

**(2014) 07 AHC CK 0169****Allahabad High Court****Case No:** Crl. M. Application No. 21770 of 2009

Brijendra Nath Dwivedi

APPELLANT

Vs

State of U.P.

RESPONDENT

**Date of Decision:** July 25, 2014**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 173(8), 216, 309, 482
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 302, 307

**Citation:** (2014) 3 ACR 3074**Hon'ble Judges:** Ramesh Sinha, J**Bench:** Single Bench**Advocate:** Shiv Nath Singh, Satyam Singh, P.K. Singh and Dharmenara Singhal, Advocate for the Appellant; Rajiv Lochan Shukla, Ram Chandra Solanki, R.K. Maurya and A.G.A, Advocate for the Respondent**Judgement**

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Ramesh Sinha, J.

Today the matter is listed alongwith Criminal Misc. 4th Bail Application No. 37254 of 2013, Surendra Nath Dwivedi v. State of U.P., before this Court by the orders of Hon"ble the Chief Justice, which has also been nominated to this Bench vide order dated 18.4.2014 and the matters are listed in the daily cause list at serial No. 49.

2. The applicant, through the present application under Section 482, Cr.P.C., has invoked the inherent jurisdiction of this Court with a prayer to quash the entire proceedings of S.T. No. 1020 of 2008, State v. Brijendra Nath Dwivedi and others, pending in the court of Additional Sessions Judge, F.T.C. No. 2, Kanpur Nagar or in alternative direction may be issued to the trial court to decide the discharge application of the applicants and appropriate order may be passed.

3. Heard Sri P.K. Singh, learned counsel for applicants and Sri Rajiv Lochan Shukla, learned counsel appearing on behalf of complainant/opposite party No. 2 and Sri R.K. Maurya, learned A.G.A. for the State.

4. The brief fact of the case are that the incident is said to have taken place on 16.2.2008 at 7:00 p.m. and the F.I.R was lodged by the complainant of the case namely Abhijeet Singh Sanga against 7 accused persons including the applicants as Case Crime No. 48 of 2008 under Sections 147, 148, 149 and 307, I.P.C. which was later on converted under Section 302, I.P.C. after the death of the injured namely Sharvan Kumar who was the uncle of the informant. The case was investigated by the police, which submitted charge-sheet against the accused persons including the applicants. Out of seven accused persons six accused persons were committed to the Court of Sessions. The co-accused Rajeev Dwivedi alias Raju has not surrendered before any court of law till date. Earlier co-accused Rajeev Dwivedi. alias Raju has filed a Criminal Misc. Application under Section 482 No. 16898 of 2008, R.D. Dwivedi and others v. State of U.P., praying that though the charge-sheet has been submitted against him alongwith co-accused persons for the offence in question, but the matter has been sent to C.B.C.I.D. for further investigation in view of Section 173(8), Cr.P.C., hence the proceedings of the case be stayed against him. This Court vide order dated 8.7.2008 passed order disposing of the said 482 application the said order is as under :

"The local police submitted a charge-sheet against the applicant under Sections 147, 148, 149 and 302, I.P.C, Police Station : Bithoor, District Kanpur Nagar vide Crime No. 48/2008. However, the matter is now being sent to C.B.C.I.D. It is not necessary for me to go into detail now the matter was referred to C.B.C.I.D. But fact is that matter was referred to C.B.C.I.D. but fact is that matter is under further investigation under Section 173(8), Cr.P.C. with C.B.C.I.D.

I am not inclined to stay the trial of the applicant for murder charge but at the same time I am of the opinion that sometime be granted to C.B.C.I.D. to complete the investigation.

In such a view after hearing learned counsel for the applicant and learned A.G.A. I dispose of this application by directing that for a period of one month the proceedings on the charge-sheet being sheet No. 67/2008 dated 16.4.2008 against the applicant in the aforementioned crime number shall remain stayed. This period is granted to C.B.C.I.D. to complete further investigation and submit its report to the concerned court. Here I may add a word of caution.

