

Ripun Bora and Another Vs. Central Bureau of Investigation and Another

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Court : Guwahati

Decided On : Jun-11-2013

Judge : B.D. Agarwal

Appeal No. : Criminal Petition Nos. 579 of 2012 & 828 of 2012

Appellant : Ripun Bora and Another

Respondent : Central Bureau of Investigation and Another

Judgement :

Judgment and Order, (Cav)

1. The order dated 01.09.2012 passed by the learned Additional Sessions Judge, Kamrup, Gauhati in Sessions Case No.60(K) of 2010 is under challenge in these criminal petitions, filed under Section 482 of the Code of Criminal Procedure, 1973 read with Section 401. By this impugned order the learned Judge has framed charges against accused Shri Ripun Bora under Section 120(B)/302 IPC and under Section 120(B)/302/34 against the two co- accused, namely Pulin Phukan and Kamal Nath. Being aggrieved with the order of framing of charges, two of the three accused persons, namely, Ripun Bora and Pulin Phukan have filed the aforesaid criminal petitions. Though the third accused Kamal Nath has appeared in the case as a respondent no separate criminal petition was filed by him, so as to challenge the impugned order.

2. Heard Mr. Niloy Dutta, learned senior counsel for the appellants, assisted by Mr. AM Bora, Mr. N Borah, Mr. D Gogoi, Mr. SR Boruah and Mr. S Shyam, learned counsel for the accused Pulin Phukan, Mr. AD Choudhury and Mr. PN Choudhury, learned Standing Counsel for the CBI and Mr. D Das, learned Additional Public Prosecutor for the State.

3. Before addressing the submissions of the learned counsel it would be just and proper to narrate the facts of the case, in brief, as to how the petitioners are being prosecuted for the offence of murder with conspiracy.

3.1 The deceased Danial Topno was a popular tea tribe leader of Assam, particularly in the district of Sonitpur. He was murdered by unknown persons in the night of 27.9.2000 on a village road. On the same night one Manik Dhara lodged an FIR. On the basis of the said FIR Gauripur Police Station Case No. 183 of 2000 under section 302 IPC was registered against the unknown persons. After initial investigation by the Assam Police the case was subsequently handed over to CID, Assam for investigation. After a detail investigation the CID submitted a charge sheet in the Court of learned SDJM, Biswanath Chariali on 30.10.2004 against two accused persons, namely, Narayan Gore and Umakanta Mizar @ Kale Mizar. The second accused, however, was shown as an absconder.

4. While the case was being investigated by the CID, the brother of the deceased Sri Santosh Topno filed a Writ Petition No.6198 of 2000 in the High Court praying for transferring the investigation from CID to CBI. The writ petition was disposed of on 17.5.2005 directing the CBI to investigate the case. It may be mentioned here that the case was handed over to the CBI primarily on the ground that the CID failed to conclude the investigation and could not file charge sheet since September, 2000. By this order the Superintendent of Police, Sonitpur was also directed to provide all the necessary documents to the CBI. In fact, on a petition by the CBI dated 23.8.2005 the learned SDJM also recorded in his order dated 31.8.2005 that the case diary was already handed over by the CID to CBI.

5. Since the CID had already submitted a charge sheet against two other accused persons on 30.10.2004 the State of Assam filed Review Petition No.82 of 2005 in the High Court praying for recalling the order of CBI investigation. This review

petition was disposed of on 26.8.2005. However, the High Court maintained its earlier order primarily on the statement by the CBI counsel that pursuant to the original order dated 17.5.2005 the CBI had already registered a case and 80% investigation was completed. It may be mentioned here that in the original order there was no direction for re-investigation. In other words, the order dated 17.5.2005 was simpliciter handing over the investigation to the CBI. However, in the subsequent order dated 26.8.2005 this Court recorded that re-investigation was ordered in view of murder of an active social worker.

6. On the basis of the order of the High Court the CBI registered FIR No. RC-5/S/2005-Kolkatta on 6.6.2005 and submitted the chargesheet on 30.12.2008 against three accused persons. On the basis of this charge sheet the learned Additional Sessions Judge has framed charges of murder with conspiracy, vide impugned order dated 1.9.2012, which is under challenge.

