
(1974) 09 CAL CK 0019
In the Calcutta High Court
Case No : Criminal Revision No. 552 of 1974

Nirmal Bose

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 18-09-1974

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 155(2), 190(1), 251A(3), 441
Penal Code, 1860 (IPC) — Section 120B, 384, 420

Citation : (1976) 2 ILR (Cal) 353

Hon'ble Judges : N.C. Talukdar, J;A.N. Banerjee, J

Bench : Division Bench

Advocate : Samarendra Kumar Dutta, Pramatha Nath Palit and Alope Nath Ghosh, for the Appellant;Rafiqul Ismail, for the Respondent

Final Decision : Allowed

Judgement

N.C. Talukdar, J.—This Rule is at the instance of the three accused Petitioners, Nirmal Bose alias Malay Bose, Biswanath Chattopadhyaya and Dwarka Prosad Maheswari, directed against order, being order No. 13 dated January 4, 1974, passed by the learned Chief Presidency Magistrate, Calcutta, issuing summons against the accused Nos. 1, 2 and 3 and order dated May 16, 1974, passed by Shri A.K. Dasgupta, Metropolitan Magistrate, Thirteenth Court, Calcutta, framing charge u/s 420, Indian Penal Code, against the accused Petitioners in case No. G.R. 32 of 1974.

2. For the purpose of a consideration of the point involved in the present Rule the facts need not be set down in details. An F.I.A. was lodged on November 24, 1972, at the Park Street P.S. by one Santi Goenka against four named accused persons including the present three accused Petitioners as well as three other unnamed accused alleging, inter alia, that following an advertisement in the Statesman for selling one hydraulic press machine, he was approached for being the machine by a person introducing himself as a representative of National

Commercial Corporation, Calcutta and following some old gambling on November 23, 1972, the informant was forced to pay Rs. 11,500 and the accused persons took him in writing that Rs. 8,500 was due and he was asked to pay the same on November 24, 1972. On the basis of the said F.I.R. the three accused persons were arrested but they were discharged by the learned Chief Presidency Magistrate, Calcutta, on September 28, 1973, as the Police did not submit any charge-sheet. On January 4, 1974, a challan was submitted against the three accused persons u/s 384, Indian Penal Code and the learned Chief Presidency Magistrate by his order of the same date issued summons against them. The matter thereafter proceeded and ultimately on May 16, 1974, on a consideration of the materials, the learned Metropolitan Magistrate, Thirteenth Court, Calcutta, to whom the matter was transferred, framed a charge u/s 420, Indian Penal Code, against them. The order dated January 4, 1974, summoning the accused persons by the learned Chief Presidency Magistrate, Calcutta, as well as the order dated May 16, 1974, framing a charge u/s 420, Indian Penal Code, against the accused Petitioners had been impugned and the present Rule was obtained.

2. Mr. Samarendra Kumar Dutta, Advocate (with Mr. Pramatha Nath Palit and Alope Nath Ghosh, Advocates) appearing in support of the Rule, made a two-fold submission, vastly, that the investigation made by the Police into a non-cognizable offence without the requisite order of the learned Magistrate, having power to try such cases, has been bad and repugnant (sic) ultimate challan u/s 384, Indian Penal Code and the cognizance taken thereupon. The second dimension of Mr. Dutta's contention is that the charge framed u/s 420, Indian Penal Code, is also bad because no hearing was given by the learned Magistrate before framing the charge in violation of Section 251A(3), Code of Criminal Procedure. Mr. Md. Refiquel Ismail, Advocate, appearing on behalf of the State joined issue. Mr. Ismail contended in the first instance that the offence alleged being under Sections 120B/420, Indian Penal Code, there has been no non-conformance to Section 155(2) of the Code of Criminal Procedure and that the ultimate cognizance has also not caused any prejudice in the facts and circumstances of the case. Mr. Ismail next contended that the objection relating to the denial of any hearing-is more technical than real inasmuch as the charge was read over and explained to the accused persons who appeared to have understood the same and pleaded not guilty.

