

(2010) 06 CAL CK 0087
In the Calcutta High Court
Case No : C.R.R. No. 909 of 2010

Puspen Sarkar

APPELLANT

Vs

Central Bureau of Investigation

RESPONDENT

Date of Decision : 16-06-2010

Acts Referred:

Bengal Criminal Law (Industrial Areas) Amendment Act, 1942 — Section 4
Calcutta Suburban Police Act, 1866 — Section 33A
Criminal Procedure Code, 1973 (CrPC) — Section 154, 155, 155(2), 155(4), 173
Penal Code, 1860 (IPC) — Section 120B, 290, 418, 420
Telegraph Act, 1885 — Section 20
Wireless Telegraphy Act, 1933 — Section 3, 6(1)

Citation : (2010) 3 CALLT 215 : (2011) 6 RCR(Criminal) 1507

Hon'ble Judges : Ashim Kumar Roy, J

Bench : Single Bench

Advocate : Rajdeep Majumder, for the Appellant; Himangshu De, for the Respondent

Judgement

Ashim Kumar Roy, J.—This is a criminal revision against an order whereby a Sessions Court has affirmed an order of the Learned Trial Magistrate, framing charge u/s 418/120B of the Indian Penal Code and u/s 20(1) of the Indian Telegraph Act.

2. Heard the Learned Counsels appearing on behalf of the parties. Perused the materials on record, the Lower Court Records as well as the case laws cited on behalf of the parties.

3. On two fold grounds the impugned order of framing charge has now been challenged;

(a) The Magistrate took cognizance on a charge-sheet relating to the offences punishable under Sections 418/120B of the Indian Penal Code and u/s 20(1) of the Indian Telegraph Act, and although all offences are non-cognizable still the police investigated the case without the prior permission of the Court in terms of

Section 155(2) of the Code of Criminal Procedure.

(b) Even assuming that the cognizance was not taken on a police report but treating such police report as a complaint in terms of explanation to Section 2(d) of the Code of Criminal Procedure, the offences involved being punishable with imprisonment for two years and is a warrant case, the trial to be held following the procedure prescribed for trial of a warrant case instituted otherwise than on a police report and no charge can be framed without recording of the prosecution evidence first.

On behalf of the petitioners much reliance have been placed on the following decisions of this Hon"ble Court, viz., (I) Subodh Singh Modak Vs. The State, (ii) Tapan Kumar Ghosal v. The State of West Bengal and Anr. reported in 1976 CHN 131 and lastly on the decision in the case of Vijoy Yadav and Ors. v. The State of West Bengal reported in (2008) 1 CrI LR763, rendered by this particular Court.

On the other hand, the Learned Counsel appearing on behalf of the C.B.I. vehemently opposed the prayer for quashing and submitted that initially the case was registered for offences which were both cognizable and non-cognizable and only after conclusion of investigation it was found that accused is prima facie guilty for commission of a non-cognizable offence and therefore at that stage the question of taking permission from the Court does not at all arise and such police report can very much be treated as a complaint filed by a police officer.

4. The prosecution case against the present petitioner in brief are as follows;

On 4.8.89 Puspen Sarkar, Proprietor and Ms. Shyamalee of the Bengal Communication System met Shri K. Ramanujam, the Chief General Manager, Shri N.N. Banerjee, General Manager/Customer Care and Shri P.S. Bhattacharya, Director/Vigilance, of the Calcutta Telephones and apprised in writing their mode of operation in respect of Fax Broad-Casting Business and requested for Voltage Reversal Facility in 49 local lines.

They appraised in writing that their mode of operation was approved by the Telecom Engineering Center vide certificate No. TEC/WR/I/Fax-03/02/006 dated 4.9.97. They also stated that they would generate lots of revenue through the business. They wanted the facility only to bill their customers in America.

Investigation revealed that this mode of operation of M/s. Bengal Communication System was not approved by the Telecom Engineering Center (TEC). It could be revealed that TEC approval vide No. TEC/WR/I/Fax-03/02/006 dated 4.9.97 was issued in favour of M/s. Rincon India, 10/184 Telang Road, Mumbai-19 for use of TR-114, a P.C. based Fax Card. This Fax Card facilitates receipt and sending of Fax messages through a personal computer whose one port is connected to one P.S.T.N. line or a direct exchange line. The system is a Group - 3 Fax working and no multi-port use was allowed in this regard by the Tec. Further no approval was given by Tec to any one for Net-Work Faxing of Fax Broadcasting.

The Calcutta Telephones Authorities on the basis of their appraisal provided the

required voltage reversal facility to the 49 Telephones of Bengal Communication System having local call facility on provisional basis with certain conditions.