7. The admitted fact is that no person had witnessed the offence of murder. After going through the entire recitation of the charge sheet it appears to me that the petitioners have been charge sheeted primarily on the basis of confessional statement of the co-accused Kamal Nath. Besides this the I.O has also taken a view that since the deceased was a threat to the political future of Congress party, more particularly that of Sri Ripun Bora, a conspiracy was hatched by the petitioners alongwith another Congress leader Sri Mani Kumar Subba and as per the said conspiracy Danial Topno was eliminated by hiring two persons namely, Krishna Hazarika and Bishnu Saikia. Both these persons have, in the meanwhile, died.

8. Mr. Dutta, learned senior counsel for the accused Sri Ripun Bora attacked and assailed the impugned order from different angles and contended that not only the charge sheet has been framed on wild conjectures, surmises and on the subjective satisfaction of the I.O, which is again based on a fiction story, but the learned Additional Sessions Judge also failed to apply judicial mind before passing the impugned order. According to the learned counsel, the learned trial judge did not make any endeavour to ascertain as to whether any iota of evidence exists, not to speak of strong grounds, against the petitioner to order him to face trial in

the murder case.

9. According to the learned senior counsel, the alleged confessional statement of the co-accused Kamal Nath could not have been made the basis for framing charges in absence of any iota of corroborative evidence. Referring to the judgment of the Honble Supreme Court, rendered in the case of *Kashmira Singh vs- State of M.P*; (AIR 1952 SC 159) the learned counsel submitted that confession of a co-accused is a very weak evidence for convicting another accused. The relevant observations of the Honble Supreme Court are reproduced below:

The proper way to approach a case of this kind, first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

9.1 In this cited case their Lordships have observed that a confessional statement does not come within the definition of evidence under Section 3 of the Evidence Act as it is neither required to be given on oath nor in the presence of the accused and the same also cannot be tested by way of cross-examination of the author of the confessional statement. According to their Lordships, at best, such confessional statement of a co-accused can be looked into to lend assurance to other legally admissible evidence against a co-accused and not as primary evidence. In fact this is the settled position of law till date.

10. Mr. Dutta, learned senior counsel for the petitioners submitted that the legal principle regarding the evidential value of a confessional statement of a co-accused is equally applicable at the stage of framing of charges. Referring to the judgment of the Apex Court, rendered in the case of *Suresh Budharmal Kalani @*

Papu Kalani vs- State of Maharashtra; (AIR 1998 SC 3258) the learned counsel submitted that for the first time the Honble Supreme Court has evolved a new theory about inadmissibility of confessional statement of co-accused even at the stage of framing of charges. This case arose out of framing of charges under various provisions of TADA and IPC and the order of framing of charges was challenged before the Honble Supreme Court and on the basis of the law laid down by the Apex Court in Kashmira Singh (supra) the charges were quashed.

11. The learned counsel for the petitioner also submitted that the statement of the co-accused Kamal Nath given before a Judicial Magistrate was subsequently retracted by the accused himself and, situated thus, it cannot be said as on date that any confessional statement is available to the Court for its use for any purpose. Even otherwise the learned counsel argued that the alleged confessional statement of Kamal Nath is out and out an exculpatory statement and the same does not fall in the category of confession by the accused. On this ground also the confessional statement of the co-accused should have been left out of consideration.

12. At this stage it would be just and proper to refer the submission of Mr. Talukdar, learned counsel for the co-accused Kamal Nath. Mr. Talukdar submitted that the alleged occurrence took place on 27.9.2000 and at that point of time Kamal Nath was a juvenile. According to the learned counsel a petition has been filed by the said accused in the trial court on 1.8.2012 to declare him a juvenile. To establish his juvenility the said accused has also produced a school certificate and PAN card of the Income Tax Department etc. The said accused has also examined the Headmaster of the school to establish that the accused was nearly 14 years old at the time of the incident. Mr. Talukdar further submitted that in an earlier petition dated 16.9.2011 it has been pleaded that when the accused was in Jorhat jail in the year 2005 in a bomb blast case a CBI officer coerced him to give a confessional statement with an offer of his release from the jail in the bomb blast case. In this petition, supported by an affidavit, the accused has categorically reiterated that he did not give the confessional statement voluntarily but it was given under threat and duress.

13. With regard to the confessional statement of the co-accused the CBI version is that they stumbled upon a newspaper report appearing in Ei Saptaha on 9.3.2006 that the co-accused Kamal Nath knew about the offender of murder of Danial Topno. Accordingly, the suspect was contacted on 28.6.2006 and subsequently he gave his confessional statement on 29.5.2007. In this regard Mr. Dutta, learned senior counsel for the petitioner submitted that as per an RTI Act information there is no weekly newspaper Ei Saptaha in Assam. I also do not find any copy of the newspaper in the record nor does it appear to me that any official or reporter from the said newspaper was examined by the CBI I.O.

