
(2011) 07 AHC CK 0274
In the Allahabad High Court
Case No : Criminal Revision No. 2114 of 2011

Shiv Prakash Tiwari and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 04-07-2011

Acts Referred:

Constitution of India, 1950 — Article 20, 21
Criminal Procedure Code, 1973 (CrPC) — Section 173(5), 200, 202, 227, 228
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 304A

Citation : (2011) 3 ACR 3242 : (2011) 6 ADJ 534

Hon'ble Judges : Vinod Prasad, J

Bench : Single Bench

Judgement

Vinod Prasad, J.—A group of close associates of half a dozen plus one revisionists namely, Shiv Prakash Tiwari. three sibling brothers Murli Upadhyay, Pawan Upadhyay, Ravi Upadhyay, teamed with Pintoo Singh, Pankaj Pathak, his father Paras Pathak and Kallu Mishra, have invoked the revisional jurisdiction of this Court, mooting a legal question for determination as to whether they can be improperly charged and be prosecuted for an offence, which they have never committed on the pretext that at the subsequent stage of trial their charge can be suitably amended? Mooting said question they have questioned the validity and sustainability of impugned order dated 17.2.2011 passed by Special Judge (SC/ST Act), Varanasi in S.T. No. 360 of 2010 State v. Murli Upadhyay and Ors. Revisionists grievance is that Code of Criminal Procedure as well as Constitution, which is fountain head of all laws in India, both mandates that accused can be charged and be prosecuted only for the crime/ offence committed by them disclosed either in the police case diary filed alongwith the charge-sheet or in the statements of witnesses recorded during inquiry conducted by the Magistrate under Sections 200 and 202 Code of Criminal Procedure, herein after referred to as the Code. Trial Court cannot improperly charged and commence the trial of accused on the pretext that at the later stage of the same charge can be suitably amended.

2. Before advertng to the harangued question, a quick search light on the back ground facts indicate that revisionist No. 1 and informant Respondent No. 2 Jai Prakash Tiwari are uterine brothers being sons of Late Raja Ram Tiwari. In between them, their relatives and associates an incident of assault occurred on 26.4.2009 concerning an immovable property, regarding which Original Suit No. 130 of 2009 Aanchal Prakash v. Suresh and Ors., is pending before Civil Judge, (JD) Hawaii, district Varanasi and in which an interim injunction under Order 39 Rule 1 and 2 was also passed on 12.2.2009. Plaint of the Suit and injunction order are Annexure 1 and 2 to the affidavit, appended alongwith this revision. It is noted here that the Suit was in respect of a gift deed executed on 11.8.2006 by Smt. Savitri Devi, mother of revisionist No. 1 and informant Respondent No. 2, in favour of Aanchal Prakash, wife of revisionist No. 1 and her daughter in-law. Execution of the gift deed had succeeded by digging up of a foundation on 24.6.2009 and because of that on the date of the incident (26.6.2009) both the parties engaged themselves in a brawl armed with blunt objects and assaulted men from either side. From the side of the revisionists, Shiv Prakash Tiwari, and Pawan Upadhyay, revisionist Nos. 1 and 2, sustained head injuries and revisionist No. 1 had a partial bone fracture of the right side head. Revisionist No. 1 got a FIR of the incident registered at PS Rohania district Varanasi vide Crime No. 270 of 09, under Sections 147, 148, 323 Indian Penal Code. Copy of the FIR alongwith two medical examination reports are Annexure 3 to 5 of the affidavit appended alongwith this revision. Ensued investigation into the crime ultimately culminated in laying down a charge-sheet, Annexure No. 6, before the Court on 26.6.2009 and, on that basis cognizance was taken by the Magistrate on 15.7.2009 against the charge-sheeted accused.

3. In respect of that very incident another brother informant Respondent No. 2 Jai Prakash Tiwari also got a cross version lodged as Crime No. 270 A, of 2009, under Sections 147, 148, 308, 323, 506 Indian Penal Code, at the same police station vide Annexure No. 7. From his side Suresh Tiwari had sustained injuries and was medically examined on the same day at 3.20 p.m. He was also got admitted in Institute of Medical Science BHU Varanasi. His medical report at SSPG Hospital Varanasi vide Annexure 8 to the affidavit indicates that he had sustained lacerated wound muscle deep on the right side of head above right eye and was advised for X-Ray. Brain matter was protruding from posterior and right part of his head. Rest of the injuries sustained by him were all contusions on various parts of his torso. In the midst of his treatment, after three days, Suresh Tiwari lost his life on 29.4.2009 at 5.50 p.m. Papers regarding his death and certificate of the same are Annexures 9 and 9A, issued from Singh Medical and Research Centre Private Ltd. Teliyabad, Varanasi. According to Annexure 9A, Suresh Tiwari had expired due to cardio respiratory arrest. Autopsy report of the deceased Annexure No. 11, conducted on 30.4.2009 at 4.30 p.m. however, records cause of death due to coma as a result of injury to head and brain. Investigation into the counter version, Crime No. 270 A of 2009, also concluded in filing of a charge-sheet on 4.7.2009 against named revisionist accused,