On 4.8.99 itself Shri P.S. Bhattacharya issued the letter of approval vide No. DIR/VIG/Subs/39 citing all the conditions which were duly acknowledged by Ms. Shyamalee and Puspen Sarkar one of the conditions was that "Formal approval to start such services should be obtained from the competent authority within three months."

Investigation revealed that installation and further use of the Dish Antenna and other sophisticated Satellite equipment etc. such as Satellite Modem, Mux equipment, Channel banks, were not informed to the Calcutta Telephones Authorities by Puspen Sarkar or Ms. Shyamalee while obtaining the voltage reversal facility on 4.8.99.

Investigation revealed that on 25.6.99 Shri Puspen Sarkar of Bengal Communication System while requesting for the voltage reversal facility for all his lines vide his Letter No. PS/CAL/BCS/02 dated 28.6.99 addressed to Shri D.K. Sengupta, S.D.E./Internal, Dum Dum, and Shri T.K. Nandan, S.D.E./External, Krishnapur Exchange enclosed a copy of equipment to be attached in his location which mentioned about the Dish Antenna, Message Receiving Modem, Telephone Channel Box and Automatic Fax receiving and Broad-Casting Machine along with a list of telephones and an agency agreement showing him as the agent of Ms. MAP Industries Inc, of U.S.A., without obtaining the approval for installation and use of the V-SAT Antenna from competent authorities of the W.P.C. Wing of the Department of Telecommunication.

Investigation revealed that on 9.8.99 the voltage reversal facility was provided to the 49 telephones of M/s. Bengal Communication System by the internal division of Dum Dum Telephone Exchange.

M/s. Bengal Communication used the telephones there after and as such call units were registered at the Internal section of the Dum Dum Exchange, Voltage Reversal Facility was withdrawn during the month of November as the party could not produce the requisite approval from the competent authority of the Department of Telecommunication.

Investigation revealed that the telephones of M/s. Bengal Communication System were working further after withdrawal of the voltage reversal facility. The same were disconnected on 21.01.2000.

Investigation revealed that on getting an information that the said M/s. Bengal Communication System had installed unauthorisedly a V-SAT Antenna and other Satellite equipment and was further indulged in making and receiving ISD Calls while bypassing the V.S.N.L. Gateway Shri P.S. Bhattacharya arranged for the surprise inspection along with the officers of the Calcutta Telephones Vigilance Department, V.S.N.L., Department of Telecommunication Satellite Wing and CBI Telephone Cell etc.

During the surprise inspection the V-SAT Antenna along with other sophisticated instruments such as Satellite Modems, Mux Equipment, Channel Banks etc. were found to be installed inside the premises of M/s. Bengal Communication System. The same were taken into custody from the spot. The total system was found to be in switched off condition during the inspection.

Investigation revealed that on 16.1.2000 during the visit of Shri T.K. Nandan, SDE/External of concerned Krishnapur Exchange the total system was found to be in operation and voice transmission was being made through the system instead of Fax Transmission.

During investigation opinion of experts and witnesses confirmed that voice calls landing from distant locations were being switched from this location unauthorizedly to International locations bypassing the V.S.N.L. Gateway. As the V.S.N.L. Gateway was being bypassed in respect of the International voice calls transmitted or received through the system the Government of India lost substantial amount of revenue. Investigation revealed that V.S.N.L. is the sole carrier of the ISD Calls generated from India or coming to India.

During the investigation the total V-SAT System was found in a witched off condition and thus the suspected Foreign Satellite through which M/s. Bengal Communication was operating in an illegal manner to make and receive. International calls could not be traced. Moreover, no recording of the local call particulars received or made from the local facility telephones of Bengal Communication system which were switching the calls was maintained at the concerned telephone exchange for which exact loss in terms of revenue for the switched calls could not be ascertained.

During the investigation it has been established that Shri Puspen Sarkar and Ms. Shyamalee entered into a criminal conspiracy and in pursuance to such criminal conspiracy established an unauthorized V-SAT system and there by caused pecuniary loss to the Government of India in the form of revenue while allowing voice calls to be switched from their system.

A charge sheet u/s 173 Cr.P.C. is thus being submitted against Puspen Sarkar and Ms. Shyamalee for committing offences u/s 120B, 418 of IPC and Section 20(1) of Indian Telegraph Act 1885.

It is requested that the Ld. Court may kindly take cognizance of the offences and initiate process against the accused persons for trial.

5. Before advertng to the rival contentions of the parties, in my opinion it would be appropriate to consider the provisions of Section 155 of the Code of Criminal Procedure and Section 2(d) of the Code, which are quoted below,

Section 155 of the Code of Criminal Procedure:

Section 155. (1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable

offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.

