

(1993) 05 CAL CK 0020

In the Calcutta High Court

Case No : Criminal Rev. No's. 265-266 of 1991

Shaktri Sadhan Majhi and Another

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 14-05-1993

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(5), 173, 245(3), 468

Citation : 97 CWN 822

Hon'ble Judges : R. Bhattacharyya, J; Nisit K. Batabyal, J; A.M. Bhattacharjee, J

Bench : Full Bench

Advocate : B.C. Roy, Haradhan Banerjee, Y. Dastoor, Amitabha Pain and S.K. Roy Karmakar, for the Appellant; Sekhar Basu for Amicus Curea and S.S. Hazra and Sasanka Ghosh, for the Respondent

Judgement

A.M. Bhattacharjee, C.J.—We are speaking through different judgments, but not in different voices. My two learned brothers are delivering different, but not differing, judgments. On the whole, we are unanimous and my judgment has the concurrence of both of my learned brothers, Batabyal and Bhattacharyya JJ. Now to the matter. By the Code of Criminal Procedure (West Bengal Amendment) Act, 1988, which has come into force on and from the 2nd May, 1989, a new sub-section (5) has been substituted for the original sub-section (5) of section 167 of the Code of Criminal Procedure, 1973. That new sub-section, substituted by the West Bengal Amendment Act as aforesaid runs as hereunder

(5) If in respect of -

(i) any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months or

(ii) any case exclusively triable by a Court of Session or a case under Chapter XVIII of the Indian Penal Code (45 of 1860) the investigation is not concluded within a period of three years, or

(iii) any case other than those mentioned in clauses (i) and (ii) the investigation is not concluded within a period of two years from the date on which the accused was arrested or made his appearance,

the Magistrate shall make an order stopping further investigation into the offence and shall discharge the accused unless the officer making the investigation satisfied the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the periods mentioned in this sub-section is necessary.

2. Two question that have arisen for consideration by this Special Bench are (i) whether the aforesaid sub-section (5) has retrospective operation and would govern all investigations initiated before the commencement of the said sub-section and (2) whether, taking cognizance of an offence on the basis of any investigation continued and a charge-sheet submitted beyond the period specified in that sub-section and the trial thereafter, without any order from the Magistrate for the continuation of investigation beyond the period, are bad and void.

3. The principles of interpretation of statutes, as has been pointed out by Chandrachud, C.J. *Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another*, with rules pulling in different directions have become a murky area and just as a case-law digest can supply an authority on almost any thinkable proposition, so also these principles have collected over the years divergent formulae which can fit in with any interpretation which one may choose to place. As pointed out by Lord Denning in his *Discipline of Law* (1979, page 9), "If you find a maxim or rule on your side, your opponent will find one on his side to counteract it". The plethora of rules and case-laws have now become so flabbergasting that instead of helping us in achieving clarity of certainty, they, more often than not, may land us in obfuscation. But certain rules of interpretation have nevertheless stood the test of time and have held the field for such a long time that they may be taken to be well settled. One such rule is that law's relating to procedure are generally retroactive in operation unless there is any contrary indication, either expressly or by irresistible implication, in the law itself. The authorities on this point, whether textual or judicial, are galore and reference, by the way, may be made to a rather recent decision of the Supreme Court in *Gurbachan Singh Vs. Satpal Singh and others*, where the following passage from Halsbury's *Laws of England* (4th Edition, Volume 44, page 574) has been cited with approval:

The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence, on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.

4. We are, however, satisfied that there are clear indications in sub-section (5) to demonstrate that the provisions thereof cannot apply to any investigation which

has already been concluded by the submission of a charge-sheet or otherwise, before coming into force of the said sub-section. The sub section has clearly directed that "the Magistrate shall make an order stopping further investigation into the offence and shall discharge the accused" and this is a clear demonstration of the Legislative intention that it would apply to such earlier investigation which is not complete and can, therefore, be stopped. If, as already stated, the investigation is already completed whether within the specified period or beyond the same, the Magistrate will have nothing to stop in respect of investigation and that being so, the sub-section on the face of it cannot apply to such an investigation already concluded before the coming into operation of the aforesaid sub-section. It would not be retrospective to that extent. But the sub-section would nevertheless apply with retrospection to any earlier investigation which is not concluded and, is therefore, pending on the date of the commencement of the sub-section, as the Magistrate in that case would have scope to stop the investigation and to discharge the accused. We are accordingly satisfied that the new sub-section (5) inserted by the West Bengal Amendment Act of 1988 shall not apply to the investigation already concluded or completed before the commencement of that sub-section, but shall nevertheless apply to all investigations, initiated before but not concluded and is thus pending on the date of such commencement. Needless to state, it would apply to all investigations initiated after such commencement.

