
(1999) 10 GAU CK 0005
In the Gauhati High Court
Case No : Writ Petition (C) No. 4918 of 1999

Mantu Kalita

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 07-10-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 164

Citation : (2000) 1 GLT 96

Hon'ble Judges : D.N. Chowdhury, J

Bench : Single Bench

Advocate : N. Zaman, B.D. Konwar and J. Konwar, for the Appellant; G.A., for the Respondent

Judgement

D.N. Chowdhury, J.—Heard Mr. BD Konwar, the learned Counsel for the Petitioner and also heard Mr. P. Pathak, the learned Addl. Advocate General of Assam assisted by Mr. C. Choudhury, the learned Govt. Advocate.

2. The issue raised in this petition pertains to investigation of a criminal case. The Petitioner is the younger brother of the victim/informant Sri Ananta Kalita who lodged an FIR on 19.9.99 before the Officer-in-charge, Basistha Police Station. According to the informant, on 16.9.99 at about 2.00 a.m. in the night while he was sleeping at his residence, a group of about 10/12 armed persons came in a Maruti Gypsy and a Tata Sumo forcefully took away the informant and he was kept confined at 13th Battalion camp, Kahilipara and was physically tortured. On 18th at about 12.00 in the mid-night the group of armed personnel took the informant to Jorabat Police Station in the said vehicle and keeping him tied in the vehicle the group of persons stayed at the police station for some time and again took him to the top of the mountain. At the same time another group of armed personnel was already waiting there while his hands were tied, the informant was taken out from the vehicle and made to stand at the edge of the mountain and a small weapon was placed at his head and taking one step

backwards he was shot at his head and thrown from the mountain. The informant was seriously injured and became unconscious. In the early morning on regarding his consciousness drenched with blood with great difficulty the informant/victim climbed from below the mountain and reached the main road and on getting an Auto rickshaw and travelling on it he reached the District Office of Yuba Chatra Parishad. Thereafter, the workers of the Parishad admitted him to the GMC Hospital and on referral he was shifted to Gauhati Neurological Centre, Dispur. The informant is able to identify the persons involved in the aforesaid incident. In the FIR being Basistha P.S. Case No. 224/99 the informant made a prayer to the Officer-in-charge to investigate and take appropriate steps and also requested him to record his statements by a Magistrate immediately.

3. The Petitioner moved the Court for a direction for examining the informant u/s 164 of the Code of Criminal Procedure by a Magistrate. On receipt of this application, I called upon the learned Govt. Advocate to peruse the Case Diary alongwith the report of the investigation. Accordingly, the matter was placed before me which shows that the investigation is going on. The learned Govt. Advocate has also produced medical report by the concerned Medical Officer showing progress of the health condition of informant. Mr. P. Pathak, learned Addl. Advocate General submits that the investigation agency is going ahead with the investigation and the informant is undergoing due treatment at the Down Town Hospital and he has also been given necessary police protection. Mr. Pathak has also submitted that the power of examination is vested on the authority prescribed by the Code of Criminal Procedure, namely, on any Metropolitan Magistrate or Judicial Magistrate. Since the power is vested on the concerned authority, for fitness of things it was always open for any witness for the complainant to request the concerned Magistrate for his examination. Mr. Pathak has also questioned the bonafide of the Petitioner.

4. The matter pertains to the area of investigation of a criminal offence regulated by the procedural code of the land. In view of the nature of the question that was posed before me, I called for the assistance of Mr. R. Gogoi, the learned Sr. Advocate, who was present in me court and rendered legal aid ungrudgingly.