resulting in taking cognizance by the Magistrate on 16.7.2009 vide Annexure No. 13. In this crime number, finding the case of the accused revisionists triable by Session's Court, after observing due formalities, the same was committed to the Session's Court by the Magistrate, where it was registered as S.T. No. 360 of 2010 State v. Murli Upadhyay and Ors. and then was allotted to Special Judge SC/ST Act Varanasi for trial. At the stage of Section 227/228 Code of Criminal Procedure i.e. framing of charges, revisionists accused moved an application, Annexure 14, on 29.7.2010., raising objections for charging them u/s 302/149 Indian Penal Code. Their said prayer was negatived by the trial Judge by passing the impugned order dated 17.2.2011, who thereafter framed charges against the accused revisionist under Sections 147, 148, 323/149, 325/149, 506 and 302/149 Indian Penal Code. vide Annexure No. 15 and 16. Hence this revision.

4. In the backdrop of preceding facts scenario I have heard Sri Arvind Kumar Srivastava, learned Counsel for the revisionists and Sri Patanjali Misra, learned AGA for the State in support and opposition of this revision and have also perused the record.

Supporting case of the accused revisionists, learned Counsel for the revisionists castigated the impugned order by canvassing that it is a non-speaking order rendered without considering revisionist arguments and therefore, cannot be sustained being devoid of any discussion and reasonings thereof. It is a slip shod order without application of mind and perusal of material contained in the case diary. Reasons are link between thoughts and conclusions and therefore, absence thereof makes the impugned order vulnerable submitted learned Counsel. Framing of charges, in a trial procedure, is of utmost importance, as nobody can be charged and prosecuted improperly for any offence, which has never been committed. It is the charge which the accused is asked to plead guilty or to defend and therefore the same cannot be framed in a casual exercise of power harangued learned Counsel. Further advanced contention is that Article 20 of the Constitution provides that nobody can be prosecuted and be punished except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence and therefore charging accused with offences entailing serious punishment and graver consequences is an illegal exercise of jurisdiction requiring correctional order. Article 20 was taken recourse to for contending that Constitution, which is the fountain head of all laws in India, provides that nobody can be prosecuted for offence which he has never committed and secondly, No. penalty can be imposed on an accused greater than what can be imposed on him only for an offence committed by him. It is contended that Section 302 I.P.C. is punishable only with two sentences either imprisonment for life or with death and since the revisionists have never committed that offence, their prosecution for the said charge is contrary to the constitutional mandate and statutory provisions contained in the Code. It was next submitted that the reasons, which are the backbone of all judicial decisions, are required to be mentioned while deciding an

important issue in criminal trial procedure, more so when it involves question of jurisdiction of a Court to try an offender. Corollary to the said argument is that perusal of the charges indicate that but for the charge u/s 302/149 Indian Penal Code, all other charges are triable by Magistrate-Ist class and once that offence of murder is not prima facie indicated from the material contained in the case diary, question of jurisdiction of Session's Court to try the revisionist accused will also be a question to be reckon with. Contention is that there has to be ex-facie material for framing of charge u/s 302/149 I.P.C. On the aforesaid submissions, it was submitted that the impugned orders of identical date of rejecting prayer of revisionist accused for not charging them u/s 302/149 and later on charging them with that offence both orders be set aside and the matter be directed to be reconsidered by the trial Judge.

5. Learned AGA per contra submitted that the impugned order is an interlocutory order, as the charge can be amended at any stage and therefore, revision is barred u/s 397(2) Code of Criminal Procedure Autopsy report of the deceased indicates at least one injuries sufficient to cause death and therefore, charge u/s 302 Indian Penal Code has been rightly framed. It was an unlawful assembly and in fact the revisionists have No. grouse against framing of charges under all other offences but for 302 Indian Penal Code. It lies within the realm of the trial Judge to alter the charge suitably at any subsequent stage of trial and hence No. prejudice is caused to the accused in that respect. Alternatively it was pleaded that it is trite law, not open to be questioned this belatedly, that an accused charged with a graver offence can be punished for a milder offence and therefore, accused cannot have any grievance in that respect. It was further submitted that present revision has been preferred only to linger on the trial and delay the proceedings. State counsel further argued that after prosecution delineated it's evidences, revisionists can raise their grievance before the trial Judge in respect of charge u/s 302/149 Indian Penal Code and can always convince it to alter or amend the same and trial Court will have to consider that. It was therefore contended that the revision be dismissed as there is No. reason for this Court to interfere with the trial of the revisionists and the impugned order.

