

(2015) 05 CAL CK 0075
In the Calcutta High Court

Case No : Writ Petition No. 12526(W) of 2012 and C.A.N. No. 6852 of 2013

Promita Dutta

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 04-05-2015

Acts Referred:

Arms Act, 1959 — Section 25, 27
Constitution of India, 1950 — Article 142, 20, 226
Criminal Procedure Code, 1973 (CrPC) — Section 173(2), 173(8), 200, 235, 300
Penal Code, 1860 (IPC) — Section 120B, 302, 304-A, 307

Citation : (2015) 2 CALLT 363

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : B.R. Bhattacharya, Senior Advocate, Uday Sankar Chattopadhyay, Sabyasachi Chatterjee, S. Ghosal, P. Banerjee and A. Bhattacharya, for the Appellant; L.K. Gupta, A.A.G, Sudipta Moitra, Sutapa Sanyal and Billwadal Bhattacharyya, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Dipankar Datta, J.—The petitioner's husband (hereafter the victim) was brutally murdered on May 6, 2011 at about 9.45 p.m. while riding a motorcycle. As per the postmortem report, the victim died of, inter alia, lacerated injuries/scalp haematoma (2 Nos.) and several gunshot wounds (6 Nos.) ante-mortem in nature. According to the petitioner, the victim was an environment activist and with a crusader's zeal led movements frontally to save water-bodies in Howrah district from becoming extinct due to the greed of land sharks. Ultimately, this resulted in his premature death. One Bablu Prosad was riding pillion on the motorcycle of the victim at the time of the fateful incident. On the written complaint of the said Bablu Prasad, Bally Police Station FIR No. 205 dated May 6, 2011 under sections 302/307/120B of the Indian Penal Code (hereafter the IPC) and sections 25/27 of the Arms Act was registered.

2. From the documents produced in course of arguments by Mr. Roy, learned

advocate, who was initially representing the State, this Bench noticed that more than a couple of years before the journey of life of the victim came to an abrupt end, he had written letters to the senior police officers of the district expressing that he perceived threat to his life for opposing land sharks from filling up water bodies and that he may be provided with police escort. On the fateful night, however, the victim had only the said Bablu Prasad, who was riding pillion, as company. An observation needs to be recorded in respect of the incident of firing that took away the life of the victim and the miraculous escape of the said Bablu Prasad. It is available from the materials on record that in course of indiscriminate firing resorted to by the assailants (the victim took several gun shots on his body), the said Bablu Prasad had managed to escape almost unharmed. The incident occurred at 9.45 pm and it is rather astonishing that even in the dark the victim's assailants, who were not too far away, were right on target without even the said Bablu Prasad being shot at even once by mistake. Be that as it may.

3. The Criminal Investigation Department had taken over investigation of the FIR on May 12, 2011. A charge-sheet under section 173(2), Code of Criminal Procedure (hereafter the Cr.P.C.) was filed by the Investigating Officer on August 30, 2011 vide Bally C.S. No. 406/11 dated August 30, 2011 under sections 302/120B, IPC read with sections 27/25 of the Arms Act against 5 (five) persons. Excerpts from the charge-sheet read as follows:

"During investigation it could be further ascertained that there was a long standing enmity among the deceased and some of the TMC leaders of the aforesaid area over the issue of Ash filling of Suti Cannel, Haral Cannel and other two Cannels for Anmol South City Project - A joint collaboration with W.B. Govt. The deceased formed a (sic) organization named "Jala Bhumi Bachao Committee" to prevent the filling. The TMC leaders namely Govinda Hajra, Kalyan Ghosh (Dist. Convener), Sasti Gayen, Arup Roy, Amit Pal Chowdhury, Babu Mondal and others become exasperated upon the deceased over the issue. They tried to influence the deceased by money and other means but the deceased remained strong in his adage. One Paritosh Bar a supplier of the area on behalf of the Anmol company also tried to influence the deceased but failed. The opponent then formed a syndicate lead by Panchu Begani, Sasti Gayen. Lakshmi Haider and Govinda Hajra in favour of Ash filling by the Anmol group. The deceased brought the matter before the higher authority of his party and also took shelter before the law for entrenched situation."

