

(2016) 05 CAL CK 0089
In the Calcutta High Court
Case No : C.R.R. 4296 of 2015.

**Montu Mondal - Petitioner @HASH State of West Bengal and Others -
Opposite Parties**

Date of Decision : 13-05-2016

Acts Referred:

Arms Act, 1959 — Section 25(i)(a), Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 120B, Section 302, Section 34

Citation : (2016) 4 CalCriLR 36

Hon'ble Judges : Joymalya Bagchi, J.

Bench : Single Bench

Advocate : Mr. Debasis Roy and Mr. Anindya Ghosh, Advocates, for the Petitioner; Mr. Kallol Mondal, Mr. Krishan Ray and Ms. Amrita Chel, Advocates, for the Opposite Party Nos. 12 to 16; Mr. Anand Kesari, Advocate, for the State

Final Decision : Disposed Off

Judgement

Joymalya Bagchi, J. - Order dated 18th December, 2015 passed by the learned Additional Chief Judicial Magistrate, Chanchal, Malda in connection with G.R. Case No. 1256 of 2015 arising out of Harishchandrapur Police Station Case No. 525 of 2015 dated 23rd August, 2015 under Sections 302/120B/34 of the Indian Penal Code read with Sections 25(i)(a)/27 of the Arms Act refusing prayer for fresh investigation has been assailed.

2. F.I.R. was lodged by the petitioner, inter alia, alleging that the opposite party nos. 2 to 11 were trying to dispossess him and his family members from the land in question and had been resorting to various unlawful and criminal activities. Series of criminal cases had been registered against the said miscreants over this issue in the past. It has further been alleged that on 23rd January, 2015 around 9/10 A.M. wife of the de-facto complainant found that the mother of the victim was lying in an injured condition in the house with gun shot injury. It is further alleged that opposite party nos. 2 and 3 had demanded six lakhs of rupees in connection with the land but he had refused the same. He suspected that the opposite party nos. 2 to 11 herein in conspiracy and collusion with each other

had committed the murder of his mother who was residing in the said property. Investigation commenced in the matter and one of the F.I.R. named accused persons namely, opposite party no.11 was arrested in connection with the case. It has been submitted that prayers for bail of opposite party no.11 were repeatedly rejected by the learned Magistrate, inter alia, observing that there is sufficient material in the case diary implicating him. In the course of investigation involvement of other accused persons namely, opposite party nos. 12 to 16 transpired and they were also arrested. In conclusion of investigation, however, charge-sheet was filed only against opposite party nos. 12 to 16 and a prayer for discharge was made in respect of the F.I.R. named accused persons namely, opposite party nos. 2 to 11 herein on the ground of insufficient evidence. The petitioner filed an application for reinvestigation which was turned down by the learned Magistrate vide impugned order dated 18th December, 2015. Hence, the present petition has been filed.

3. Mr. Debasis Roy, learned advocate appearing for the petitioner submitted that there is clear indication as to the motive of the opposite party nos. 2 to 12 to evict the petitioner and his family members from the property and the murder was committed as a sequel to such motive. He further submitted that the orders passed by the learned Magistrate in the midst of investigation belied the fact that there is no material against the discharged accused persons. He submitted that the investigation was not conducted in a fair manner and it was fashioned to shield the real offenders from prosecution. He accordingly, prayed for reinvestigation by a superior investigating agency. He relied on *Vinay Tyagi v. Irshad Ali @ Deepak & Ors.* reported in (2013) 4 SCC (Cri) 557.

4. On the other hand, Mr. Anand Kesari, learned advocate appearing for the State produced the case diary. He submitted that no material could be collected against the F.I.R. named accused persons and accordingly, prayer was made for discharge.

5. On the earlier occasion I directed the Officer-in-charge, Harishchandrapur Police Station and the Investigating Officer to be personally present as I was unable upon perusal of the case diary to understand under what circumstance the F.I.R. named accused persons were discharged. Pursuant to such direction, the police officers are present in court today.

6. Mr. Kallol Mondal, learned advocate, appearing for the opposite party nos. 12 to 16, who have been arrayed as accused persons in the charge-sheet, submits that his clients have been falsely implicated while the real offenders have been given a reprieve.

