

(2021) 10 CAL CK 0012
In the Calcutta High Court
Case No : Criminal Revision No. 92 Of 2021

Rajlakshmi Chaudhuri

APPELLANT

Vs

State Of West Bengal & Ors.

RESPONDENT

Date of Decision : 01-10-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 154, 154(1), 154(3), 156(3), 190, 190(1), 202, 397, 401, 482

Indian Penal Code, 1860 — Section 34, 323, 325, 341, 376, 406, 417, 506, 506(2)

Citation : (2021) 10 CAL CK 0012

Hon'ble Judges : Bibek Chaudhuri, J

Bench : Single Bench

Advocate : Bikash Ranjan Bhattaharyya, Uday Sankar Chattopadhyay, Suman Sankar Chatterjee, Santanu Maji, Snigdha Saha, Pranay Basak, Sekhar Kr. Basu, Rajdeep Majumder, Moyukh Mukherjee, Arushi Rathore

Final Decision : Allowed

Judgement

Bibek Chaudhuri, J

1. This is an application under Sections 397/401 read with Section 482 of the Code of Criminal Procedure filed by the petitioner challenging legality, validity and propriety of the order dated 12th November, 2020 passed by the learned Chief Judicial Magistrate, Alipore, South 24 Pgs in serial No.119 of 2020, thereby rejecting the petition filed by the petitioner under Section 156(3) of the Code of Criminal Procedure (hereafter described as the Code).

2. The facts involved in the instant revision are as follows:-

3. The petitioner was a member of the State Committee of the Bharatiya Janata Party, in the State of West Bengal. As a person involved in active politics she has acquaintance with the leaders of state and national level. On the allegation of rape, he filed a written complaint before the officer-in-charge, Behala (Women) Police Station against one Amalendu Chattapadhyay. The said complaint was

registered as Case No.1 of 2018 dated 31st August, 2018 under Sections 417/376/406 of the Indian Penal Code. The investigation of the said case resulted in filing of charge-sheet against the above named Amalendu Chattapadhyay. It is alleged by the petitioner that since the filing of the charge-sheet, she was pressurized by the opposite party Nos.2, 3 and 4, namely, Pradeep Joshi, Jishnu Basu, Kailash Vijayvargiya national level leaders of the said party to withdraw the case against Amalendu Chattapadhyay. On the pretext of having a discussion over the said matter, the above named opposite parties asked the petitioner to come to the residential apartment of opposite party No.4. It is submitted by the petitioner that she tried to inform the matter to the officer-in-charge of Behala Women Police Station but the police suggested her to meet them in response to such call. The petitioner went to the residential apartment of the opposite party No.4 on 29th November, 2018 at about 5 p.m. The opposite party Nos. 1 and 2 were present in the said apartment from before. It is alleged by the petitioner that the opposite parties committed rape upon the petitioner against her will one by one. Thus, the petitioner became the victim of ludo of leaders of the said political party occupying position of national level. After the incident she was threatened with dire consequences. Not only this, she was threatened by the opposite parties that in the event she takes any legal step alleging such act against the opposite parties, her son would also be killed. Subsequently also the petitioner was subjected to physical assault and mental torture and she lodged complaint against the opposite parties before the police, vide, Sarsuna P.S Case No.131 dated 20th December, 2019 under Sections 341/506(2)/34 of the Indian Penal Code and Bolepore P.S Case No.18/2020 under Sections 341/323/325/506/34 of the Indian Penal Code. Over the incident dated 29th November, 2018 she tried to make complaint with the local police station, but police refused to accept such complaint from the petitioner. She also informed the matter to the higher authorities of the police but they also failed to take any action against the opposite parties by registering an FIR. Finally on 12th November, 2020 she filed an application under Section 156(3) of the Code of Criminal Procedure before the learned Chief Judicial Magistrate, Alipore praying for sending the same to the officer-in-charge of Bhawanipore Police Station for treating the same as an FIR.