4. The said charge-sheet was followed by a supplementary charge-sheet dated September 26, 2011. Excerpts from the said charge-sheet read as follows:

"The Investigation of the above noted case has been completed:- There is no evidence against the following persons whose names are mentioned in the original charge sheet No. 406/11 dated: 30.8.2011 viz. 1) Govinda Hazra, 2) Kalyan Ghosh, 3) Arup Roy, 4) Amit Pal Choudhury, 5) Babu Mondal, 6) Panchu Begani, 7) Laksmi Haider, and 8) Paritosh bar."

5. One of the persons against whom the needle of suspicion was directed in the initial charge-sheet (though ultimately not named as accused) but such direction was totally changed while filing the supplementary charge-sheet had become a minister in the Government after the change of the political scenario in the State in May, 2011.

6. The petitioner expressing apprehension that investigation would not proceed in the right direction because of involvement of influential persons and on other grounds urged in this writ petition approached this Court on June 19, 2012, seeking, inter alia, the following relief:

"In the aforesaid facts and circumstances your petitioner most humbly prays that Your Lordship may be graciously pleased to pass the following Orders:

a) A Writ of and/or in the nature of Mandamus do issue directing that the investigation in connection with the unnatural death of Tapan Dutta vide Bally Police Station Case No. 205/11 be forthwith be handed over and be conducted by the Central Bureau of Investigation and with a further direction to the Central Bureau of Investigation to submit a report of such investigation before this Hon"ble High Court within such period as may be fixed by this Hon"ble Court and on perusal of such Report the Hon"ble Court may be pleased to pass appropriate Order/Orders as this Hon"ble Court may deem fit and proper;"

7. Unfortunately, hearing of the writ petition could not conclude within a short time and in the meanwhile charges having been framed and the case having been committed to the court of sessions, trial commenced before the Additional District and Sessions Judge, Fast Track Court - I, Howrah. The learned Sessions Judge recorded in no uncertain terms his dissatisfaction in respect of the investigative process in his judgment and order dated December 6, 2014 and ultimately returned a finding that the 5 (five) persons accused of murdering the victim were not guilty and, accordingly, acquitted them under section 235, Cr.P.C.

8. The writ petition was taken up for consideration after exchange of affidavits and regular hearing commenced from December 12, 2014.

9. The State, as noted above, was initially being represented by Mr. Roy. However, after Mr. Roy had argued on two days, Mr. L.K. Gupta, learned additional advocate general took over the burden of defending the State together with Mr. Sudipto Moitra, learned advocate. With the permission of this Bench, both of them advanced arguments touching the maintainability of the writ petition in the light of the criminal laws as well as the Constitution. Since Mr. Gupta and Mr. Moitra extensively argued the case of the State, this Bench does not consider it necessary to deal with the arguments of Mr. Roy. Suffice it to record that it was as if Mr. Roy was arguing the case of the minister and not the State, and had faced a barrage of questions from the Bench which were uncomfortable for him to answer.

10. The main argument of the respondents was that the writ petition by efflux of

time and supervening circumstances has been rendered infructuous and nothing survives for decision thereon.

11. Mr. Moitra argued that since no proceeding is pending following registration of the FIR, nothing is alive and with the termination of the proceedings with the judgment and order of acquittal there could not be a further investigation. According to him, the writ petition has reached its jural death and cannot be reopened so long as the judgment of the learned Sessions Judge remains on record without being touched by a superior Court. It was further urged that the acquittal recorded by the learned Sessions Judge cannot be examined in course of proceedings under Article 226 of the Constitution. He also contended that the petitioner approached this Court nearly 8 (eight) months after the supplementary charge-sheet was filed without justifying the belated approach, and without even explaining why the remedy provided by section 173(8), Cr.P.C. was not pursued initially before commencement of trial and no appeal under section 372, Cr.P.C. was preferred by her. It was finally submitted that the writ petition ought to be disposed of as having become infructuous.

12. The decision of the Supreme Court reported in (2002) CRI. L.J. 263 (N.R. Govindaraji v. S. Venkatachalam) was cited by Mr. Moitra in support of the contention that once the trial has come to an end, it would not be open for the investigating agency to further investigate the matter even if the real accused was still at large, and only upon a complaint under section 200, Cr.P.C. being filed that the Magistrate could have proceeded with the complainant's case.