Heuristic ----- shows that once the matter is referred to C.B.C.I.D., it is thrown in garbage by the C.B.C.I.D. who takes years to complete check up - ordered. For all those periods either the accused persons languish in jail or if on bail, they are given a free hand.

In such view C.B.C.I.D. is directed not to delay the investigation and complete it within one month as the charge against the applicant is of murder.

The copy of this order be sent to Superintendent of Police C.B.C.I.D. who is making the further investigation for compliance of this order.

The application is disposed of with the aforesaid direction. The prayer for quashing of the proceedings of case No. 12946 of 2008 relating to the above crime No. 48 of 2008 P.S. Bithoor, District : Kanpur Nagar stands dismissed.

Interregnum if applicant surrenders and make an application for bail, his bail prayer is directed to be considered expeditiously without unreasonable delay in the aforesaid case.

It is stated at the bar the co-accused has already been granted bail having the same allegation. At the time of considering the bail prayer of the applicant both the courts below will keep that aspect of the matter in mind.

Copy of this order be given to Sri Sangam Lal Keserwani, learned A.G.A. free of charges by tomorrow, i.e., 9.7.2008.

Dated 8.7.2008

Sd. Vinod Prasad, J."

5. In view of the aforesaid order passed by this Court it appears that the C.B.C.I.D. has conducted further investigation and submitted report in the matter. It further appears that the applicants had moved an application before the trial court praying to supply complete papers of the further investigation done by the C.B.C.I.D. under Sections 173(8), Cr.P.C. The learned trial court vide order dated 28.5.2009 directed that the said papers be supplied to the accused persons as prosecution has no objection and further observed that there is order of this Court passed on 17.4.2009 for deciding the matter within a stipulated period hence it also ordered that the said papers be supplied on priority basis to the accused persons.

6. A stay vacation application alongwith counter-affidavit has been filed on behalf of the complainant a copy of which has also been served to learned counsel for applicant on 5.10.2009, but no rejoinder-affidavit has been filed by the applicants till date nor the same is on record.

7. It has been submitted by Sri P.K. Singh, learned counsel for applicants that the earlier investigation done by the Police and charge-sheet submitted by it on the basis of which cognizance has been taken by the Magistrate against the applicant and the" case has been committed to the court of Sessions where the accused-applicants are facing trial is bad, unfair and tainted investigation which was done under the influence of complainant. He further submits that the investigation which has been carried out by C.B.C.I.D. and submitted to the trial court is a fair one and further urged that the material which has been collected during the course of

further investigation conducted by the C.B.C.I.D. in view of Section 173(8), Cr.P.C. no offence has been disclosed against them hence they should be discharged from the present case and proceedings of the aforesaid trial against them be quashed by this Court. In support of his argument he has placed reliance on a judgment of the Apex Court in the case of Vinay Tyagi Vs. Irshad Ali @ Deepak and Others, and further submitted that the matter be sent to the trial court for being decided in the light of the aforesaid judgment.

8. Per contra, Sri Rajeev Lochan Shukla, learned counsel for the opposite party has vehemently opposed the prayer for discharging of the accused/applicants from the said case or for quashing of the proceedings of the said trial. He pointed out the conduct of the applicants and co-accused Rajeev Dwivedi alias Raju, who have misused the process of law and have lingered on the trial of the present case by adopting dilatory tactics and not have allowed to proceed and conclude the trial inspite of the direction of this Court passed in Criminal Misc. Application No. 7933 of 2009. Abhijeet Singh Sanga v. State of U.P., dated 17.4.2009, wherein the trial was directed to be concluded preferably within a period of six months from the certified copy of the order is produced before it. It was argued that the charges have been framed against the applicants and the co-accused persons vide order dated 5.12.2008 by the trial court in S.T. No. 1020 of 2008, State of U.P. v. Brijendra Nath Dwivedi and others, and the examination-in-chief of P.W. 1 namely Abhijeet Singh Sanga (informant of the case) has been recorded on 3.9.2009 and the cross-examination was deferred due to paucity of time and thereafter, an ex parte interim order was obtained by the applicants on 2.9.2009 from this Court in the present 482, Cr.P.C. application even without impleading the complainant/informant of the case as a necessary party and have misled another Bench of this Court which issued notice to opposite party No. 2 without there being any opposite party made in the present 482, Cr.P.C. application. He has also drawn attention of this Court towards Criminal Revision No. 3507 of 2008 filed by co-accused Surendra Nath Dwivedi in which further a novel method was adopted by the co-accused who has moved an application before the trial court seeking complete papers of the investigation done by the C.B.C.I.D. under Section 173(8), Cr.P.C. and further challenged the order of the trial court dated 5.12.2008 framing charges against him and other co-accused persons for the offence under Sections 147, 148, 149 and 302, I.P.C. and another Bench of this Court has upheld the charges framed against co-accused Surendra Nath Dwivedi and the applicants by the trial court vide order dated 5.12.2008 and observed that the trial court may not proceed unless the accused have supplied with the papers of further investigation done by the C.B.C.I.D. under Section 173(8), Cr.P.C. and disposed of the said revision vide order dated 9.1.2009.