6. I have considered the arguments of both the sides. This revision can be decided on a short question and therefore, I do not propose to issue notice to Respondents No. 2 as that will only be a wastage of time and will unnecessarily hampered the trial and linger it for months together, which will not be suited to the interest of justice of either side. Perusal of the impugned order indicates that the said order is bereft of any reason. The application filed by the revisionists had raised some significant legal questions which required determination after conducting a critical analysis looking into the back ground of facts and circumstance of the allegations, ex-fade material and evidences incorporated in the case diary submitted by the police but very weirdly the same has been eschewed by the trial Judge in a very unsatisfactory manner. It was not expected of the trial Judge to reject the prayer of the accused regarding contentious issues by writing a single sentence. It was it's duty under Sections 227/228 of the Code

to consider, analyse and then decide the question of framing of appropriate charges against the accused as charging an accused with an improper offence is illegal and unjustified. Session's trial procedure ordains that Session's trial commences with opening statement by the public prosecutor by stating the charges against the accused and narrating the evidences by which prosecution desires to prove those charges. After it, trial judge is required to hear the accused and the prosecution on the question of framing of charges. Hearing of the accused at this stage is not an idle formality but is a judicial act entailing serious consequences and hence arguments of the accused cannot be brushed aside without a reasoned order. After hearing the accused and deciding his submissions that the trial Court is required to frame charges against the accused and he be asked to plead guilty or deny the same. If the accused pleads guilty then he has to be convicted then and there and No. evidence is required to be led in the trial. It is only when the accused abjure charges that prosecution be asked to establish his guilt to the hilt by tendering it's evidences as was stated by it in the opening statement by the public prosecutor. In such a procedural scheme trial Court cannot frame improper charges by sheltering itself behind a lame excuse that the charges can be altered at any later stage of the trial procedure. Sections 227/228 Code of Criminal Procedure cannot be offended on such a pretext. Trial Court is required to look into the materials contained in the case diary, decide offence committed and disclosed through it and then charge the accused as is required under the Code. Accused can be prosecuted and punished only for the offence/offences committed by him/them and No. other.

7. In this context many decisions by the Apex Court and of this Court can be cited wherein it has been reminded that charging the accused with appropriate charge is not an idle formality nor an act which the Court can do as a matter of routine course. Above discussion leads to the importance of framing of correct charges. In *State of M.P. v. Sheetla Sahai* AIR 2009 SC (Supp) 1744, it has observed by the Apex Court as under:

59. In this case, the probative value of the materials on record has not been gone into. The materials brought on record have been accepted as true at this stage. It is true that at this stage even a defence of an accused cannot be considered. But, we are unable to persuade ourselves to agree with the submission of Mr. Tulsi that where the entire materials collected during investigation have been placed before the Court as part of the charge-sheet, the Court at the time of framing of the charge could only look to those materials whereupon the prosecution intended to rely upon and ignore the others which are in favour of the accused. The question as to whether the Court should proceed on the basis as to whether the materials brought on record even if given face value and taken to be correct in their entirety disclose commission of an offence or not must be determined having regard to the entirety of materials brought on record by the prosecution and not on a part of it. If such a construction is made, Sub-section (5) of Section 173 of the Code of Criminal Procedure shall become meaningless.

The prosecution, having regard to the right of an accused to have a fair investigation, fair inquiry and fair trial as adumbrated under Article 21 of the Constitution of India, cannot at any stage be deprived of taking advantage of the materials which the prosecution itself has placed on record. If upon perusal of the entire materials on record, the Court arrives at an opinion that two views are possible, charges can be framed, but if only one and one view is possible to be taken, the Court shall not put the accused to harassment by asking him to face a trial.