13. It was argued by Mr. Gupta that the judgment of the learned Sessions Judge should not be looked into by the Writ Court at all since the propriety and/or correctness of such decision is open to be examined by a Division Bench of this Court in appeal and further that any observation made by the Writ Court might impact the right of the accused. It was submitted by him that the writ petition had reached its natural death with the order of acquittal and that the only remedy available to the petitioner is to file an appeal against the judgement of the learned Sessions Judge.

14. One of the objections seriously pressed by Mr. Gupta was that since remedy is available to the petitioner in a different jurisdiction of the selfsame High Court, this writ petition merits no order. It was urged that in terms of section 372, Cr.P.C., the petitioner being the widow of the victim has a right of appeal and should an appeal be preferred by her, it is open to the Division Bench of the High Court to make such directions as it may deem fit and proper.

15. The decisions relied on by Mr. Gupta are reported in Janardan Reddy and Others Vs. The State of Hyderabad and Others, AIR 1951 SC 217 : (1951) 2 SCR 344 , K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., AIR 1954 SC 207 : (1954) 25 ITR 167 : (1954) 1 SCR 738 , and Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, AIR 1964 SC 1419 : (1964) 6 SCR 654 : (1964) 15 STC 468 .

16. The arguments of Mr. Moitra and Mr. Gupta were sought to be countered by Mr. Bhattacharya, learned senior advocate for the petitioner, by submitting that right to relief relates back to the date of institution of the proceeding and, therefore, even though the trial had concluded, acquittal of the accused does not vest any right in the actual culprits, who were not even implicated, to be proceeded against by a fresh investigation. In support of such submission, reliance was placed on the decisions of the Supreme Court reported in *Pasupuleti Venkateswarlu Vs. The Motor and General Traders*, AIR 1975 SC 1409 : (1975) 1 SCC 770 : (1975) 3 SCR 958 : (1975) 7 UJ 327 , and *Rameshwar and Others Vs. Jot Ram and Another*, AIR 1976 SC 49 : (1976) 1 SCC 194 : (1976) 1 SCR 847 .

17. Mr. Bhattacharya further argued that free and fair investigation had to be ensured, which was patently lacking and the acquittal is based on a tainted investigation; that apart, faulty investigation to protect influential people cannot be a bar for directing CBI investigation. According to him, fair investigation is part of fundamental rights available to a victim and his family members and it is the duty of the State to protect the fundamental rights, not to destroy it. He stressed that the petitioner apprehended failure on the part of the State to protect the fundamental rights and this has been proved by reason of the acquittal recorded by the learned Sessions Judge. The State's voice in this proceeding, it was submitted, has been the voice of the accused and the obligations of various machineries at the stage of investigation and trial have not been discharged. He further contended that the real culprits who were not arraigned cannot claim any protection for further investigation since the persons accused of committing the murder of the victim have not been punished. Finally, it was submitted that Article 20 does not operate as a bar and the decisions cited on behalf of the State not having been rendered in the context of breach of fundamental rights, are clearly distinguishable.

18. Replying to a query as to why the petitioner had not filed *naraji* petition under section 173(8) Cr.P.C., Mr. Bhattacharya had relied on the decision of the Supreme Court reported in *Reeta Nag Vs. State of West Bengal and Others*, (2010) CriLJ 2245 : (2009) 11 SCALE 395 : (2009) 9 SCC 129 : (2009) 14 SCR 276 : (2009) 8 UJ 3984 : (2010) AIRSCW 476 . It was submitted by him that the Supreme Court had held the order of the Magistrate to reinvestigate on a protest petition filed by the *de facto* complainant as beyond the jurisdiction and competence of the Magistrate and, therefore, the petitioner was left with no other alternative but to approach this Court in its writ jurisdiction.

19. Mr. Bhattacharya relied on the decisions reported in *Vinay Tyagi Vs. Irshad Ali @ Deepak and Others*, (2013) 2 ABR 36 : (2013) 1 AD 157 : (2013) CriLJ 754 : (2013) 1 JT 97 : (2013) 2 RCR(Criminal) 197 : (2012) 12 SCALE 343 : (2013) 5 SCC 762 and *Dinubhai Boghabhai Solanki Vs. State of Gujarat and Others*, (2014) AIRSCW 1722 : (2014) CriLJ 1886 : (2014) 3 JT 313 : (2014) 2 RCR(Criminal) 19 : (2014) 2 SCALE 629 : (2014) 4 SCC 626 : *Dinuvhai Boghavhai Solanki* for tracing the object of the criminal justice system. Reliance

