
(2011) 09 GAU CK 0024
In the Gauhati High Court
Case No : Criminal Petition No. 283 of 2011

Usha Rani Kalita

APPELLANT

Vs

State of Assam & Anr.

RESPONDENT

Date of Decision : 20-09-2011

Acts Referred:

Criminal Procedure Code, 1973 — Section 482

Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (2012) 1 GLT 585

Hon'ble Judges : H.Baruah, J

Bench : Single Bench

Advocate : Advocates appeared for the Petitioner: Mr. J.M. Choudhury, Sr. Advocate, Mr. A.K. Bhattacharjee, Sr. Advocate & Mr. B.M. Choudhury., Advocates appeared for the Res.pondents: Mr. B. B. Gogoi, Addl.PP, Mr. B.D. Konwar, Mrs. J. M. Konwar & Mr. R. Kalim, Advocates appearing for Parties

Judgement

H. Baruah, J.—Order dated 05.05.2011 passed by learned Sessions Judge, Kamrup, Guwahati in Sessions Case No. 393 (K) of 2010 is put under challenge in this criminal petition. By the order as indicated above, petitioner, Smt. Usha Rani Kalita and another namely, Dr. Hiren Kalita were charged under Section 120(B) IPC. By the aforesaid impugned order an independent charge under Section 302 IPC was also framed against Dr. Hiren Kalita. Dr. 1 firen Kalita however is not before us.

2. Petitioner herein is the aunt of Dr. Hiren Kalita, a coaccused of the Sessions Case No. 393(k) of 2011. Both are under the same roof. Indrani Kalita @ Moni (Since deceased) was given in marriage with accused Dr. Hiren Kalita. During their conjugal life they visited the house of the first informant number of times. On 5.11.2006 both Indrani Kalita @ Moni and accused Dr. Hiren Kalita had been to informant's residence situated at Hemgiri Path, South Sarania, Ulubari, Guwhati7 under Paltan Bazar Police Station and stayed for some time. On account of bursting of bomb on the same night at about 8 pm at Guwahati, the inmates of the first informant requested accused Dr. Hiren Kalita and his wife,

Indrani Kalita @ Moni (since deceased) not to leave Guwahati. But accused, Dr. Hiren Kalita contending that he had some important business at Mirza did not want to stay for the night rather insisted on to go back to their residence situated at Mirza and accordingly left along with his wife said Indrani Kalita @ Moni (since deceased). At about 9.15/9.30 pm an unknown person made a telephone call that Dr. Hiren Kalita and his wife were shot at by some unknown culprit(s). Receiving the information through telephone, the first informant and others immediately proceeded and found Indrani Kalita @ Moni lying dead in front seat of the vehicle found stationed in front of the police station. However, accused Dr. Hiren Kalita, the husband of Indrani Kalita @ Moni was not found there. On search about his where about, he was discovered in the residence of his aunt, the petitioner herein taking rest. It is also contended that in the morning said Dr. Hiren Kalita, the husband of Indrani Kalita @ Moni came to see the dead body of his wife at the instance of his brother. After seeing her dead body he left immediately. From the conduct that exhibited by Dr. Hiren Kalita, some foul play, was suspected.. It was also suspected that at the instigation of Dr. Hiren Kalita's aunt, the present petitioner, Indrani Kalita @ Moni had been killed.

3. Mohi Kanta Das, father of the deceased Indrani Kalit @s Moni on 6.11.2006 lodged an FIR with the Officer in Charge of Palashbari Police Station. It was registered as Palashbari P.S Case No. 187 of 2006 under Section 120B, 302 and 498A IPC. On the committal of the case, the learned Sessions Judge after hearing the prosecution of the defence having found materials to presume that accused Dr. Hiren Kalita and Smt. Usha Rani Kalita, the present petitioner did commit offence under Section 120B framed charge under Section 120(B) IPC by order dated 5.5.2011 impugned herein. It would also be appropriate to say that by the impugned order an independent charge under Section 302 IPC was also framed against Dr. Hiren Kalita.

4. Petitioner herein being aggrieved of the order dated 5.5.2011 preferred this criminal petition challenging its legality and correctness.