4. By passing the order impugned the learned Chief Judicial Magistrate refused to allow the prayer of the complainant and accordingly it was rejected.

5. The order of rejection of petitioner's application under Section 156(3) of the Code prompted her to file the instant revision.

6. Mr. Bikash Ranjan Bhattacharyya, learned Senior Counsel on behalf of the petitioner submits that the learned Chief Judicial Magistrate, Alipore acted illegally and failed to exercise his jurisdiction in rejecting the petitioner's application under Section 156(3) of the Code on the basis of the decisions of the Hon'ble Supreme Court in the case of Lalita Kumari vs. Government of Uttar Pradesh & Ors. reported in (2014) 2 SCC 1 and Mukul Roy vs. State of West

Bengal & Ors. reported in (2019) CrIj 245. It is also submitted by him that the learned Magistrate rejected the application under Section 156(3) of the Code predominantly on the ground that there was abnormal delay in alleging of the FIR in initiating criminal procedure. It was held by him that the alleged incident took place on 29th November, 2018 and the petitioner lodged the complaint after elapse of about two years on 12th November, 2020. The explanation of delay in lodging such complaint was not satisfactory and convincing. It was also held by him that after the incident, the petitioner lodged the complaints at Sarsuna P.S and Bolpur P.S and both the complaints was registered as FIR subsequent to the alleged incident dated 29th November, 2018. The petitioner did not disclose the incident that allegedly took place on 29th November, 2018 in the said two complaints filed by her before the police. Thus, he found that the application under Section 156(3) suffers from false story and veracity of the allegation was not even prima facie proved.

7. According to Mr. Bhattacharya, both the grounds on the basis of which the application under Section 156(3) was rejected could not be considered by the learned Chief Judicial Magistrate considering the nature of allegation. The learned Magistrate ought to have held that delay in lodging of complaint in respect of an offence of rape against a woman is not always fatal for the prosecution especially when she was threatened by the leaders of higher level of the political party to which she belongs. It is also submitted by him that the petitioner could not ventilate her allegation against the opposite parties and the act committed by them out of fear and apprehension of harm that might be caused not only to her but also to her son. Therefore, in subsequent two complaints she did not narrate anything about the incident dated 29th November, 2018. However, it is on record that prior to filing of the application under Section 156(3) of the Code she sent the complaint to the local police station and also to the Higher Authority of police. As they did not take any action against the opposite parties, she was compelled to file the application under Section 156(3) of the Code.

8. It is also submitted by Mr. Bhattacharya that the learned Magistrate failed to appreciate the ratio of Lalita Kumari (supra) and Mukul Roy (supra).

9. Mr. Sekhar Kr. Basu, learned Senior Counsel on behalf of the private parties at the outset draws my attention to the provision of Section 156(3) of the Code. The said provision runs thus:-

10. 156(3) - any Magistrate empowered under Section 190 may order such investigation as part mentioned. He next has placed the provision of Section 190 of the Code which deals with cognizance of offences by Magistrate. Section 190 runs thus:-

190. Cognizance of offences by Magistrates.-(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

- (a) upon receiving a complaint of facts which constitute such offence;
 - (b) upon a police report of such facts;
 - (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.
- (2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

11. Referring the above mentioned provision of the Code, it is submitted by Mr. Basu that both in sub-Clause (3) Section 156 and Clause (1) of Section 190 the word "may" is used by the legislature, thereby providing judicial discretion upon the learned Magistrate either to direct a police officer to investigate into a cognizable case or to take cognizance upon a complaint, or police report etc, as the case may be. If a person is aggrieved against an order of the Magistrate, rejecting an application under Section 156(3) of the Code and files criminal revision, the power of Revisional Court is only limited to consider as to whether reasonable, logical discretion was applied by the learned Magistrate or not while passing the order.