was also placed on the decision reported in *Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others*, AIR 2004 SC 346 : (2004) CriLJ 2050 : (2004) 1 JT 94 Supp : (2004) 4 SCALE 375 : (2004) 4 SCC 158 : (2004) 1 SCR 1050 : (2004) 2 UJ 1041 : (2004) AIRSCW 2325 : (2004) 3 Supreme 210 in support of the contention that further investigation, even at this stage, may be ordered by the Writ Court. He urged the Bench to uphold the rights of the victim and to direct the CBI to take over the investigation for truth to surface.

20. This Bench has heard Mr. Bhattacharya and Mr. Gupta, duly assisted by Mr. Moitra and have considered the decisions cited at the Bar.

21. The judgment of the learned Sessions Judge upon conclusion of trial is indeed a relevant fact, which cannot be brushed aside from consideration. The State seems to be justified in its contention that Pasu Puleti Venkat Easwarlu (supra) and Rameswar (supra) arose out of civil suits where the Courts had to consider the provisions of the Civil Procedure Code in deciding the rival claims as to whether subsequent events occurring after institution of the suits could be looked into or not, and that the ratio of such decisions would have no application on facts and in the circumstances.

22. This Bench is inclined to the view that the factual position before it ought to be examined in the light of the dictum of the Supreme Court laid down in the decision reported in *Beg Raj Singh Vs. State of U.P. and Others*, AIR 2003 SC 833 : (2002) 10 JT 417 : (2003) 1 SCC 726 : (2002) 5 SCR 530 Supp : (2003) AIRSCW 280 : (2003) 1 Supreme 91 . The relevant passage from the decision in *Beg Raj Singh* (supra) reads as follows:

"7. ***The ordinary rule of litigation is that the rights of the parties stand crystallized on the date of commencement of litigation and the right to relief should be decided by reference to the date on which the petitioner entered the portals of the Court. A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment. Third-party interests may have been created or allowing relief to the claimant may result in unjust enrichment on account of events happening in-between. Else the relief may not be denied solely on account of time lost in prosecuting proceedings in judicial or quasi-judicial forum and for no fault of the petitioner. A plaintiff or petitioner having been found entitled to a right to relief, the court would as an ordinary rule try to place the successful party in the same position in which he would have been if the wrong complained against would not have been done to him.****."

(underlining for emphasis by this Bench)

23. However, the vital question is whether by reason of delay in disposal of the writ petition, the petitioner ought to suffer and face dismissal of her writ petition on the ground of the same having become infructuous, or whether there is any avenue by which the victim's interest could be protected by the Writ Court, being the protector of fundamental rights of the citizens of the country, having regard to the representation made before the Bench that the judgment of the learned Sessions Judge acquitting the accused is the subject matter of an appeal under section 378, Cr.P.C. before this Court at the instance of the State.

24. That the petitioner was right in apprehending that the investigation would be flawed with a view to cover up misdeeds of some persons whom she perceived to be influential has turned into reality with the acquittal of the accused persons. In view of section 300, Cr.P.C., it would not be proper to make any observation in regard to the trial that was conducted. The State having preferred an appeal against the judgment of the learned Sessions Judge acquitting the accused, it would definitely fall for consideration of this Court in its appellate jurisdiction as to how and to what extent the power under section 386, Cr.P.C. ought to be exercised.

25. Strong reliance has been placed by Mr. Bhattacharya on *Zahira Habibulla H. Sheikh* (supra), commonly known as the Best Bakery case. The Supreme Court in its decision reported in *Satyajit Banerjee and Others Vs. State of West Bengal and Others*, AIR 2005 SC 4161 : (2005) CriLJ 648 : (2005) 1 DMC 35 : (2004) 9 SCALE 617 : (2005) 1 SCC 115 : (2004) AIRSCW 6646 : (2004) 8 Supreme 285, however, has opined that the law laid down in the Best Bakery case, in the extraordinary circumstances obtaining therein, cannot be applied to all cases against: the established principles of criminal jurisprudence. What may be permissible for the Supreme Court in a case of exceptional nature for doing complete justice between the parties under Article 142 of the Constitution may not be permissible for a Judge exercising Article 226 powers. Even otherwise, the cited decision was rendered on several criminal appeals and not on any writ petition and cannot, therefore, be of any assistance to the petitioner.