5. We have heard Mr. A. K. Bhattacharjee, learned Sr. counsel, Mr. J. M. Choudhury, learned Sr. counsel assisted by Mr. B.M. Choudhury for the petitioner. We have also heard Mr. B. B. Gogoi, learned Addl. P.P for the State respondent No.1 and Mr. B.D. Konwar, learned counsel for the respondent No. 2, Sri Mohi Kanta Das, the first informant.

6. Mr. A.K. Bhattacharjee, learned Sr. counsel at the very outset of his argument submitted that the learned Sessions Judge without marshalling the materials available in the record and the case diary in its proper perspective erroneously and illegally framed charge against the petitioner under Section 120(B) IPC. It was submitted by him that for the purpose of framing a charge the record and the case diary must prima facie show some materials showing complicity of the accused person(s), materials available if do not prima facie speak about involvement of the accused, it would not be justified on the part of the trial court

to frame charge based on no materials. It was emphatically submitted by Mr. A. K. Bhattacharjee, learned senior counsel that the materials collected by the Investigating Officer during investigation of the case and placed per provisions of Section 173 CrPC do not prima facie reveal any case as against the petitioner not to speak of under Section 120B IPC or any other section of the Penal Code. It was argued by Mr. Bhattacharjee that the petitioner is not aggrieved of framing charge against Dr. Hiren Kalita. In order to substantiate the claim of the petitioner Mr. A. K. Bhattacharjee, learned Sr. counsel led me through the statement of the witnesses recorded under Section 161 of the Cr. PC and other various documents connected with the case. It was argued that none of the witnesses whose statements were recorded by the Investigating Officer spoke about conspiracy for killing said Indrani Kalita @ Moni on the relevant night though some of them spoke of illicit relation of accused Dr. Hiren Kalita with the petitioner. Petitioner herein is however, a widow. Her husband was also doctor under whom accused Dr. Hiren Kalita practiced for some time. There are also materials to show that accused Dr. Hiren Kalita after the death of the petitioner's husband started practice independently. It is also in the report that accused Dr. Hiren Kalita mostly spent his time with the petitioner, his aunt, whom he considers as his mother. There is absolutely no material to show the complicity of the petitioner herein, in the death of Indrani Kalita @ Moni, wife of Dr. Hiren Kalita. It was argued by Mr. Bhattacharjee that in order to frame a charge against the accused under Section 120 B there must be some ingredients prima facie to indicate that there is an agreement between the accused, Dr. Hiren Kalita and the petitioner and the agreement should be to do or to be done an illegal act or an act which itself may not be illegal but by illegal means. Here in this case in the alleged killing of said Indrani Kalita @ Moni, these two ingredients must coexist and it must be available on the record. It was emphatically argued that the materials available in the case do not prima facie reveal an agreement between the petitioner and accused Dr. Hiren Kalita who allegedly caused the death of said Indrani Kalita @ Moni on the relevant night and time. Mere stayal of accused Dr. Hiren Kalita in the house of the petitioner would not prima facie reveal that there was an agreement in between them to kill Indrani Kalita @ Moni. Alleged illicit relation between petitioner and the accused Dr. Hiren Kalita also cannot prima facie take the place that they entered into an agreement to cause death of Indrani Kalita @ Moni. A heavy responsibility lies on the prosecution to place materials before the Court that there was an agreement in between the accused and the petitioner to do an illegal act or by illegal means. There being prima facie no material available on record to indicate that the death of Indrani Kalita @ Moni occurred as result of conspiracy between the petitioner herein and accused Dr. Hiren Kalita, the learned Sessions Judge was apparently wrong in framing charge against the petitioner herein under Section 120B. In order to frame a charge under the section though there may not be any direct evidence, the circumstances must be such, if considered carefully and meticulously would give rise a suspicion that it was the accused and the petitioner, who conspired themselves to do act of killing Indrani, an act itself

illegal. Here in in this case the materials prima facie available, do not speak for a case that it were the petitioner and accused Dr. Hiren Kalita who after conspiracy killed said Indrani Kalita @ Moni. Mr. A.K. Bhattacharjee, learned Sr. counsel also put emphasis that for the purpose of framing charge under Section 120B IPC court must be with material available on record that there was meeting of minds in between the petitioner and accused, Dr. Hiren Kalita. Such material being not available in the record and case diary so as to record a reasonable suspicion against the petitioner and accused Hiren Kalita, framing of charge under Section 120B IPC against this petitioner would be erroneous and illegal. Mere allegation of having illicit relation in between the two would not justify to record a suspicion as against the petitioner that to do away with said Indrani Kalita @ Moni both she and accused Dr. Hiren Kalita entered into a criminal conspiracy.