12. With the above introduction he draws my attention to the impugned order passed by the learned Magistrate. It is submitted by him that in paragraph 15 of the impugned order the learned Magistrate recorded that the petitioner lodged complaint against the accused persons vide, Sarsuna P.S Case No.131 dated 20th December, 2019 and Bolpur P.S Case No.89/2020. Both the said two police cases were registered after the incident dated 29th November, 2018, but the petitioner was conspicuously silent while about the incident dated 29th November, 2018 while lodging complaint and registration of the above mentioned two police cases. Therefore, the learned Magistrate did not commit any wrong in holding that the application under Section 156(3) of the Code of Criminal Procedure dated 12th November, 2020 alleging certain incidents dated 29th November, 2018 is an afterthought, concocted, false and frivolous and was made only to malign the opposite parties.

13. Mr. Basu next refers to the paragraph 120.6 of the decision of the Hon'ble Supreme Court in the case of Lalita Kumari vs. Government of U.P reported in (2014) 2 SCC 1. Paragraph 120.6 states as follows:-

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

- a) Matrimonial disputes/ family disputes
- b) Commercial offences
- c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

14. It is submitted by Mr. Basu that the Hon'ble Supreme Court directed the police authority to conduct a preliminary inquiry in respect of cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over three months delay in reporting the matter without satisfactorily explaining the reasons for delay. In the instant case the petitioner filed the application under Section 156(3) of the Code after a lapse of about two years from the date of occurrence. In paragraph 17 of the said application it is stated by the petitioner that on 27th October, 2020 she filed a written complaint before the concerned police station against the opposite parties, but the police personnel did not take any action against them. Subsequently, they also made another complaint to the Deputy Commissioner of Police, South Division on 4th November, 2020. The said complaint also received the same fate as that of earlier complaint dated 27th October, 2020. It is submitted by Mr. Basu that even if the statement made by the petitioner in paragraph 17 and 18 of the application under Section 156(3) of the Code is held to be true, in such case also it is found that the petitioner made the allegation of commission of rape upon her by the opposite parties for the first time on 27th October, 2020, i.e., after a lapse of almost two years.

15. Having heard the learned Senior Counsels on behalf of the petitioner and private opposite parties and on careful perusal of the impugned order passed by the learned Chief Judicial Magistrate, Alipore, I find that the learned Magistrate rejected the application under Section 156(3) of the Code on the ground that there was inordinate delay in lodging the complaint. It is needless to say that in Lalita Kumari (supra) requirement of preliminary inquiry by the police before registering a cognizable case is delineated and some category of cases in which preliminary inquiry may be made by the police authority are narrated. In subparagraph with all paragraphs 120.6 it is stated that the police should conduct preliminary inquiry when there is abnormal delay over three months in reporting the matter for initiating criminal prosecution without satisfactorily explaining the reasons for delay. Lalita Kumari (supra) never empowers the Magistrate to outright dismiss an application under Section 156(3) of the Code on the ground of delay. The said decision is about the power and responsibility of the police in dealing with cognizable offence. The learned Magistrate held, inter alia, that as no FIR was registered either at Behala Police Station or at Bhawanipore Police Station on the basis of the complaint dated 27th October, 2020 filed by the petitioner, "an inference can be drawn that the officer-in-charge of Behala Police Station and officer-in-charge of Bhawanipore Police Station did not find enough substance in the allegations to register an FIR after conducting preliminary

inquiry as per the guidelines laid down in the aforesaid case reference of the Hon'ble Supreme Court of India". The above finding made by the learned Magistrate in the impugned order is passed on surmise and conjecture in view of the fact that at any stage of inquiry, investigation or trial of a criminal proceeding there is no scope to draw an inference without verifying any such document in support of the ultimate decision made by the court.