26. It appears on reading the decision in *N.R. Govindaraji* (supra) that a conviction was recorded against one Rajasekaran under section 304-A, IPC, which was challenged before the High Court under section 482, Cr.PC. The case run in the 482 petition was that the offending vehicle was being driven not by the said Rajasekaran but by the said Govindaraji. Therefore, the conviction of Rajasekaran should be set aside and instead Govindaraji should be proceeded against. The High Court accepted the contention and directed initiation of criminal proceedings against Govindaraji. Such order of the High Court was under challenge before the Supreme Court, which interdicted and set it aside. On the authority of this judgment, it is indeed impermissible to hold on this writ petition at this stage that the acquitted persons were not the real culprits and that the real culprits having been left out with a purpose, the CBI ought to be

directed to take up investigation.

27. Despite number of authorities having been cited by either side in respect of the powers of an appellate court under section 386, Cr.P.C., the decision reported in *Popular Muthiah Vs. State* represented by *Inspector of Police*, (2006) 6 JT 332 : (2006) 6 SCALE 417 : (2006) 7 SCC 296 : (2006) 3 SCR 100 Supp has not been cited. This decision is an authority for the proposition that even in exercise of the jurisdiction conferred on a High Court by section 386, Cr.P.C., power can suo motu be exercised by the High Court in the interest of justice in relation to substantive as also procedural matters. However, there is no clear enunciation of law as to whether a particular agency could be entrusted with further investigation, should the appellate court return a finding that investigation was flawed and that further investigation ought not to be entrusted to the same agency that investigated the FIR. Paragraph 46 of the decision, to an extent, is suggestive of leaving further investigation to the police since investigation of an offence is its statutory power, unless there exists an extra-ordinary situation. It is not too certain as to whether the "extra-ordinary situation" is referable to the power of directing further investigation while hearing an appeal under section 386, Cr.P.C. or is referable to a particular agency being entrusted with further investigation, should the situation warrant such an order. *Popular Muthiah* (supra) did not consider *N.R. Govindaraji* (supra), and the law in this regard, it seems to this Bench, is in a nebulous state.

28. Although Mr. Gupta and Mr. Moitra have argued with vehemence that the judgment and order of the learned Sessions Judge being the subject matter of the appeal ought not to be looked into at all, this Bench is not persuaded to agree with such a contention. Definitely the Writ Court cannot examine the judgment of the learned Sessions Judge to find holes in it as if it were exercising appellate powers but such judgment can most certainly be looked into for the limited purpose of ascertaining whether laxity in the process of investigation led to formation of opinion that investigation was defective, resulting in the accused obtaining the benefit of doubt. Since the learned Sessions Judge did notice deficiencies and expressed dissatisfaction in regard to the process of investigation, one never knows whether there could be a situation for the appellate court under section 386, Cr.P.C. to direct further investigation, and further as to whether the appellate court could direct a particular agency to conduct further investigation. In view of the nebulous state of law noticed above, this Bench is of the considered view that such direction, without the legal position being clouded further, could be facilitated if this writ petition is kept pending for being decided along with the pending appeal for upholding the victim's right.

29. In any event, since the petitioner prayed for investigation by the CBI apprehending that there would be no fair investigation and that the investigation was flawed is indeed a finding rendered by the learned Sessions Judge himself and particularly having regard to the fact that the judgment of the learned

Sessions Judge is the subject matter of challenge before the Division Bench of this Court, it would be in the interest of justice if this writ petition is referred for hearing along with the appeal filed by the State Government in terms of Rule 26 of the Writ Rules, whereby a single Judge of the High Court has the power to refer a writ petition for hearing by a Division Bench, for enabling the appellate Court to consider the desirability of passing such order as it may consider appropriate in the circumstances. It is ordered accordingly.

30. Place the writ petition before the Hon"ble the Chief Justice for appropriate order immediately. Since it is the failure of the system that the writ petition could not be decided before the trial culminated in acquittal of the accused, this Bench would hope and trust that the petitioner is not made to suffer further agony because of system failure and that every possible endeavour is made to unearth the truth behind the murder of the victim.

Urgent photostat certified copy of this order, if applied for, shall be furnished to the applicant at an early date.