7. Mr. J. M. Choudhury, learned Sr. counsel while arguing also subscribed the view adopted by Mr. A. K. Bhattacharjee, learned Sr. counsel while advancing argument by him contended that in order to frame a charge under Section 120B, the prosecution must show that there was conspiracy to do an illegal act or to do an act which may not be illegal but by illegal means. In brief, it was argued by him that alleged illicit relation of the petitioner with accused Dr. Hiren Kalita would not justify to presume that she and Dr. Kalita conspired themselves to do away with Indrani Kalita @ Moni. Therefore, learned Sessions Judge would be wrong to hold a view that there appears prima facie material to presume that the petitioner herein and Dr. Hiren Kalita committed the offence under Section 120B. Mere illicit relation also cannot prima facie throw a suspicion against the petitioner that she conspired to kill Indrani Kalita @ Moni with accused Dr. Hiren Kalita. A reasonable suspicion of course however, would be sufficient to frame charge against the accused. But here in the present case it was argued by J. M. Choudhury that no reasonable suspicion crops up in the face of the record to show that there was an agreement in between the petitioner and the accused Dr. Hiren Kalita.

8. Learned Sr. Counsel, Mr. Bhattacharjee and Mr. J. M. Choudhury, therefore, emphatically submitted before this court that charge under Section 120B IPC was erroneously and illegally framed against the petitioner. There is no material available there for. The impugned order therefore, would be not tenable as against the petitioner. Charge framed against the petitioner under Section 120B, therefore, cannot sustain in law and the impugned order in respect of the petitioner is liable to set aside and quashed. Mr. Bhattacharjee, learned Sr. counsel in support of his contention relied in the decision reported in 2002(2) SCC135: Dilawar Bali, Kurane Vs. State of Maharashtra. Taking the ratio laid down by the Apex Court it was argued by Mr. Bhattacharjee that a Judge cannot act merely as a post office or a mouthpiece of the prosecution. He has to sift and weigh the evidence for the limited purpose of finding out whether a prima facie case has been made out. Where two views are equally possible and evidence gives rise to some suspicion but not grave suspicion, the Judge can discharge the accused. The Apex Court while deciding the case(supra) also adopted the ratio

laid down in the case in between Union of India Vs. Prafulla Kumar Samal & Anr; (1979) 3 SCC 4 and State of Gujarat Vs. Manshankar Prabhashankar Dwivedi (1973 (1) Scr 313). It was argued by Mr. Bhattacharjee that the Judge in exercise of power under Section 227 Cr.P.C, the settled position of law is that the Judge while considering the question of framing charge, the Judge has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial.

9. Since Investigating Officer files a charge sheet with all documents relevant there to under Section 173 CrPC under certain offence(s) against the accused, the Judge would not be justified to act as to the letters of the Investigating Officer or the prosecution. The Judge has a duty before whom the case is brought to examine the materials available and while examining, the Judge has the power to sift and weigh the evidence for the purpose of finding out whether or not a prima facie case against the accused has been made out. The Judge according to Mr. A.K. Bhattacharjee cannot shut his eyes rather he or she is to apply his/her judicial mind into the materials available before him/her. In the case at hand the learned Sessions Judge failed to appreciate the materials before him and accordingly framed the charge against the petitioner under Section 120 B despite nonavailability of the materials or of grave suspicion against the petitioner. According to Mr. Bhattacharjee, learned Sr. counsel the charge framed against the petitioner cannot stand in the eye of law. Mr. Bhattacharjee also in support of his contention relied in the decision of the case between Suresh @ Pappu Bhudharmal Kalani Vs. State of Maharashtra", reported in (2001) 3 SCC 703. Mr. Bhattacharjee in support of his contention also relied in the following decisions:

(1) (2005) 12 SCC 631: K.R. Purushothaman Vs. State of Kerala;

(2) (2009) 8 SCC 1: Sudhir Shantilal Mehta Vs. Central Bureau of Investigation.