9. It was further pointed out by the learned counsel for complainant that yet another application was moved by the applicants co-accused persons of the case for altering charge under Section 216, Cr.P.C. in view of material collected during the

course of further investigation under Section 173(8), Cr.P.C. by the C.B.C.I.D. On 22.8.2009, the trial court rejected the said application of accused persons observing that all the necessary papers of further investigation done by the C.B.C.I.D. under Section 173(8) has already been supplied to the applicants and co-accused persons and the contention of the applicants other co-accused persons that they have not been supplied with the papers of further investigation done by the C.B.C.I.D. under Section 173(8), Cr.P.C. is wholly incorrect and wrong.

10. It was further urged by Sri Shukla that the proceedings of trial court has been held up due to the interim order which has been obtained from another Bench of this Court on 2.9.2009 in the present 482, Cr.P.C. application is by material concealment of fact by the applicants who have not disclosed to this Court in their petition that the charges have already been framed against the applicant and co-accused persons on 5.12.2008 and further Criminal Revision filed by co-accused Surendra Nath Dwivedi challenging the orders framing charges has been dismissed by this Court on 9.1.2009 upholding the framing of charge. Further, the application of the applicant and co-accused persons moved under Section 216, Cr.P.C. for altering the charge in view of report of C.B.C.I.D. in view of Section 173(8), Cr.P.C. has been rejected by the trial court on 22.8.2009, thereafter, the trial court has recorded examination-in-chief of P.W. 1 namely Abhijeet Singh Sanga who is the complainant of the case and his cross-examination has been deferred and the trial could not proceed, thereafter, because of the interim order dated 2.9.2009 passed by this Court.

11. He further argued that the case law which has been relied upon by the learned counsel for applicant Sri P.K. Singh, of the Apex Court in the case of Vinay Tyagi (supra), is not at all applicable in the present case as charges have been framed against the applicant/accused persons way back on 5.12.2008 and moreover, examination-in-chief of P.W. 1 has been recorded and further the charges framed by the trial court against the applicant/accused persons has already been upheld by this Court on 9.1.2009, which has also attained its finality as the same has not been challenged by the accused persons before any other superior court till date. Moreover, an application has been moved by the applicant/accused persons for altering of charges under Section 216, Cr.P.C. before the trial court in view of materials collected during the course of further investigation by the C.B.C.I.D. under Section 173(8), Cr.P.C. has also been rejected by the trial court on 22.8.2009 and the said order was also not challenged by the applicants before any court of law, which also attained its finality and about 7 years have lapsed due to the act and conduct of the applicants and co-accused persons who adopted dilatory tactics for not allowing the trial to conclude inspite of specific direction given by this Court in a petition filed by the complainant for concluding the same within a period of six months vide order dated 17.4.2009, hence it was prayed that the present 482, Cr.P.C. application filed by the applicants be dismissed.