7. Nobody appears on behalf of the opposite party nos. 2 to 11.

8. I have considered the materials collected in the course of investigation in the light of the aforesaid submissions. It is true that in an offence of murder it is not always imperative for the investigating agency to establish the motive of the crime. However, when offences are sought to be proved through circumstantial

evidence as in the present case, motive of commission of offence becomes of substantial importance. F.I.R. in the instant case was lodged essentially on the basis of strong suspicion against the opposite party nos. 2 to 11 as to their involvement in the commission of murder of the victim as the victim and her family members were residing in the property which was sought to be rested out of their possession by the said F.I.R. named accused persons. They had been misbehaving with the family of the victim for long and repeated reports were lodged against their terror and unlawful behaviour at the police station even resulting in earlier registration of criminal cases. Suddenly, the victim was found murdered by gun shot injury at her residence. This being the backdrop of commencement of investigation, it was imperative on the investigating agency to examine the allegation of motive which was the foundation of implication of the opposite party nos. 2 to 11 herein in the crime. I do not find any endeavour on the part of the investigating agency to conduct the investigation from that angle and explore the truthfulness or otherwise of such allegation against the opposite party nos. 2 to 11 herein.

9. In course of investigation, however, the opposite party nos. 12 to 16 herein have been implicated on the basis of circumstantial evidence as it is alleged that they were last seen together with the victim and recoveries were also effected at their behest. I do not wish to go into the truthfulness of the prosecution case so far as the said opposite party nos. 12 to 16 are concerned. However, it is strange as to why the opposite party nos. 12 to 16 will indulge in the commission of murder of a hapless widow until and unless they have been prompted by some greater motivating force from behind to commit such crime. It is also a mystery as to how the final report praying for discharge was filed against opposite party nos. 2 to 11 herein, when prayers for bail of at least one of them, i.e. opposite party no.11 was repeatedly rejected by the court below observing there was sufficient materials against him. Motive as to the commission of crime being eloquent in the F.I.R., it was essential for the investigating agency to address itself to that question and conduct the investigation. Failure to do so discloses a clear dereliction on the part of the investigating agency and also betrays inexplicable bias in favour of the discharged accused persons. Conduct of the investigating agency particularly, in grave offences like murder etc. requires to be above board and bona fide and any shadow of doubt in that regard not only puts a blot on the investigation itself but erodes the very foundation of faith and reliability in the administration of criminal justice which in a constitutional democracy as ours is vested in the sovereign authority of the State. It is imperative in these circumstances that the Court as the last bastion for protection of rights for individuals stand up to the occasion and take remedial measures.

10. Reliance has been placed on the decision of the Apex Court in the case of Vinay Tyagi v. Irshad Ali @ Deepak & Ors. (Supra) wherein the Apex Court, inter alia, held that if the earlier investigation appears to be vitiated with dishonesty and fraud, it is necessary to clean the slate and commence reinvestigation

afresh. Reference may be profitably made to paragraphs 43, 44, 45 & 46, which are quoted hereunder :-

"43. At this stage, we may also state another well-settled canon of the 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.

44. We have deliberated at some length on the issue that the powers of the High Court under Section 482 of the Code do not control or limit, directly or impliedly, the width of the power of the Magistrate under Section 228 of the Code. Wherever a charge-sheet has been submitted to the court, even this Court ordinarily would not reopen the investigation, especially by entrusting the same to a specialised agency. It can safely be stated and concluded that in an appropriate case, when the Court feels that the investigation by the police authorities is not in the proper direction and that in order to do complete justice and where the facts of the case demand, it is always open to the Court to hand over the investigation to a specialised agency. These principles have been reiterated with approval in the judgments of this Court in *Disha v. State of Gujarat*, *Vineet Narain v. Union of India*, *Union of India v. Sushil Kumar Modi* and *Rubabbuddin Sheikh v. State of Gujarat*.

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."

11. Fair and complete investigation is a prerequisite for a fair trial and it is the paramount duty of all courts, particularly constitutional Courts, to ensure the same by issuing appropriate direction for further investigation, reinvestigation etc.

12. In *Dharam Pal v. State of Haryana & Ors.* [AIR 2016 SC 618], the Apex Court held :-

"20. Be it noted here that the constitutional courts can direct for further investigation or investigation by some other investigating agency. The purpose is, there has to be a fair investigation and a fair trial. The fair trial may be quite difficult unless there is a fair investigation. We are absolutely conscious that direction for further investigation by another agency has to be very sparingly issued but the facts depicted in this case compel us to exercise the said power???."