3. Having heard the learned Advocates appearing on behalf of the respective parties and on going through the materials on record, we hold that there is a considerable force behind both the submissions made by Mr. Dutta. In the first place, the offences alleged substantially make out a case of extortion and thereby the case concerned is a non-cognizable one. u/s 155(2) of the Code of Criminal Procedure no Police officer can investigate a non-cognizable case without the requisite order of the Court. Mr. Ismail at one stage contended that in the beginning the case was not non-cognizable and therefore, the investigation as made had not been bad. Apart from the clear allegations of a non-cognizable offence, when the material crystalised into an offence u/s 384 of the Penal Code

it was the duty of the Investigating officer to apply for the requisite order u/s 155(2), Code of Criminal Procedure. It should not be overlooked that the backdrop of the present case is under the old Code and not the new Code whereunder an offence u/s 384, Indian Penal Code has been made cognizable. It has also to be taken into consideration that the cognizance taken on such a challan is bad. A reference in this context was made by Mr. Dutta to the case of Abdul Halim and Another Vs. State of West Bengal, . J.P. Mitter J. observed therein that

in the absence of a valid order u/s A 155(2) Code of Criminal Procedure the investigation by the Police of a non-cognizable offence is illegal. The Police report of such an investigation cannot form the basis for taking cognizance u/s 190(1) of the Code. We respectfully agree with and applying the said principles to the facts of the present case, we hold that the procedure adopted has been bad and there is a non-conformance to the relevant provisions of the statute. The first dimension of Mr. Dutta's contention, accordingly, succeeds.

4. Mr. Dutta stands even on a firmer footing as regards the second branch of his submission relating to the absence of any hearing before framing the charge. The averment has been made clearly and specifically in the petition on which the present Rule was issued and in the cause shown by the learned Metropolitan Magistrate there is no reference to the same. The cause is to the effect that he has nothing to show cause and that the record will speak for itself. We have given our anxious consideration to the records to find any indication as to whether there was any hearing and we could not find any. u/s 441, Code of Criminal Procedure, the statement by the Presidency Magistrate of the grounds of his decision are considered by the High Court as part of the judgment. But unfortunately, however, there is no such statement and the averments made in this context on behalf of the accused Petitioners must prevail. The right of hearing is a valuable right and any denial thereof amounts to a denial of justice effecting thereby the ultimate order passed. This is a part in considering the principles of natural justice. Mr. Ismail submitted that there is no question of any prejudice on ultimate analysis sticks out for miles because the accused in a criminal case before the charges are framed should be given a hearing as otherwise the order would stand vitiated. A failure on the part of the learned Metropolitan Magistrate to have done so, in our view, has resulted in a non-conformance to the provisions of law and has resulted in a failure of justice.

5. This is not all. The point at issue may also be approached from another standpoint, viz. a non-conformance to the procedure established by law. The point also assumed further importance in view of the passing of the Constitution and the provisions of Article 21 of the Constitution of India. In the well-known case of Taylor v. Taylor (1876) 1 Ch. D. 426 (431) Jessel M.R. observed that

when a statutory power is conferred for the first time upon a Court and the mode of exercising it is pointed out, it means that no other mode is to be adopted.

The said principles were approved of and applied by their Lordships of the Judicial Committee in the case of Nazir Ahmed v. The King Emperor L.R. IndAp 372 (381, 382). Lord Roche, delivering the judgment of the judicial Committee, observed that

the rule which applies is a different and not less well-recognized rule, viz that there a power is given to a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

Without multiplying the cases a reference may be made to a later decision of the Supreme Court which reiterated the said principles once again, viz., the case of State of Uttar Pradesh Vs. Singhara Singh and Others, A.K. Sarkar J. (as his Lordship then was) delivering the judgment of the Court observed that

the rule adopted in Taylor v. Taylor, (1876) 1 Ch. D. 426, is well-recognised and is founded on sound principle.

6. We respectfully agree with the said observations and hold that the procedure adopted by the learned trying Magistrate has not been a procedure established by law and as such, the resultant orders have been vitiated. The objections have been raised at the earliest opportunity and it is expedient in the interests of justice that any further continuance of the proceedings should not be allowed as otherwise it would be an abuse of the process of the Court.

7. In the result, we make the Rule absolute, set aside the impugned orders and quash the proceedings pending before Shri A.K. Gupta, learned Metropolitan Magistrate, Thirteenth Court, Calcutta, being Case No. C.R. 32 of 1974 u/s 420, Indian Penal Code.

A.N. Banerjee J.

8. I agree.