With the law laid down by the Apex Court in the cases (supra) Mr. Bhattacharjee argued that the Judge while considering the materials with a view to find out if there is ground for presuming that the accused did commit the offence or that there is no sufficient ground or proceeding against, is required to make an inquiry empowered under Section 227 and 228 of the Cr. P.C. Such inquiry must confine to the existence or nonexistence of prima facie material to frame charge against the accused and if during such inquiry under Section 227 and 228 Cr. P.C the Judge finds that there are sufficient grounds to presume on the basis of the materials available that the accused committed an offence, it would be appropriate for the Judge to frame a charge under the specific section. If materials do not prima facie reveal commission of the alleged offence it would be justified for the Judge not to frame a charge against the accused. Therefore, in order to frame a charge there must be prima facie material to presume that the

accuse commit the offence else not. It was therefore, argued by Mr. Bhattacharjee that a duty is always cast on the Judge to make an inquiry into the materials available to frame a charge against the accused. The prosecution case at hand being unable to place such prima facie material before court or of grave suspicion against the accused petitioner the learned Sessions Judge committed error in framing charge against the petitioner. Under the facts and circumstances of the case and the materials available it was argued by Mr. Bhattacharjee that the impugned order in respect of the petitioner is liable to be quashed.

10. Contrary to the submission advanced by Mr. A. K. Bhattacharjee, learned Sr. counsel and Mr. J. M. Choudhury, learned Sr. counsel, it was argued by Mr. B.B. Gogoi, learned Addl. P.P. representing the respondent No. 1 that the statement of the witnesses recorded under Section 161 of the CrPC prima facie reveal a suspicion that too grave against the petitioner and the accused, Dr. Hiren Kalita as well since she allegedly had illicit relation with Dr. Hiren Kalita. It was argued by him that though the accused was married to Indrani Kalita @ Moni, accused Dr. Hiren Kalita mostly spent his time in the company of the petitioner. This association according to Mr. B.B. Gogoi, learned Addl. P.P led to a conspiracy in between them to wipeout said Indrani Kalita @ Moni whom they considered a barrier in between them to facilitate them to mix freely and stay together. This piece of argument advanced by Mr. Gogoi would not find any leg to stand in view of any materials showing any agreement in between the petitioner and Dr. Hiren Kalita ttfkill said Indrani Kalita @ Moni on the relevant night and time. Amere illicit relation also do not necessarily result a grave suspicion as against the petition. Therefore, the claim of Mr. Gogoi that there are sufficient materials to presume that accused did commit an offence under Section 120B IPC cannot be accepted. This court finds no force in the argument advanced by Mr. B.B. Gogoi, learned Addl. P.P. for the State in view of the materials available on record.

11. Mr. B.D. Konwar, learned counsel for the respondent No. 2 while advancing his argument taking note of the facts the circumstances appearing in the record and the materials placed before the trial Judge argued strenuously that if the trial Judge while inquiring under Sections 227 and 228 of the CrPC finds sufficient grounds to presume that the accused did commit offence as alleged, the trial Judge would be within his power to frame charge accordingly. Again if grave suspicion arises as against the accused from the perusal of the materials on record, the circumstance as well as facts, the trial Judge also would be within his/her jurisdiction to frame charge against the accused. If however, the materials available are not found sufficient to presume commission of the offence and grave suspicion, the trial Judge would also be within his/her jurisdiction to discharge accused. It was argued by him that the facts and circumstances appearing in the face of the record and materials collected by the Investigating officer do prima facie reveal a conspiracy in between the petitioner and the accused Dr. Hiren Kalita. It was also argued by Mr. Konwar that the petitioner having had the illicit relation with the accused Dr. Hiren Kalita and they being considered sajid Indani Kalita @ Moni (since deceased) as a barrier for their free

mixing and maintaining relation, they conspired together to eliminate said Indrani Kalita @ Moni. Therefore, such a conspiracy, in the face of the facts and evidence on record and materials cannot be ruled out and the learned Sessions Judge has not therefore, committed any error or illegality in framing charge against the petitioner under Section 120BIPC. Mr. B. D. Konwar in support of his submission relied in the following decisions:

- (1) (1979) 3 SCC 4: Union of India Vs. Prafulla Kumar Samal & Anr.
- (2) (1989) 1 SCC 715: Stree Atyachar Virodhi Parisad Vs. Dilip Nathumal Chordia & Anr.
- (3) (2000) 2 SCC 57: State of M.P. Vs. S. B. Johari & Ors.;
- (4) (2000) 6 SCC 338: State of M.P. Vs. Mohanlal Soni;
- (5) (2008) 2 SCC 561: Onkar Nath Mishra & Ors. Vs. State (NCT of Delhi) & Anr.);
- (6) (2008) 10 SCC 681: Sanghi Brothers (Indore) Private Limited Vs. Sanjay Choudhury & Ors.
- (7) (2009) 8 SCC 617: State of Madhya Pradesh Vs. Sheetla Sahai & Ors.;
- (8) (2009) 11 SCC 721: Chaman Lal & Ors. Vs. State of Punjab & Anr.
- (9) (2009) 15 SCC 643: MIR Nagvi Askari Vs. Central Bureau of Investigation; and
- (10) (2010) 8 SCC 233: S. Arul Raja Vs. State of Tamil Nadu.

12. It is true that a Judge while exercising his or her jurisdiction under Sections 227 and 228 of the Cr. P.C is to enquire the existence of prima facie material to presume the commission of the offence by the accused or existence of grave suspicion as well. If after such inquiry the Judge finds materials to presume such commission of offence or existence of grave suspicion as against the accused for such commission of the offence, the Judge would be within his/her jurisdiction to frame charge accordingly. If no such materials are available to presume commission of offence or existence of grave suspicion, the trial Judge would also be within his or her jurisdiction not to frame charge against the accused against whom such charge is alleged. In other words the framing charge and discharge as well would be dependent upon cne existence and nonexistence of materials or grave suspicion. Here in our case though prosecution tries to show the existence of materials to presume commission of such offence by the petitioner on the basis of the collected materials available on record and case diary as well this Court does not consider those materials sufficient to frame charge against the petitioner. Though the learned Addl. P.P representing the respondent No. 1 and Mr. B. D. Konwar representing the respondent No. 2 by placing various case laws tried to impress upon this Court that the learned trial Judge did not commit any error or illegality in framing charge against the petitioner under Section 120B IPC, this court does not consider it sufficient. The argument advanced by Mr. A.K.

Bhattacharjee and Mr. J. M. Choudhury, learned Sr. counsel appear to be more convincing one, for which this court is constrained to accept their argument.

13. The Apex Court while deciding the case between State of Haryana & Ors. Vs. Bhajanlal & Ors.; reported in 1992 Supp (1) SCC 335, in paragraph 103 observed as under:

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice." In the aforesaid decision it was held that power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in a rarest of rare cases. The extraordinary and inherent power does not confer in any arbitrary jurisdiction on the court to act accordingly to its whim or caprice. The court will not be justified in embarking as to do the reliability or genuineness or otherwise of the allegation made in the FIR or the complaint. The question of reliability or genuineness or otherwise of the allegations made in the FIR or the complaint would be a subject of the trial. The power endorsed under Section 227 or 228 Cr. RC to the court is to make an enquiry only to satisfy itself about the existence or non existence of the prima facie materials or grave suspicion either to frame charge or not to frame charge. While exercising power under this section, the court cannot go into the reliability or genuineness of the allegations. Here in our case we do find though an allegation of illicit relation is complained of in between the petitioner and the accused Dr. Hiren Kalita in absence of meeting of minds for the killing of said Indrani Kalita @ Moni, it would be appropriate for this court to exercise jurisdiction under Section 482 Cr. P.C.

14. Under the facts and circumstances of the case and the law laid down by the Apex Court and various High Courts, this court is of considered view that the learned Sessions Judge committed error and illegality in framing charge against the petitioner under Section 120B. The impugned order dated 5.5.2011 as against the petitioner cannot stand in eye of law, it is accordingly set aside and quashed.

15. The criminal petition is allowed. Transmit back the LCRs. The learned trial Judge would proceed with the trial as against the accused Dr. Hiren Kalita.