5. Mr. Konwar, the learned Counsel for the Petitioner referred to the background of the offence wherein the State police personnel were also implicated. He has also pointed out that the informant had undergone a major surgical operation and the condition of the informant is not beyond danger and, therefore, prompt steps ought to have been taken by the police for recording the statement of the informant Under-section 164 Code of Criminal Procedure by a Judicial Magistrate in the context of a fair trial. Mr. Konwar has also submitted that it was mandatory on the part of the police agency to take steps for recording the statement of the informant. Mr. P Pathak the learned Addl Advocate General has strenuously opposed the plea as mentioned earlier. Mr. Gogoi, the learned Sr Advocate appearing as an Amicus Curiea has submitted that the recording of statement of an witness Under-Section 164 Code of Criminal Procedure by the Magistrate is

discretionary wherein the learned Magistrate exercises Judicial discretion. The power is that of the Judicial Magistrate. The Magistrate may exercise discretion even at the instance of a witness for recording his statement. When in the stage of investigation it is always open for a police officer to request the Magistrate to record the statement of the witness Under-Section 164 Code of Criminal Procedure and such requests are not to be turned down by the Magistrate. Mr. Gogoi submits that the similar discretion may be exercised, but the Magistrate has a wide discretion when a similar request was made from a person other than the investigating agency. Mr. Gogoi, in support of his contention, referred to a Single Bench decision of the Madras High Court in. In Re: C.W. Casse, . The Code of Criminal Procedure enjoying the responsibility of recording of confessional statement from any Metropolitan or Judicial Magistrate whether or not he has jurisdiction in the case to record such statement made to him in course of an investigation under Chapter-XJJ of the Code or under any other law for the time being in force or any time afterwards before the commencement of the enquiry or trial. The Magistrate concerned is required to exercise the jurisdiction with foil responsibility to advance the cause of justice, the power though wide in nature, is not arbitrary. The discretion is a sign of discernment of what is right and wrong between the shadows and me substances. It is not the whim of an individual person, the officer concerned to exercise judicial discretion whenever an application is made for recording statement by any police officer making investigation. The Magistrate concerned is required to record such statement to aid the course of investigation and what will be the effect of the statement will be taken care of at the time of trial. Similarly, it is also open for an witness to move before the Magistrate for recording its statement, the said application is not necessarily made by the police alone. The entire object is for an effective investigation, there may be a situation where the investigating agency may avoid such recording. If such a request is made it is for the Magistrate to examine the matter and record his statement if he finds that it will be likely to assist in the proper investigation/enquiry of the case. The discretion in second case is wider than the first instance when the application is made by the investigating agency, but as indicated earlier, the exercise of discretion is to be made lawfully keeping in mind the interest of justice. The fundamental purpose of law is to conserve the safety of the inhabitants and the law and order machinery well on the courts on required reportar discharge responsibility when the Magistrate will exercise discretion in a given situation it will depend on the facts and situation. In the case in hand it appears from the case diary that the investigating agency already recorded the statement of the witnesses. The investigating agency also put a note about the requirement of recording the statement of the informant in his C/ D.

6. Mr. Pathak, however, has stated that the informant is recovering in the hospital and not under the custody of the police. On examination of materials on record, Mr. Konwar has submitted that the power under Article 226 is wide in nature and this Court, in view of the facts and circumstances is required to issue

a direction on the Chief Judicial Magistrate, Kamrup to take steps in recording the statement of Shri Ananta Kalita. The power to issue writ under Article 226 is plenary" in nature. It is no doubt true this Article 226 is not inhabited by any provision of the Constitution. The greater the power the greater is the responsibility and for this reason alternative remedy does not impede in exercise of the power, but the courts in India, on its own impose restraint on itself. Alternative remedy in the following three situations shall not bar for exercise power under Article 226 of the Constitution of India and they are as follows:

- (1) Where a writ petition has been filed for enforcement of any of the fundamental right guaranteed under part-in of the Constitution;
- (2) Where there has been violation of the principles of natural justice; and
- (3) or where the order or the proceeding are wholly without jurisdiction.

7. In the circumstances, no other compelling reasons or reasons are also discernible for exercising the extra-ordinary power of this Court in the facts and situation. In the circumstances, it will, however, be open for the first informant to move the learned Chief Judicial Magistrate concerned by way of proper application for recording a statement Under- Section 164 Code of Criminal Procedure and in such eventuality, the teamed Chief Judicial Magistrate, Kamrup shall undoubtedly take necessary action as per law and alluded earlier. The object of recording the statement of a witness is to assist the investigating and to render justice between the parties. In the event of such application is made, the learned CJM, Kamrup shall undoubtedly take necessary steps in the light of the observations made above and take appropriate steps as per law.

8. Subject to the observations made above, the writ petition stands disposed of.