5. The view we take is in perfect accord with the decision of the five-judge Full Bench of this Court in *Ajit Kumar Palit Vs. The State*, where it has been ruled that though there is no doubt that amended law relating to procedure operates retrospectively, it only means that pending cases, although initiated under the old law but still pending, are Governed by the new procedure under the amended law; but that does not mean that the part of the old procedure already applied and concluded before the amendment came into force, becomes bad or can be reopened under the new procedure after the amendment.

6. As to the second question, we are of the opinion that cognizance of offence and the trial thereof on the basis of investigation carried on and charge-sheet submitted beyond the period fixed u/s 167 (5), without any order from the Magistrate under that sub-section or from the Session Judge under sub-section (6) are bad and void.

7. Section 167 (5) of the Central Code of Criminal Procedure, 1973, only deals with cases triable as summons cases and provides that if the investigation is not concluded within six months from the date on which the accused was arrested, the Magistrate must make an order stopping further investigation into the offence, unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice, investigation beyond that period is necessary. With reference to this Section 167(5), it has been observed by the Supreme Court in *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, that once an order stopping further investigation is made, only two

courses would be open thereafter. Either the police must immediately file a charge-sheet, if the investigation conducted till then warrants such a course or if not, the accused must be released forthwith.

8. Mr. Roy appearing for the petitioners has, however, contended on the strength of the decisions of the Supreme Court in H.N. Rishbud and Inder Singh Vs. The State of Delhi, in Abhinandan Jha and Others Vs. Dinesh Mishra, and in Balkishan A. Devidayal Vs. State of Maharashtra, that formation of opinion by the officer-in-charge and the filing of charge-sheet on the formation of such opinion is a part of the "investigation" under the code and, that being so, neither the requisite opinion can be formed nor a charge-sheet can be filed after order has been passed stopping the "investigation" and that the contrary view of the Supreme Court in Hussainara Khatun (Supra) cannot be treated as good law in view of the series of earlier and later decisions cited above.

9. We, however, need not decide the point as in our view, the West Bengal Amendment Act of 1988 has clinched the question by express words used in the substituted sub-section (5). While Section 167(5) of the Central Code only provides for an "order stopping further investigation into the offence". Section 167(5) as substituted by the West Bengal Amendment Act of 1988 has gone a step further by providing in express words that on such stoppage of investigation, the Magistrate "shall discharge the accused". Under the West Bengal law, therefore, discharge of the accused must follow as a matter of course once an order is made stopping the investigation. After this West Bengal Amendment Act, there will be no scope under the West Bengal law to follow the course suggested in Hussainara Khatun (supra) of filing a charge-sheet after the stoppage of the investigation, even if Hussainara Khatun (Supra) has laid down good law notwithstanding H.N. Rishbud (Supra), Abhinandan Jha (Supra) and Balkissen A. Devidayal (Supra).

10. But we are here more concerned with a different question and that question is, if in a given case, whether through error, omission, inadvertence or otherwise, an order of stoppage of investigation and discharge of accused is not made and investigation has continued beyond the period specified even though there was no order either under sub-section (5) or sub-section (6) authorising further investigation, and then a charge-sheet is eventually filed obviously beyond the period specified, followed by taking of cognizance and trial of the offence, whether such cognizance and the trial following can be allowed to stand? As already indicated, we are returning a negative answer.

11. It is true that the Supreme Court decision in H.N. Rishbud (Supra, at 204) and the decisions following the same, may, appear to be authorities for the broad proposition that invalidity of the pending investigation may not, by itself, invalidate the cognizance or trial of the offence, unless a failure of justice has been caused thereby. But a closer reading of the decision in H.N. Rishbud (Supra) is apt to give rise to the impression that the law therein was so propounded in the context of and with reference to such illegality or invalidity or

defect which can be cured or rectified by the Court on its attention being drawn at an early stage. After holding that invalidity or investigation may not affect a subsequent cognizance and trial of offence, it was observed in H.N. Rishbud as hereunder (Supra, page 204, Para 10):-

It does not follow, however, that the invalidity of an investigations to be completely ignored by the court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for.

12. But once the investigation is continued beyond the period fixed without an order for continuation under sub-section (5) or an order under sub-section(6) of section 167, the illegality or the defect can no longer be cured or rectified by ordering any amount of reinvestigation. It may, therefore, be doubted as to whether the principle enunciated in H.N. Rishbud (Supra) would at all apply to a case where the irregularity, illegality or invalidity of the Investigation can no longer be cured as would be the case where an investigation is continued beyond the specified period without an appropriate order from the Magistrate or the Session Judge under sub-section (5) or sub-section (6) of Section 167.