16. Moreover, paragraph 120.6 of Lalita Kumari's case cannot be read in isolation of other directions contained in Paragraph 120.1 to 120.8. Paragraph 120.1 states that registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of an cognizable offence and no preliminary inquiry is permissible in such a situation. At Paragraph 120.2, a preliminary inquiry by police may be conducted if the information received does not disclose a cognizable case but indicates the necessity for an inquiry to ascertain whether cognizable offence is disclosed or not. Paragraph 120.5 states that the scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

17. Careful reading of Paragraph 120 of the Lalita Kumari (supra) culls out the following ratio:-

(a) If the complaint discloses cognizable offence, registration of FIR is mandatory for the police.

(b) If there is any doubt as to whether cognizable offence is disclosed or not the police will conduct a preliminary inquiry in case of certain types of cases like matrimonial disputes/family disputes, commercial offences, medical negligence cases, corruption cases and cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over three months delay in reporting the matter without satisfactory explanation for the delay, preliminary inquiry may be made by the police and report should be prepared within seven days from the date of initiation of preliminary inquiry.

(c) Preliminary enquiry by police is no to verify the veracity of the complaint, but to ascertain if a cognizable case is made out.

18. It is needless to say that unexplained delay in lodging complaint in most of the times proves fatal for the prosecution. At the same time, there are plethora of decisions of the Apex Court where it is held that in a case of sexual assault and rape delay in lodging FIR by itself is not a ground to discard the written complaint. The delay in lodging FIR is not of much significance as the victim has to muster courage to come out in open and express herself in a conservative social milieu. In cases of rape, the delay in filing FIR by the prosecutrix in all circumstance is not of significance.

Sometimes the fear of social stigma and on some occasions fear from the accused persons that she may be subjected to further assault of like nature and

absence of physiological inner strength to undertake a legal battle against the man of money, muscle and power are the reasons for delay in lodging complaint.

19. In the case of State Of Himachal Pradesh vs. Shree Kant Shekari : (2004) 8 SCC 153, the Hon'ble Supreme Court held as hereunder:

17. The High Court has also disbelieved the prosecution version for the so-called delay in lodging the FIR. The prosecution has not only explained the reasons but also led cogent evidence to substantiate the stand as to why there was delay. The trial Court in fact analysed the position in great detail and had come to a right conclusion that the reasons for the delay in lodging the FIR have been clearly explained.

18. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle. These aspects were highlighted in *Tulshidas Kanolkar v. State of Goa*.

20. Similar view was taken in *Sohan Singh & Anr. vs. State Of Bihar* : 2010 (1) SCC 68 ; *Deepak vs. State of Haryana* : (2015) 4 SCC 762 ; *State of Himachal Pradesh vs. Sanjay Kumar* : (2017) 2 SCC 51.

21. At the stage of dealing with an application under Section 156(3) of the Code, the learned Magistrate is not in a position to see the veracity of the complaint. This is the precise reason for which the learned Magistrate is empowered to direct the police authority to treat the complaint as an FIR and register a specific case and cause investigation of the same. If the police authority on investigation does not find any evidence in support of the prosecution case, it is open for the investigating officer to file report in final form.

22. Mr. Basu, learned Senior Counsel on the behalf of the private opposite parties relies on the decision of this Court in the case of *Mukul Roy vs. State of West Bengal & Ors* reported in (2019) Cri.L.J 245 (Cal). The said report is pronounced by a Hon'ble Single Judge of this Court.

23. In Paragraph 59 of the *Mukul Roy's* case (*supra*) the Hon'ble Single Judge

passed the following guidelines while invoking power under Section 156(3) of the Code.