8. In *P. Vijayan Vs. State of Kerala and Another*, it has been held by the Apex Court as under:

10. If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the Trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere Post Office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the Court, after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which *ex facie* disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

9. Reverting back to facts of the present revision and impugned order it is surfaced that through the impugned order, trial Judge has not at all considered the arguments raised by the accused and the same is bereft of any reasoning. This Court as well as the Apex Court has time and again reminded that an order by a Court or even by an administrative authority cannot be sustained when it offends principles of natural justice and is bereft of reasonings. As pointed out above reasons are the links between thoughts and conclusions. On this respect, some of the decisions of the Apex Court are referred to below:

In *Tutul Kumari Sen Vs. State of Jharkhand and Another*, it has been held by the Apex Court as under:

8. We find that the order of the High Court is practically unreasoned. It is not certainly the way a revision petition was to be disposed of. There is absolutely No. discussion as to why the conclusions of the trial Court in rejecting the prayer made in terms of Section 227 of the Code were unsustainable. No. basis has also been indicated as to why High Court was of the view that No. offence was

disclosed in the FIR. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's judgment not sustainable. Even in respect of administrative orders Lord Denning M.R. in *Breen v. Amalgamated Engineering Union* (1971 (1) All ER 1148) observed: "The giving of reasons is one of the fundamentals of good administration". In *Alexander Machinery (Dudley) Ltd. v. Crabtree* 1974 LCR 120, it was observed: "Failure to give reasons amounts to denial of justice. Reasons are live-links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at". Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, as peaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance. This Court in *State of Orissa Vs. Dhaniram Luhar*, has while reiterating the view expressed in the earlier cases for the past two decades emphasised the necessity, duty and obligation of the High Court to record reasons in disposing of such cases. The hallmark of a judgment/ order and exercise of judicial power by a judicial forum is to disclose the reasons for its decision and giving of reasons has been always insisted upon as one of the fundamentals of sound administration justice-delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. Any judicial power has to be judiciously exercised and the mere fact that discretion is vested with the Court/forum to exercise the same either way does not constitute any license to exercise it at whims or fancies and arbitrarily as used to be conveyed by the well-known saying: "varying according to the Chancellor's foot". Arbitrariness has been always held to be the anathema of judicial exercise of any power, all the more so when such orders are amenable to challenge further before higher forums. Such ritualistic observations and summary disposal which has the effect of, at times, cannot be said to be a proper and judicial manner of disposing of judiciously the claim before the Courts. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind.

10. In *Union of India (UOI) Vs. Mohan Lal Capoor and Others*, it has been

observed by the Apex Court as under:

Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.

11. In *Cyril Lasrado v. Juliana Maria Lasrado* AIR 2005 SC 1367, it has been observed by the Apex Court as under:

10. The order of learned Single Judge and impugned judgment of the Division Bench show clearly non-application of mind. The latter is practically non-reasoned. The basic issue raised by the Appellants was the unexplained delay in filing the writ application. Neither Single Judge considered that aspect before disposal of the writ petition without issuance of the notice to the present Appellants. Though specifically urged and argued, the Division Bench has not dealt with it and has not recorded any conclusion on that issue and No. reason has been indicated.

11. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's judgment not sustainable.

12. Even in respect of administrative orders Lord Denning M.R. in *Breen v. Amalgamated Engineering Union* 1971 (1) All ER 1148, observed "The giving of reasons is one of the fundamentals of good administration." In *Alexander Machinery (Dudley) Ltd. v. Crabtree* 1974 LCR 120, it was observed: "Failure to give reasons amounts to denial of justice". Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at". Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

12. Turning towards the objection by the learned AGA regarding this revision being hit by Section 397(2) Code of Criminal Procedure as impugned order being interlocutory in nature, said objection does apply on the facts of the case as the

question of jurisdiction is also involved in the impugned order. The accused pleaded that out of seven accused none of them had any intention to commit murder of the deceased and because of single fatal injury, they cannot be prosecuted for any offence more than 304-A of causing death by rash and negligent act in an incident in which both the sides had assaulted each other and prosecution was the aggressor. Section 304A Indian Penal Code is triable by Magistrate 1st Class and if contention of learned Counsel is accepted then the Session's Courts will lack initial jurisdiction to try the revisionists. In such a view, when in this revision, the question of jurisdiction of the trial Court is also involved, then the impugned order cannot be said to be purely an interlocutory order as it will fall in the category of intermediary order amenable of revisable power.

13. In view of above discussion impugned order rejecting the prayer of the accused not to charge them with murder and subsequent framing of charge for that offence by the trial judge cannot be sustained.

Present revision is allowed. Impugned order dated 17.2.2011 passed by Special Judge (S.C./S.T. Act) Varanasi in S.T. No. 360 of 2010 State of U.P. v. Murli Upadhyay and Ors., is hereby set aside. The matter is remanded back to the trial Court concern to re-decide the question of framing of charges against the revisionists in accordance with law in the light of observations made herein above within a period one month from the date of production of certified copy of this order before it.

Let a copy of this judgment be sent to the trial Judge concerned for further action at its end.