13. But we are, however, of the opinion that even according to the principle enunciated in H.N. Rishbud (Supra) cognizance and trial of an offence on the basis of the investigation continued beyond the period specified in Section 167(5) without an appropriate order from the Magistrate under that sub-section or an order from the Session Judge under sub-section (6), would be bad and void as failure or miscarriage of justice would be writ large on the face of such cognizance and trial. As already noted, without an order for continuation of investigation by the Magistrate, an accused immediately acquires a right to be discharged from the case once the investigation is not concluded within the period fixed in Section 167(5). Therefore, if investigation in a case has in fact continued beyond that period without an appropriate order under sub-section (5) or sub-section (6) of section 167, the right of the accused to have a speedy trial as conferred by sub-section(5) is immediately affected. It can no longer be disputed, as pointed out by the Supreme Court in Hussainara Khatun (Supra) that the right to speedy trial is a fundamental right guaranteed under Article 21 of the Constitution. And once that right is illegally affected, failure of justice cannot but immediately show its head. Then again, as pointed out earlier, without an appropriate order under sub-section (5) from the Magistrate or under sub-section (6) from the Session judge, the accused immediately acquires a right to be discharged from the case. Therefore, if an accused is deprived of such a statutory right to release operating in his favour by the unauthorised continuation of the investigation beyond the period specified, followed by charge-sheet, cognizance and trial, failure or miscarriage of justice would immediately manifest and demonstrated, for there cannot be greater failure or miscarriage of

justice than in a case where an accused entitled to be released has not been released, but has still been prosecuted and convicted. We are, therefore, of the opinion that any cognizance or trial of an offence on the basis of an investigation continued and charge-sheet filed beyond the period fixed u/s 167(5), without an appropriate order from the Magistrate under that sub-section or an order of the session judge under sub-section (6), must be held to be illegal and void on the ground of failure of justice. In that view of the matter, as in both the cases before us, cognisance was taken on the basis of investigation continued and charge-sheet filed beyond the period specified in Section 167 (5), without any order from the Magistrate under sub-section (5) or any order from the Session Judge under sub-section (6), the proceedings in both the cases must be quashed and we direct accordingly.

Both the Revisional Applications accordingly succeed and the impugned criminal proceedings stand quashed and all the accused persons are discharged.

N.K. Batabyal. J.

14. I agree with the reasons and conclusions reached in the judgment just delivered by My Lord, A. N. Bhattacharjee, C. J. I also agree with the reasoning and conclusion arrived at in the judgment of my Learned brother, Bhattacharyya, J. mentioned hereinafter.

15. I would like to add the following on the question as to whether cognizance can be taken even if there is a violation of Section 167(5) of the Cr. P. C, as views expressed by different High Courts of India have been different. My Learned Brother, R. Bhattacharyya, J. Has in his judgment referred to the decisions of the Calcutta High Court on this point. I would rather refer to the decisions of some of the High Court on this point.

16. In Jai Bhagwan's Case (1985 Cri. L.J. 932). it has been held that Section 167(5) Cr. P.C. cannot be read to mean that no permission could be sought from the Magistrate once the period of six months has expired. It is evident that before the Magistrate will pass an order stopping further investigation, he must give an opportunity to the police to satisfy him that there are any special reasons to continue the investigation beyond the period of six months. This matter thus come up for consideration only after six months have run out. If the provision is read to mean that he is powerless to grant permission after a lapse of six months, it would lead to a peculiar situation that he could not pass an order for continuing the investigation, even if he was of the view that it was in the interest of justice to do so. This would make Section 167(5) of the Cr. P.C. otiose.

17. In Hanuman Box Agarwalla Vs. Girish Chandra Gogoi and Others, the following points were considered :--

i) Whether the entire proceeding becomes without jurisdiction and nullity in case investigation in a summons case is not completed and the charge-sheet is not submitted within a period of six months from the date of arrest of the accused

unless the Investigation Officer making the investigation satisfies the Magistrate that for a special reason and in the interest of Justice the continuation of the investigation beyond the period of 6 months is necessary?

ii) Whether the proceeding becomes without jurisdiction and nullity only because the charge-sheet was submitted after 6 months though investigation was completed within a period of 6 months from the date of arrest of the accused in a summons case?

iii) Whether the proceeding is a nullity and Magistrate cannot take cognizance, if the investigation continues beyond 6 months of arrest of the accused although the part of investigation completed before expiry of 6 months make out a case for trial against the accused?