(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.

(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

Section 2(d) of the Code of Criminal Procedure:

Section 2. In this Code, unless the context otherwise requires-

(a)....

(b)....

(c)....

(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

6. Now, on a combined reading of Sub-section (2) and Sub-section (4) of Section 155 of the Code of Criminal Procedure makes it abundantly clear that although it is mandatory for the police before undertaking investigation into a case exclusively relating to non-cognizable offences to take prior permission from the Magistrate having power to try such case or commit the case for trial, but where a case relates to one or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable offence and notwithstanding the other offences are non-cognizable, the prohibition contained in Sub-section (2) of Section 155 of the Code is not attracted. Whereas, according to the explanation to the definition of complaint u/s 2(d) of the...a report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be complaint; and the police officer by whom such report is made shall be deemed to be the complainant. Thus, it is absolutely clear that after completion of investigation of a case relating to both cognizable and non-cognizable offences, if ultimately the result of such investigation discloses

commission of a non-cognizable offence, in such case no permission u/s 155(2) of the Code is required to be obtained from the Court by the police and in such case in terms of Section 2(d) of the Code, the police report will be deemed to be a complaint and the police officer as the complainant. The Section 155(2) of the Code comes into operation only when police is going to commence investigation of a case relates to only non-cognizable offence not when police after investigating a case involving both cognizable and non-cognizable offences, at the end found that no cognizable offence has been committed and the result of investigation discloses commission of non-cognizable offence only. Therefore, in a case where at least one offence is cognizable and rests are non-cognizable, there will be no legal bar for recording a FIR and to undertake investigation by the police without any prior permission from the concerned Court and ultimately if it is found that no cognizable offence has been committed, then in that case neither the investigation by the police becomes unauthorized, nor it can be said before filing of report as regards to commission of such non-cognizable offence the prior permission of the Court concerned is necessary. Thus, where police after investigation of a case involving both cognizable and non-cognizable offences submitted a report disclosing commission of non-cognizable offence only, in such a situation the provision of Section 2(d) of the Code became at once operative and such police report is to be deemed as a complaint and not charge-sheet and Court is to take cognizance thereupon under Sub-section (a) of Section 190 of the Code, treating such police report as complaint and not as a charge-sheet u/s 190(1)(b) of the Code of Criminal Procedure.

7. Now, having regards to the case at hand, it is an admitted position initially the FIR u/s 154 of the Code was registered for the offences punishable u/s 420 read with Section 120B of the Indian Penal Code and u/s 3 and 6(1) of the Indian Telegraphy Act, 1933 involving commission of both cognizable and non-cognizable offences, as such there was nothing wrong in registration of the FIR or of undertaking investigation into the case by the police without the prior permission of the Court and when after such investigation police found that only non-cognizable offence is committed and submitted its report there cannot be any infringement of Section 155(2) of the Code of Criminal Procedure, as no prior permission was taken by the police before initiation of the investigation or before submission of police report in Court and for the Court, there will no legal impediment to take cognizance on such police report u/s 190(1)(a) of the Code. But it appears from the Lower Court Records that the Learned Magistrate wrongly proceeded with the case by treating such police report relating to non-cognizable offences as charge-sheet which obviously not in accordance with law. In the facts situation of the case the Learned Magistrate upon receipt of the police report, should have proceeded with the matter, by treating the same as complaint and the police officer as the complainant in terms of explanation to Section 2(d) of the Code of Criminal Procedure and to take cognizance u/s 190(1)(a) of the Code.

8. I further found the C.B.I. after conclusion of the investigation ultimately concluded the offences punishable u/s 418/120B of the Indian Penal Code and u/

s 20(1) of the Indian Telegraph Act have been committed. Both the offences being punishable with imprisonment for a term exceeding two years is a warrant case. However, in this case the Learned Magistrate upon receipt of the police report about the commission of non-cognizable offences triable as warrant case committed a further mistake by after taking cognizance thereupon and in wrongly proceeding with the case following the procedure prescribed for a trial of a warrant case by Magistrate instituted on a police report and framed charge against the petitioners. Which indisputably not in accordance with law.

When the police report discloses commission of non-cognizable offences, not only such police report be treated as complaint and the police officer as complainant, at the same time as the offences involved relates to warrant case, the Learned Magistrate while proceeding with the trial ought to have followed the procedure prescribed for a trial of a warrant case instituted otherwise than on a police report, and only after recording of prosecution evidence, then could have entered into the question of framing of charge. The approach of the Learned Magistrate is wholly erroneous and illegal.