13. The Court further held such power is not eclipsed and may be exercised in deserving case even after commencement of trial :-

"21. We may further elucidate. The power to order fresh, de-novo or re-investigation being vested with the Constitutional Courts, the commencement of a trial and examination of some witnesses cannot be an absolute impediment for exercising the said constitutional power which is meant to ensure a fair and just investigation. It can never be forgotten that as the great ocean has only one test, the test of salt, so does justice has one flavour, the flavour of answering to the distress of the people without any discrimination. We may hasten to add that the democratic setup has the potentiality of ruination if a citizen feels, the truth uttered by a poor man is seldom listened to. Not for nothing it has been said that Sun rises and Sun sets, light and darkness, winter and spring come and go, even the course of time is playful but truth remains and sparkles when justice is done. It is the bounden duty of a Court of law to uphold the truth and truth means absence of deceit, absence of fraud and in a criminal investigation a real and fair investigation, not an investigation that reveals itself as a sham one. It is not acceptable. It has to be kept uppermost in mind that impartial and truthful investigation is imperative. If there is indentation or concavity in the investigation, can the "faith" in investigation be regarded as the gospel truth? Will it have the sanctity or the purity of a genuine investigation? If a grave suspicion arises with regard to the investigation, should a Constitutional Court

close its hands and accept the proposition that as the trial has commenced, the matter is beyond it? That is the "tour de force" of the prosecution and if we allow ourselves to say so it has become "id" ee fixe" but in our view the imperium of the Constitutional Courts cannot be stifled or smothered by bon mot or polemic. Of course, the suspicion must have some sort of base and foundation and not a figment of one's wild imagination. One may think an impartial investigation would be a nostrum but not doing so would be like playing possum. As has been stated earlier facts are self-evident and the grieved protagonist, a person belonging to the lower strata. He should not harbour the feeling that he is an "orphan under law".

14. Similar view is expressed in *Pooja Pal v. Union of India & Ors.* [AIR 2016 SC 1345] where the Court held :-

"76. A "speedy trial", albeit the essence of the fundamental right to life entrenched in the Article 21 of the Constitution of India has a companion in concept in "fair trial", both being in alienable constituents of an adjudicative process, to culminate in a judicial decision by a court of law as the final arbiter. There is indeed a qualitative difference between right to speedy trial and fair trial so much so that denial of the former by itself would not be prejudicial to the accused, when pitted against the imperative of fair trial. As fundamentally, justice not only has to be done but also must appear to have been done, the residuary jurisdiction of a court to direct further investigation or reinvestigation by any impartial agency, probe by the State police notwithstanding, has to be essentially invoked if the statutory agency already in-charge of the investigation appears to have been ineffective or is presumed or inferred to be not being able to discharge its functions fairly, meaningfully and fructuously. As the cause of justice has to reign supreme, a court of law cannot reduce itself to be a resigned and a helpless spectator and with the foreseen consequences apparently unjust, in the face of a faulty investigation, meekly complete the formalities to record a foregone conclusion. Justice then would become a casualty. Though a court's satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for further investigation or reinvestigation, submission of the charge-sheet ipso facto or the pendency of the trial can by no means be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analysed to decide the needfulness of further investigation or reinvestigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the court of law is to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency.

77. As every social order is governed by the rule of law, the justice dispensing system cannot afford any compromise in the discharge of its sanctified role of administering justice on the basis of the real facts and in accordance with law. This is indispensable, in order to retain and stabilise the faith and confidence of

the public in general in the justice delivery institutions as envisioned by the Constitution."

15. It is, therefore, no longer *res integra* that powers subsist in the courts particularly, the superior courts to direct further investigation, reinvestigation in appropriate cases notwithstanding submission of charge-sheet and even commencement of trial. In the aforesaid factual matrix which display a dismal manner of investigation and complete absence of effective enquiry on the issue as to the involvement of the opposite party nos. 2 to 11 who had immediately prior to the incident exhibited severe hostility to the victim and his family by resorting to unlawful and criminal measures in seeking to evict them from their own property, it is imperative that appropriate orders for further investigation of the case may be made and that to by a superior investigating agency.

16. Although there are severe and gross lapses of investigation in this case, in my view, it is not a fit case to completely erase out the earlier investigation and direct reinvestigation particularly when materials have been collected in the course of the earlier investigation implicating opposite party nos.12 to 16 in the crime, of which veracity cannot be conclusively ascertained at this stage.

17. Under such circumstances, I direct further investigation of the case to be conducted by a competent officer attached to the Criminal Investigation Department, State of West Bengal not below the rank of Deputy Superintendent of Police who shall be assigned with such duty by the Additional Director General of Police (Crime). The further investigation so conducted shall also be supervised by the latter authority. Report of such investigation shall be filed before the learned Magistrate promptly and in accordance with law.

18. I observe that in course of further investigation all the lapses/lacunae noted by me in the order shall be taken into consideration and fair and effective investigation be conducted in the matter so as to instill confidence in the minds of the victims of crime. I further observe that in the course of such further investigation it is desirable that statements of the de-facto complainant and other important witnesses be recorded under Section 164 of the Code of Criminal Procedure as it has been complained before me that their versions had not been honestly and truthfully recorded in the course of earlier investigation.

19. With the aforesaid directions, the petition is disposed of.

20. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.