18. It was held that the entire proceeding would not become without jurisdiction and nullity in those cases where investigation in summons cases is not completed within a period of six months where no permission has been obtained to continue investigation beyond six months. It was further held that the proceedings could not become without jurisdiction and nullity only because the charge-sheet was submitted after six months. It was also held that the proceedings would not become a nullity if the materials collected before expiry of six months make out the case for trial against the accused.

19. It has been held in *The Public Prosecutor Vs. Sagam Pratap Reddy*, that so far as taken of cognizance is concerned, limitation has been provided by Section 468 of the Cr. P.C. Because of this if cognizance is taken on the basis of charge-sheet filed within the period of limitation mentioned in Section 468 but after the period of six months, the same would not be totally barred.

20. The Kerala High Court in *C. Bhaskaran Nair Vs. State of Kerala and Others*, and the Bombay High Court in *State of Maharashtra vs. P.C. Tatyaji*, (1986 Cril. L.J. 332) have also taken the same view. In *Jagannathan and Others Vs. The State*, , it has been held that carrying on of investigation beyond the period of six months without the permission of the Magistrate would be illegal but if cognizance has once been taken by a competent Court, the mere antecedent illegality in the investigation will not invalidate or vitiate the proceedings unless it is shown that prejudice has been caused to the accused and mis-carriage of justice has resulted thereby.

21. In *D. Kumar Vs. State of Karnataka*, it has been held by Karnataka High Court that the bar imposed by Section 167(5) is for Investigation and not for the Court taking cognizance of that case.

22. From a discussion of the principles laid down in those cases it appears that the common principle is that the Magistrate can take cognizance even after the expiry of the six months period as laid down in sub-section (5) of Section 167 in summons cases. But following the principles as laid down in *H.N. Rishbud and Inder Singh Vs. The State of Delhi*, it cannot be said that there is no limitation on

the application of the principle laid in that case. There are two important limitations; first, the invalidity or illegality must be curable and secondly, that no injustice is caused consequent upon the taking of cognizance in breach of the statutory provisions relating to investigation. After the introduction of the West Bengal Act 24 of 1988, the Magistrate is under a duty to stop the investigation after the expiry of the prescribed period and to discharge the accused. This is an extension of the right to have speedy investigation or speedy trial as adumbrated under Article 21 of our Constitution. So when a person is otherwise entitled to an order of discharge in view of invasion of an entrenched right under the Constitution then taking of cognizance over - looking the mandatory direction regarding stopping of investigation and discharge of accused is bound to lead to injustice. In this context we differ fundamentally from the views of the other High Courts of India on this point as stated above.

23. In view of the clear position of law as enunciated by us, we hold that both the cases before us where cognizance was taken on the basis of investigation continued and chargesheet filed beyond the period prescribed u/s 167 (5) Cr. P.C. as amended by the West Bengal Act 24 of 1988 without any order from the Magistrate under Sub-section (5) or any order from the Sessions Judge under sub--section (6) of Cr. P.C., the proceedings in both the cases must be quashed and we direct accordingly. We put on record our deep appreciation of the help rendered by the Learned amicus curiae in this case.

R. Bhattacharyya, J.

24. I had the advantage of going through the judgment of the Hon"ble the Chief Justice and also the judgment of my learned brother Shri N.K. Batabyal, J. and I fully subscribe to the views expressed by their Lordships. But, I want to add a few words more to flush other points as it is expedient to do so, in the background of the State Amendment.

25. It has been debated at the bar that the word "discharge" appearing in Section 167(5) of the State Amendment has a restrictive meaning which cannot be extended to the discharge of the accused from the case. Mr. Roy has disputed the correctness of the submission. Mr. Bose appearing as an amicus curiae in rebutting the contention of Mr. Roy has made a forceful submission that the word "discharge" as engraved in the body of the State Amendment constitutes a discharge of the accused from the bail bond or from the custody or under a special order of the Magistrate. But, this contention is not buttressed by the State Amendment as it is not the dominant intention of the legislature to attribute to that meaning, as canvassed by Mr. Bose.

26. A plain reading of the State Amendment suggests without any shred of obscurity that it refers to discharge of the accused from the case. This view becomes patent and is not devoid of logic when the expressions "shall discharge the accused" is read with "any case" as manifest from Clauses (I to II) of the substituted provision of Section 167(5). Besides, the solemn object of Section

167(5) is to avoid investigation which is not only baneful for an individual but also to the society at large as under-trial prisoners languish in jail during detention, although the accused charged with the offence or offences may be of trivial nature.