9. So far as the first two case laws relied upon by the learned advocate of the petitioner the same appears to have no manner of application in the facts and circumstances of the present case for the reasons as stated below.

In the case of Subodh Singh Modak v. State (supra) this Court finds the petitioner's house was searched not in the context of any cognizable offence and finally charge-sheet was submitted u/s 4 of the Bengal Criminal Law (Amendment) Act, 1942 without any prior permission of the Court u/s 155(2) of the Code of Criminal Procedure and accordingly the investigation was quashed. In this connection it may be noted that the said case was registered on 21st of March, 1970, whereas explanation to Section 2(d) of the Code of Criminal Procedure came into operation only with effect from January 25, 1974.

Similarly, in the case of Tapan Kumar Ghoshal v. State of West Bengal and Anr. (supra) the case relates to an offence punishable u/s 290 of the Indian Penal Code, which is a non-cognizable offence and accordingly the Court quashed the investigation as the police investigated the said case without any prior permission u/s 155(2) of the Code of Criminal Procedure.

Now, so far as the case of Bijoy Yadav and Ors. v. The State of West Bengal (supra) is concerned, the Learned Counsel of the petitioner gave much stress and heavily relied on the observation of this Court in paragraph 6 therein which are quoted below;

It is beyond controversy when in course of investigation of cognizable offences the police found that a case of non-cognizable offence punishable u/s 33A of the Calcutta Suburban Police Act, 1966 has been made out it was incumbent upon the police to proceed in terms of the provisions of Section 155(2) of the Code of Criminal Procedure and thus in the instant case non-compliance thereof renders the order of taking cognizance invalid and illegal. (para 6)

That was a decision rendered by this particular Court, where this Court held that in course of investigation of the cognizable offences, the police, if finally find a non-cognizable offence has been committed, it is incumbent upon the police to seek permission from the Court u/s 155(2) of the Code of Criminal Procedure before filing its report. It now appears to me at the time of hearing of the aforesaid case the provisions of Section 2(d) of the Code had somehow escaped the notice of this Court. However, now having fuller consideration of the provisions of Section 155(2) of the Code of Criminal Procedure and the explanation to Section 2(d) of the Code of Criminal Procedure as above, I find the view taken by me earlier in the aforesaid decision was not correct and the same needs rectification and it is the correct position that when police in course of investigation of a case relates to cognizable and non-cognizable offences ultimately finds that non-cognizable offences has been committed, no permission u/s 155(2) of the Code is required to be taken before filing its report in Court and same is only necessary when prior to the commencement of investigation of a case the police found the complaint discloses only non-cognizable offences. In the first category of cases where the police after investigation found only non-cognizable offence has been committed, such police report is to be treated as a complaint in terms of explanation to Section 2(d) of the Code and the police officer as the complainant.

In the result, the order of taking cognizance as well as all consequential steps taken by the Court below including the order of framing charge stands set aside and the matter is remanded back to the Court below and the Learned Magistrate is directed to proceed with the same from the stage of submissions of the police report in the light of the observation made hereinabove.

Nevertheless, this Court has already reached to its conclusion as regards to the points raised in this criminal revision still feels that a few lines from the decision of the Hon"ble Supreme Court in the case of Shri Umed Vs. Raj Singh and Others, be quoted, where Bhagwati J., observed as follows;

Bhagwati, J.: 27. (Supplement). Since I was a party to the decision in Mohd. Yunus Saleem Vs. Shiv Kumar Shastri and Others, which is now being overturned by us...we find...that the view taken by the Court in that case was erroneous and needs to be corrected. To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this we derive comfort and strength from the wise and inspiring words of Justice Bronson in *Pierce v. Delameter* (1847) 3 AMY 18

a judge ought to be wise enough to know that he is fallible, and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion, and follow truth wherever it may lead; and courageous enough to acknowledge his errors.

This is a case where C.B.I. after completion of investigation submitted its report in the Court sometime in July, 2000, but till date there have been no progress in

the matter and it is pending for nearly 10 years, in such circumstances it would be appropriate for the Trial Court to conclude the trial as expeditiously as possible preferably within seven months from the date of communication of this order. The Trial Court is directed to proceed with the trial strictly in terms of provisions of Section 309 of the Code of Criminal Procedure and must not grant any adjournment to either of the parties, unless the Court feels the same is necessary for ends of justice.

The petitioner must appear in the Court below within 15 days from this date and the C.B.I. is also directed to take necessary steps in this regard.

The Office is directed to communicate this order to the Court below and send down the Lower Court Records at once.

The parties shall have the liberty to obtain the urgent Photostat certified copy of this Judgement on usual undertaking.