12. Heard counsel for the parties.

13. After examining the rival contentions of the learned counsel for the parties and from perusal of the records it appears that the incident in the present case has taken place on 16.2.2008 and charge-sheet has been submitted against the applicants and the case was committed on 20.6.2008 before the trial court beside one co-accused Rajeev Dwivedi alias Raju and thereafter, the court has taken cognizance of the offence on the basis of charge-sheet submitted against the accused persons and thereafter, the case was sent for further investigation to the C.B.C.I.D. under Section 173(8), Cr.P.C. and in the petition filed by the co-accused Rajeev Dwivedi, this Court vide order dated 8.7.2008 directed the C.B.C.I.D. to conclude the investigation within one month which was concluded by the C.B.C.I.D. and a report has also been submitted to the trial court.

14. The trial court framed charges against the applicants and other accused persons on 5.12.2008. One of the co-accused Surendra Nath Dwivedi, has filed Criminal Revision No. 3507 of 2008 before this Court in which the charges framed against the applicants and other accused persons were upheld by this Court vide order dated 9.1.2009, thereafter, applicants as well co-accused persons appears to have moved an application for altering of charge in view of provisions of Section 216, Cr.P.C. on the basis of material collected during the course of further investigation by the C.B.C.I.D. and prayed that the charges framed by the trial court on 5.12.2008 against them be altered and the said application of the accused/applicants was rejected by the trial court vide order dated 22.8.2009.

15. From the record it also transpires that when the charges were framed against the applicants and co-accused persons on 5.12.2008 and the application under Section 216, Cr.P.C. of the applicant has been rejected by the trial court on 22.8.2009 the case was fixed for recording prosecution evidence on 3.9.2009 on which date the trial court recorded the examination-in-chief of P.W. 1 (Abhijeet Singh Sanga), who is complainant of the case.

16. The contention of the applicants' counsel that the matter be again remanded back by this Court in view of judgment of the Apex Court in the case of Vinay Tyagi (supra) does not appear to be sustainable in the eyes of law, as from the records of the present case it is apparent that the investigation done by the C.B.C.I.D. has already been concluded and the trial court has already framed charges against the applicant and co-accused persons on 5.12.2008 and the order passed by the trial court framing charges has already been upheld by another Bench of this Court in a criminal revision filed by the co-accused Surendra Nath Dwivedi vide order dated 9.1.2009 and, thereafter, accused persons/applicant have moved an application before the trial court for altering of charge against the applicant in view of materials collected during the course of further investigation made by the C.B.C.I.D. that too was rejected vide order dated 22.8.2009 by the trial court and same has not been challenged by the trial court by applicant or by the co-accused persons before any

superior court of law, nor any amendment application has been moved by the applicants/accused persons in the present case, before this Court challenging the same, hence the same has attained its finality.

17. Taking note of the material collected during further investigation by C.B.C.I.D. done under the provisions of the Section 173(8), Cr.P.C. (which has been annexed as Annexure-5 of the affidavit filed in support of the present 482, Cr.P.C. application) which is being hammered by the learned counsel for applicant, it is evident that the Investigating Officer of C.B.C.I.D. has interrogated some witnesses regarding the incident of murder of deceased Sharwan Kumar Singh, but from the said evidence also it cannot be safely said that the applicants and co-accused Surendra Nath Dwivedi were not involved in the incident. It appears from the statement of one witness namely Umesh Kumar Mishra who stated that he saw only Pappu Dwivedi and did not see any member of Dwivedi family. It further appears that the Investigating Officer has made efforts to create doubt about the involvement of the co-accused Vimal Dixit by taking evidence that Vimal Dixit received an injury on his leg which was fractured and a plaster was tied on his heel as he slipped while playing on 10.2.2008 between 6:00 to 6:30 p.m. hence he could not walk properly and his presence at the place of occurrence is doubtful and his name has been falsely implicated in the present case because of inimical relationship with the informant. Further the Investigating Officer has also tried to show that co-accused Ravindra Nath Dwivedi alias Munna was not present at the date and time of incident at the place of occurrence on the basis of statement of his distant relative namely Mahendra Kumar Tewari. Therefore, the argument of the learned counsel for applicant that in view of the said material no offence is made out against the applicants and co-accused Surendra Dixit be permitted to claim discharge from the trial court is wholly unfounded cannot be allowed at such belated stage and much water has flown out particularly when the statement of P.W. 1 informant has been recorded by the trial court and his cross-examination has been deferred because of interim order of this Court passed on 2.9.2009. However, it is always well within jurisdiction of the trial court to examine the evidence adduced by the parties during the course of trial on the basis of materials collected by two investigating agencies and test their authenticity and truthfulness in the light of prosecution as well as defence evidence. Moreover, it appears from the material collected during the further investigation by the C.B.C.I.D. under Section 173(8), Cr.P.C. the Investigating Officer has tried to dilute initial investigation done by the police on the basis of which charge-sheet has been submitted against the applicants and co-accused persons and cognizance of the offence has been taken by the Magistrate and charges have been framed against them on 5.8.2012 by the trial court which was challenged before this Court by co-accused Surendra Nath Dwivedi in Criminal Revision which was confirmed by this Court on 9.1.2009. It is well-settled law that the purpose of further investigation under Section 173(8), Cr.P.C. should not be such to wipe of the initial investigation because it is in continuation of the primary report