14. With regard to the presumption that Danial Topno was murdered by accused Ripun Bora as the deceased was preparing for contesting Assembly election in 2001 the learned counsel submitted that this presumption is also absurd and no person can be framed in a case of murder on the basis of such imaginary story. Referring to the election results of 1991 and 1996 the learned senior counsel submitted that the Congress candidate had lost the election in the previous terms not because the deceased Danial Topno had also contested the elections but due to cutting of votes with the dissident candidate of the Congress party itself. According to the learned counsel Ripun Bora had contested the election for the first time in the year 1996 and lost election only by a margin of about 2000 votes, whereas, the dissident candidate of his own party had secured 4660 votes. The learned counsel further submitted that if a prospective candidate is killed there is no guarantee that all the votes secured by him in the previous election would come in favour of a particular candidate. According to the learned counsel if this view is taken the deceased can also be killed by any other candidate who had good prospect to win the election. Hence, the murder of a prospective candidate cannot be directly attributed to another prospective candidate.

15. The impugned order of framing charges was also assailed on the ground that though the CID had already submitted its chargesheet in the Court long back in the year 2004 the CBI as well as the learned Additional Sessions Judge failed to consider the materials and evidence collected by the CID against two other accused persons, namely, Sri Narayan Gore and Umakanta Mizar @ Kali Mizar. According to the learned counsel the learned trial Judge brushed aside the charge

sheet of the CID solely on certain observations made by the High Court while handing over the investigation to the CBI and not on the merit of the charge sheet of the CID. Referring to a recent judgment of the Honble Supreme Court, rendered in the case of Vinay Tyagi vs- Irshad Ali @ Deepak; 2013 Cri LJ 754 the learned senior counsel submitted that whatever materials, collected by the previous investigating agency, are also a part of the record and the Courts are bound to consider those materials even at the stage of framing of charges. On the basis of this judgment from the Apex Court, the learned counsel submitted that all the final reports submitted by any investigating agency under Section 173 Cr.P.C. are essentially only primary reports and the subsequent reports submitted on the basis of further investigation or re-investigation can be termed as supplementary reports and both the reports have to be read conjointly. The learned counsel also contended that even a supplementary report may also be rejected by the Court for valid reasons, but the same cannot be read in isolation sans the original/primary report.

15.1 For better appreciation of the aforesaid submissions it would be just and proper to reproduce the relevant observations of the Honble Supreme Court, which are as below:

31. Having discussed the scope of power of the Magistrate under Section 173 of the Code, now we have to examine the kind of reports that are contemplated under the provisions of the Code and/or as per the judgments of this Court. The first and the foremost document that reaches the jurisdiction of the Magistrate is the First Information Report. Then, upon completion of the investigation, the police are required to file a report in terms of Section 173 of the Code. It will be appropriate to term this report as a primary report, as it is the very foundation of the case of the prosecution before the primary report, as it is the very foundation of the case of the prosecution before the Court. It is the record of the case and the documents annexed thereto, which are considered by the Court and then the Court of the Magistrate is expected to exercise any of the three options afore-noticed. Out of the stated options with the Court, the jurisdiction it would exercise has to be in strict consonance with the settled principles of law. The power of the magistrate to direct further investigation is a significant power which has to be

exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the Court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the Court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the primary report. This is clear from the fact that the provisions of Section 173(3) to 173(6) would be applicable to such reports in terms of Section 173 of the Code.

32. Both these reports have to be read conjointly and it is the cumulative effect of the reports and the documents annexed thereto to which the Court would be expected to apply its mind to determine whether there exist grounds to presume that the accused has committed the offence. If the answer is in the negative, on the basis of these reports, the Court shall discharge an accused in compliance with the provisions of Section 227 of the Code.

33. *** *** *** ***

34. *** *** *** ***

35. The power to order/direct reinvestigation or de novo investigation falls in the domain of higher courts, that too in exceptional cases. If one examines the provisions of the Code, there is no specific provision for cancellation of the reports, except that the investigating agency can file a closure report (where according to the investigating agency, no offence is made out). Even such a report is subject to acceptance by the learned Magistrate who, in his wisdom, may or may not accept such a report. For valid reasons, the Court may, by declining to accept such a report, direct further investigation, or even on the basis of the record of the case and the documents annexed thereto, summon the accused.