27. In the back drop of the above, the word "discharge" can not have any other meaning as it is compatible with the amendment. More so the amendment should not be read in isolation of realities.

28. The other aspect of the matter is the view taken by our High Court about the scheme and object of section 167(5) of the Code of Criminal Procedure. But, we must take an analytical approach to the cases of our High Court when conflicting judgments handed down from time to time by different Judges sitting singly and also by the division bench. The cases of Joy Shankar Jha vs. State, 1982 Cr. L.J. 744, Ram Kumar Keshari vs. State, 1981 Cr. L.J. 1288. Rambriksa Yadav vs. State, 1983 Cr. L.J. 39, Phalguni Mondal vs. State, 1991 (i) C.H.N. 311, Pappa Rao vs. State, 1985 Cr. L.J. 546, Prabhunath Singh vs. State of W.B. 1982 C. Cr. LR. 338 & Utpalendu Mahato Vs. State and Another, represent the one view.

29. The cases of Motion Mukherjee vs. State & Another, 1992 C. Cr. LR. 211 & Shyamal Kr. Chakraborty vs. State of W.B. & Another, 1993 C. Cr. LR 31 respectively represent the other view.

30. After going through the anatomy of the decisions under reference it is evident that the decisions were strictly confined to the fate of the investigations when continued beyond 180 days or 6 months from the date of arrest of the accused without the prior permission of the Magistrate.

31. The Hon"ble Judge sitting singly or sitting in the division bench were unanimous that investigation, if continued beyond the statutory period in absence of an order from the Magistrate would render it illegal. But, there is an unnatural silence maintained in those decisions about the fate of the concluded investigation and the trial proceeded or concluded on such investigation which continued beyond the statutory period. It is noteworthy that there was no reference of H.N. Rishbud vs. State of Delhi 1955 Cr. L.J. 526 in those cases where salient features of investigation, effect of concluded investigation proceeded on illegality and the trial followed or concluded were fully discussed and the law laid down there. Only in Pappa Rao vs. State, 1985 Cr. L.J. 546, their Lordships proceeded on the view earlier taken, by our High Court viz. if the investigation is not completed within 180 days, no court can take cognizance on a chargesheet submitted, as a result of any investigation continued beyond 180 days from the date of arrest. The filing of the charge-sheet according to their Lordships could never be a flesh and bone of investigation. An interpretation of the word investigation was put on by their Lordships in paragraph 7 of the judgment which is extracted below for appreciation:

We have pointed out that on the terms of Sub-Section 2 of Section 173, it is only when the investigation is completed and the report is drawn up that the said

report is forwarded to the Id. Magistrate. The Act of investigation concludes when the investigation officer forms his opinion draws up the report. Forwarding the same to the Magistrate is the statutory obligation which follows the same.

32. It evinces, therefore, that the decision in Pappa Rao (Supra) falls on different premises. There, the law with which we are presently concerned was not correctly decided or discussed.

33. The case of Motion Mukherjee (Supra) is a complete departure from the principle of law laid-down in Rishbud (Supra). The case of Shyamal Chakraborty (Supra) is also beside the point as his Lordship, after examining the number of circumstances held;

The sub-section (5) however will have to be applied, wherever it has to apply, in all its dimensions and not in a tournated way. For securing the applicability of the substituted sub-section (5) in all its dimensions to pending investigations the manner of application of the same may be reasonably modulated so as to ensure the availability of the right of the accused as given by the said sub-section as well as the opportunity of the investigating agency to pray for continuation of the investigation beyond the prescribed period in deserving cases. Such modulated application can be permitted in a reasonable manner best suited to the circumstances. This can be done by allowing the investigating agency an opportunity to pray, if necessary, for continuation of the investigation beyond the prescribed period before the order stopping investigation is passed by the Magistrate in cases where a period equivalent to the prescribed period had already expired before the substituted sub-section came into force but the investigation has yet been continuing even after that date.

34. In Satyacharan 96 C.W.N. 406, their Lordships only discussed the scope of Section 245(3) of the State Amendment of the Cr. P.C. in the background of the object of Article 21 of the Constitution of India. The issue when brought to a close, it is discernible that the present State Amendment is not a substitute for earlier Central Law but a recognition of the comprehensive right of the accused in the temple of Section - 167 (5) of the State Amendment which should be achieved than defeated. To sum up, thus, I am with great deference firmly of the view with respect that the point decided in the foregoing decisions can no longer be held to be the good law and, accordingly they are overruled.

It is therefore, unanimously held that -

(a) the State Amendment will not apply to the investigations already concluded before 2.5.89, and

(b) the State amendment is appropriately applicable to pending investigation.