was committed it was committed by the University officials alone. As the investigation could not be completed within the prescribed period the accused obtained an order of discharge. Therefore, it is clear that truth was not revealed in investigation of the earlier FIR.

8. As to the two writ petitions referred to by the petitioner in the instant case before the Hon''ble Court there was no occasion on the part of the Hon''ble Court to adjudicate whether the petitioner submitted forged certificate or marksheet showing him to be an M.A. in Bengali or not and the writ petitions proceeded on the basis of averment of the petitioner that the petitioners is a post-graduate. Thus, the order in the writ petitions do not have any force insofar as the investigation into the criminal case relating to cheating, forgery, manipulation of marksheet and certificate are concerned.

9. Mr. Milon Mukherjee, learned Advocate appearing for the petitioner takes me to a decision of this Court in N.C. Nag Pal and Ors. v. State and Anr. as reported in 1979(2) CHN 198, to argue that in exercising the inherent power the scope of the Court is much more expansive in this that a Court can quash a proceeding for ends of justice or to prevent the abuse of the process of the Court and the Court can look into and rely upon materials which can be translated into admissible and relevant evidence. Mr. Mukherjee argued that continuation of the second proceedings, the first proceeding having been terminated by virtue of Section 167(5) of the Cr.PC, is certainly an abuse of the process of the Court and at this distant date it would be wholly unjust to allow the continuance of the second

proceeding on the self-same allegations of facts. Mr. Mukherjee argued that the initiation of the second proceeding was definitely actuated by mala fide intention and when a criminal proceeding is manifestly attended with mala fide or where the proceeding is maliciously instituted with an ulterior motive it should be quashed. In support of the submission I have been taken to the decision in State of Haryana and others Vs. Ch. Bhajan Lal and others, , wherein Their Lordship of the Hon"ble Supreme Court held that if a proceeding is the outcome of mala fide or malice and with ulterior motive it would be a ground for quashing of the same.

10. Learned Advocate for the State respondent refers to the decision in Nirmal Kanti Roy v. State of West Bengal 1998 C Cr. LR (SC) 216, to buttress the point that the provision of Section 167(5) of the Cr.PC is not to be treated with rigidity and it is not mandatory that on the expiry of the period indicated in the statute the Magistrate should necessarily pass the order of discharge of the accused and before ordering stoppage of investigation the Magistrate has to consider whether on the facts of the case further investigation would be necessary in the interest of criminal justice, and when substantial part of investigation was by then over the Magistrate should seriously ponder over the question whether it would be conducive to the interest of justice to stop further investigation and discharge the accused. This decision of the Hon"ble Supreme Court has been cited in support of the contention that an order of discharge u/s 167(5) of the Cr.PC does not attain finality in the matter of a prosecution because according to the learned Advocate for the State finality in a criminal proceeding is attained by a judgment and order of acquittal pursuant to a criminal prosecution and where there has been no prosecution at all and the case met its death only at the stage of investigation because of efflux of time it cannot be said that the investigation in the subsequent case, subject to the period of limitation, would be an abuse of the process of the Court provided the FIR does otherwise disclose a clear cognizable case. I am further taken to a decision in S.M. Datta Vs. State of Gujarat and Another, , where Their Lordships held that an FIR ought not to be thwarted at the initial stage if it discloses an offence and where he does not disclose an offence it is then only that investigation should not be permitted. I am further taken to the decision in M. Krishna v. State of Karnataka 1999 SCC 397, in support of the submission that there is no provision in the Cr.PC which debars the filing of an FIR and investigation into the alleged offences merely on the ground that for an earlier period there was an FIR which was duly investigated into culminating in a "B" form report which was accepted by a competent Court. It has also been observed that though the earlier period also could be a subject-matter of investigation for a variety of reasons like some assets not being taken into account or some materials brought during investigation not being taken into account, yet at the same time the result of the earlier investigation cannot be totally obliterated and ignored by the investigating agency. The case of M. Narayan Das v. State of Karnataka and Ors. 2004 SCC 118, ruled that complaint disclosing cognizable offence should not be quashed. This decision is based upon the decision in Bhajan Lal's case as cited above.

Learned Advocate for the O.P. No. 2 refers to a decision in *Durgesh Chandra Saha Vs. Bimal Chandra Saha and others*, , wherein it has been held by the Hon''ble Supreme Court that provisions of Section 167(5) of the Cr.PC providing for discharge of accused are applicable to cases when investigation is not completed within a specified time period and not applicable to cases of pendency of trial after completion of investigation.