submitted to the court, unless the report of earlier/initial investigation has been ordered shall not form part of record of the case by specific order of any superior court.

18. As it has been pointed out by the learned counsel for complainant that the facts and circumstances of the present case is completely distinguishable from the facts and circumstances of the case of Vinay Tyagi (supra) hence the said case of the Apex Court is also not applicable in the present case. Moreover, the ex parte order which has been obtained by the applicants by another Bench of this Court on 2.9.2009 in the present 482, Cr.P.C. application appears to have been obtained by the applicants by way of material concealment of facts and without disclosing the fact that the trial proceeded against the applicants at much later stage and the charges have been framed against them by the trial court on 5.12.2008 which was also confirmed by another Bench of this Court on 9.1.2009 in the criminal revision which was filed by the co-accused person before this Court and further vide order dated 22.8.2009 the application of the applicants/accused persons for altering of charge has also been rejected by the trial court which speaks otherwise about the conduct of the applicants, which cannot be appreciated by this Court.

19. In view of the foregoing discussions this 482, Cr.P.C. application lacks merits and it accordingly dismissed, interim order, if any, stands vacated.

20. Considering the fact that the trial of a murder case pertaining to the year 2008 has already been lingered on and delayed for the last 6 years, the trial court is directed to expedite the trial of the aforesaid case and conclude the same preferably within a period of six months from the date of production of a certified copy of this order before it, strictly as per the provisions of Section 309. Cr.P.C., if there is no legal impediment.

21. Before parting with the case the court wants to express its displeasure for the manner in which this 482, Cr.P.C. application has been kept pending for more than 6 years and not listed before the court after obtaining ex parte interim order dated 2.9.2009 and thereafter till 20.11.2009 and the same was directed by this Court to be placed before Hon"ble the Chief Justice for nomination of a Bench when the fourth bail application of co-accused Surendra Nath Dwivedi which came up before this Court on 25.4.2014 after the nomination from Hon"ble the Chief Justice on 18.4.2014 who also nominated the present 482, Cr.P.C. application on 2.5.2014 to this Bench and directed that the same be listed alongwith Criminal Misc. Bail Application No. 37254 of 2013.

22. The deceitful means which appears to have been adopted for suppressing the orders" of Hon"ble the Chief Justice of nomination of present matter to this Bench on 2.5.2014 the matter was not listed before this Court on 30.5.2014 alongwith the fourth bail application of the co-accused Surendra Nath Dwivedi and taking serious view of the matter this Court directed a detailed inquiry about circumstances in

which the present 482, Cr.P.C. application was not listed after 20.11.2009 before the court for the last five years even after the nomination by Hon"ble the Chief Justice dated 2.5.2014 before this Bench for which a detailed order has been passed on 30.5.2014 by this Bench in the fourth bail application of the co-accused and a report of the Registrar General is still awaited in the matter who vide his report dated 5.7.2014 has requested this Court to allow the inquiry officer Sri A.K. Goel (O.S.D., Inquiry) one month"s more time to complete the inquiry in compliance of the order dated 30.5.2014 for the report being submitted to this Court.

23. The application stands dismissed accordingly.