"59. Therefore, I direct that Learned Registrar General shall take immediate steps for issuance of suitable guidelines to all the Chief Judicial Magistrates, Chief Metropolitan Magistrates, Additional Chief Judicial Magistrates, Additional Chief Metropolitan Magistrates, Judicial Magistrates through the District Sessions Judges and Metropolitan Magistrates, Calcutta of all the Districts of the State of West Bengal, which guidelines are laid down for application of judicial mind by the Learned Judicial Magistrate while invoking power under Section 156(3) of the Code, as under-

1. The learned Magistrate would be well advised to verify the truth and the veracity of the allegations, regard being had to the nature of allegations of the case.
2. There has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3) of the Code of Criminal Procedure.
3. Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed which are the sine qua non for application under Section 156(3) of the Code.
4. An application under Section 156(3) of the Code should be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made.
5. A number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed.
6. Learned Magistrate would also be aware of the abnormal delay in lodging of the FIR in initiating criminal prosecution."

24. In Mukul Roy (supra) the Hon'ble Single Judge in sub-paragraph 1 of the Paragraph 59 directs that the Magistrate shall verify the truth and veracity of the allegations, record being had to the nature of the allegations of the case. With all humiliation and greatest respect to the Hon'ble Judge the said direction is not in conformity with the direction made by the Hon'ble Supreme Court in Lalita Kumari (supra) in Paragraph 120.5 of Lalita Kumari, the Hon'ble Single Judge clearly directs that the scope of preliminary inquiry is not to verify the veracity or otherwise of the information received, but only to ascertain whether the information reveals any cognizable offence. When the police authority in case of preliminary inquiry prior to the registration of a case concerning cognizable offence is not entitled to verify the veracity, how would a Magistrate be able to verify the truth and veracity of the allegations contained in the application under Section 156(3) of the Cr.P.C. In view of what has been stated above and applying the ratio of Lalita Kumari, this court holds that sub paragraph (4) of Mukul Roy's

case is not a correct guideline to be followed by the Magistrate while dealing with an application under Section 156(3) of the Code.

25. All other points mentioned in Paragraph 59 of the decision of Mukul Roy are culled out from the decision of the Hon'ble Supreme Court in the case of Priyanka Srivastava & Anr vs. State Of U.P. & Ors reported in AIR 2015 SC 1758.

26. Coming to the instant case it is found that the directions of the Priyanka Srivastava were prima facie complied with by the petitioner before filing of an application under Section 156(3) of the Code.

27. Upon receiving an application under Section 156(3) of the Code two alternative courses of action are open to the Magistrate. The Magistrate can under Section 190 of the Code, before taking cognizance ask for investigation by police under Section 156(3) of the Cr.P.C. Secondly, if the Magistrate thinks fit he can take cognizance upon the petition of complaint and follow the procedure contained in Section 202 of the Code. He cannot draw an inference that because of delay of lodging complaint it could be inferred that the application could not be treated as FIR on the ground of inordinate delay.

28. Before I part with, I am tempted to mention the effect of delay in lodging FIR. In a criminal case the FIR is the earliest statement of commission of a cognizable offence. It is not a substantive piece of evidence and it can be used in trial either for corroboration or contradiction. Delay in lodging complaint is treated as a ground of false narration of the incident, embellishment and suppression of material fact.

29. All such points are to be decided by the Court during the trial of a case. While dealing with an application under Section 156(3) of the Code, the Magistrate cannot decide the effect of delay in lodging complaint. Lalita Kumari empowers the police authority to conduct preliminary inquiry over inordinate delay in lodging the complaint. The Supreme Court never directs in Lalita Kumari to throw an application away under Section 156(3) of the Code on the ground of delay without sending it to the police authority for either preliminary inquiry or investigation treating the same as FIR.

30. In the light of the above discussion, the impugned order passed by the learned Chief Judicial Magistrate on 12th November, 2020 is liable to be set aside.

31. Accordingly, the instant criminal revision is allowed on contest however, without cost against the private opposite party and ex-parte against the State of West Bengal.

32. The learned Chief Judicial Magistrate, Alipore, South 24 Pgs is directed to reconsider the application filed by the petitioner under Section 156(3) of the Code in the light of the observation passed herein above and pass a reasoned order within seven days from the date of receipt of such order.

33. Parties are at liberty to act on the server copy of the order.