36. The Code does not contain any provision which deals with the court competent to direct fresh investigation, the situation in which such investigation can be conducted, if at all, and finally the manner in which the report so obtained shall be dealt with. The superior courts can directed conduct of fresh/de novo investigation, but unless it specifically directs that the report already prepared or the

investigation so far conducted will not form part of the record of the case, such report would be deemed to be part of the record.

16. According to the learned counsel for the petitioner though it was pointed out to the High Court in the Review Petition No. 82 of 2005 that CID had already submitted a charge sheet on 30.10.2004 this Court did not pass any order about inadmissibility of the CID charge sheet. The learned counsel also submitted that two investigating agencies i.e. CID and CBI have come to different conclusions by taking different approaches and different routes. Hence, it was not proper for the learned trial Judge to exclude the charge sheet submitted by CID, in which one Narayan Gore and others were challaned as perpetrators of the crime on the basis of legally admissible evidence. According to the learned counsel the theory propounded in the CID charge-sheet is more realistic than the theory projected in the CBI report.

17. The learned senior counsel for the petitioners also raised various other issues to contend that Ripun Bora has been made an accused in this case with oblique motives, if not with any malafide intention. However, I do not feel it necessary to discuss other aspects in detail at this stage.

18. Mr. Shyam, learned counsel for the co-petitioner Shri Pulin Phukan endorsed the arguments advanced by Sri Dutta, learned senior counsel for the other petitioner. Mr. Shyam also submitted that the learned Additional Sessions Judge was swayed by the story projected by the CBI instead of searching for legally admissible evidence before framing charges.

19. Mr. Talukdar, learned counsel for the accused Kamal Nath also pleaded that the impugned order is unsustainable in law since there was no confession by this accused. The learned counsel reiterated that the so-called confessional statement was obtained by the Investigating agency at a time when the accused was juvenile and that too after giving certain assurances and promises for his release in another case.

20. Sri RP Sharma, learned senior counsel for the complainant and Mr. PN Choudhury, learned Standing counsel for the CBI submitted that instead of giving

any finding on the issues raised by the learned counsel for the accused persons by this court it would be just and proper to remand the case to the trial court for fresh examination. The suggestion was not opposed by the learned counsel for the petitioners. I am also of the view that it would be just and proper to remand the case to the Sessions Court since the learned Addl. Sessions Judge framed the charges against the petitioners solely on the basis of the charge sheet submitted by the CBI without looking at the merit of the charge sheet of the CID. In my considered opinion it would have been proper for the learned Judge to put both the charge-sheets in juxtaposition to compare the merits and demerits of each other before framing of charges. In this way, I hold that the impugned order has been passed without looking the entire record.

21. Though there appears to be substance and weight in the arguments of the learned counsel for the petitioners I am of the view that the case has to be remanded back to the trial court for a fresh decision inasmuch as the learned Sessions Judge has to take a fundamental decision as to which of the two theories, one propounded by the CID and an altogether different story projected by CBI has to be accepted. In view of the judgment of Honble Supreme Court, rendered in the case of Vinay Tyagi (supra) it is for the trial court to accept the supplementary report or reject the same as can be done in respect to the primary report /original charge sheet under Section 173 Cr.P.C.

22. For the foregoing reasons the impugned order dated 1.9.2012, framing various charges against the accused persons, is hereby set-aside and quashed and the trial court is directed to re-examine the case in the light of the legal points and issues raised by the accused persons.

23. Since the charges framed against the accused persons have been quashed and since the case is being remanded back for a fresh decision it is just and proper that the case should be transferred from the court of learned Addl. Sessions Judge to the Court of learned Sessions Judge, Kamrup, Guwahati so that the case can be re-examined with an open mind.

24. As noted in this judgment the offence of murder had taken place in the year 2000 and the case is still at the stage of framing of charges it is expected that the

learned Sessions Judge shall take a fresh decision regarding framing or not framing of charges as expeditiously as possibly, preferably within eight weeks from the date of the receipt of a copy of this Judgment.

25. The petitioners/accused persons, CBI and the complainant are directed to appear in the court of learned Sessions Judge, Guwahati on 24.06.2013 (Monday) and receive further orders.

26. The registry is directed to return the LCR with a copy of this Judgment to the learned Sessions Judge, Kamrup, Guwahati so as to reach in the trial court on or before 24.06.2013.

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