11. Having gone through the decisions referred to above by the learned Advocates for the parties and having perused the FIR it does not appear to me at all that the FIR did not at all disclose any commission of cognizable offence. Offence alleged is very distinct in this that the accused without being an M.A. committed criminal breach of trust, cheating, and forgery and procured fake marksheet and fake provisional certificate from Ranchi University showing him to be an M.A. in Bengali although according to the complainant he only secured 239 marks in the subject. It is not possible to agree with Mr. Mukherjee, learned Counsel for the petitioner that the petition of complaint was actuated by malice or with mala fide intention. Simply because an earlier case was filed which had to be abandoned because of the technicality in the procedure it cannot be said that the present complaint is legally not tenable subject of course to the law of limitation which does not hit in the present case. In the *Bhajan Lal*'s case series of guidelines have been given which if read as a whole cannot lead the Court to hold that the proceeding is an abuse of the process of the Court. The decision in *M. Krishna* (supra) clearly held that existence of an earlier FIR culminating into a "B" Form Report, does not constitute any bar to investigation in the later FIR. In the instant case there was no submission of termination of the proceeding in the form of final report. The earlier case did not culminate with any finding of the police that no case could be made out. If the case had been so that the investigation into the earlier FIR revealed no prima facie case then and then only the quashing of the present FIR could have been a legitimate one. It is not a case that an accused has been put to double jeopardy for the same offence. In the decision in *Thomas Dana Vs. The State of Punjab*, , the five-Judge Bench of the Hon''ble Supreme Court was considering whether a proceeding before the Sea Custom Authority u/s 167(8) of the Sea Customs Act are not "prosecution" within the meaning of Article 20(2) of the Constitution and Their Lordships held that the mere fact that the Customs authorities confiscated the goods and inflicted a penalty on the persons does not bring into operation the provisions of Article 20(2) so as to prevent prosecution u/s 167(8) of the Act. Here in our case the accused was not prosecuted at all in the earlier case and he was discharged from the case by virtue of Section 167(5) of the Cr.PC which is distinguishable from an order or acquittal. In *Satish Chandra Mathur and Others Vs. State of Rajasthan*, , there was an earlier prosecution before the Special Judge wherein the accused was acquitted and proceedings dropped for want of valid sanction and His Lordship observed that fresh chargesheet filed after obtaining proper sanction for the same offence and on the same facts was not barred and this was held on the basis of decision of the Hon''ble Supreme Court *State of T.N. Vs.*

M.M. Rajendran, . In *Rajjab Ali Vs. The State*, , the Allahabad High Court held that the words "prosecuted and punished" are not to be taken distributively so as to mean prosecuted or punished and both the factors must co-exist so as to invoke Article 20(2) of the Constitution. Therefore, it cannot be said that discharge from the case u/s 167(5) of the Cr.PC in the earlier case has constituted any bar to investigation pursuant to an FIR, which is not hit by the law of limitation.

12. The law is clear that an order of discharge u/s 167(5) of the Cr.PC must not be automatic. It is not known whether the Id. Magistrate was alive to the decision of the Supreme Court in *Nirmal Kanti Roy v. State of West Bengal* 1998 C Cr. LR (SC) 216; *State of West Bengal v. Shakti Sadhan Majhi and Anr.* 1998 C Cr. LR (SC) 283; *State of West Bengal v. Falguni Dutta and Anr.* 1993 C Cr. LR (SC) 123. In the decision in *Falguni Dutta* it was held that when the investigation has been stopped on the expiry of six months or the extended period, if any, by the Magistrate in exercise of power conferred by Sub-section (5) of Section 167 of the Cr.PC the investigation comes to an end and, therefore on the completion of the investigation u/s 173(2) it enjoins upon the Officer-in-Charge of the police station to forward a report in the prescribed form. There is nothing in Sub-section (5) of the Section 167 to suggest that if the investigation has not been completed within the period allowed by that sub-section, the Officer-in-Charge of the P.S. will be absolved of the responsibility of filing the police report u/s 173(2) of the Cr.PC on the stoppage of the investigation. It has further been held that the investigation done within the period of six months from the date of arrest of the accused is not rendered invalid merely because the investigation is not completed and further investigation is stopped. In *State of West Bengal v. Shakti Sadhan Majhi and Anr.* (supra) the decision in *Falguni Dutta*'s case was reiterated. In *Nirmal Kanti Roy v. State of West Bengal* (supra) it has been held that the order stopping further investigation into the offence and consequently order of discharge are not intended to be automatic sequel to the failure to complete the investigation within the period fixed in the sub-section. It has been held also that the succeeding words in the Sub-section confer power on the Court to refrain from stoppage of such investigation if the investigation officer satisfies the Magistrate of the fusion of two premises (1) that in the interest of justice it is necessary to proceed with the investigation beyond the period shown in the Sub-section and (2) that there are special reasons to do so.

13. Therefore it was within the scope of the Id. Magistrate to take cognizance of offence if on perusal of case diary it would have reflected that the material so far collected within the statutory period were sufficient to hold that the prima facie case was found out with respect to the charges alleged in the petition of the complaint/FIR. The Id. Magistrate did not make any exercise to that effect and this necessitated in filing an FIR by another person alleging the same fact and when it appears that facts alleged clearly disclosed a commission of cognisable offence this Court in exercise of revisional jurisdiction u/s 482 of the Cr.PC must not thwart investigation and quash the proceeding.

14. Accordingly, I dismiss the revisional application.
15. A copy of the order shall be sent to the learned CJM, Purulia for information and necessary action.
16. Urgent xerox certified copy shall be provided if applied for.