

Sri Ripun Bora and Sri Pulin Phukan Vs Central Bureau of Investigation and Sri Manik Dhara

Court: Gauhati High Court

Date of Decision: June 11, 2013

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 173, 227, 401, 482

Evidence Act, 1872 â€” Section 3

Penal Code, 1860 (IPC) â€” Section 120(B), 302, 34

Citation: (2013) 3 GLD 485 : (2013) 4 GLT 21

Hon'ble Judges: B.D. Agarwal, J

Bench: Single Bench

Advocate: N. Dutta and Mr. A.M. Bora, Mr. S. Shyam, A.D. Choudhury, Mr. N. Borah, Mr. D. Gogoi, Mr. S.R. Boruah Advocates, for the Appellant; P.N. Choudhury, Learned Standing Counsel, CBI, Mr. R.P. Sarmah, A. Talukdar, for the Respondent

Judgement

B.D. Agarwal, J.

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 u/s 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 u/s 120(B)/302 IPC and u/s 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. Heard Mr. Niloy Dutta, learned senior counsel

for the appellants, assisted by Mr. A.M. Bora, Mr. N. Borah, Mr. D. Gogoi, Mr. S.R. Boruah and Mr. S. Shyam, learned counsel for the accused

Pulin Phukan, Mr. A.D. Choudhury and Mr. P.N. Choudhury, learned Standing Counsel for the CBI and Mr. D. Das, learned Additional Public

Prosecutor for the State.

2. 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.

2.1 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 u/s 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.

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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 Hon"ble Supreme Court, rendered in the

case of Kashmira Singh Vs. State of Madhya Pradesh, the learned counsel submitted that confession of a co-accused is a very weak evidence for

convicting another accused. The relevant observations of the Hon"ble 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.

8.1 In this cited case their Lordships have observed that a confessional statement does not come within the definition of ""evidence"" u/s 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.

9. 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 @ Pappu Kalani Vs. State of Maharashtra, the learned counsel submitted that for the first time the Hon"ble 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 Hon"ble Supreme

Court and on the basis of the law laid down by the Apex Court in Kashmira Singh (supra) the charges were quashed.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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 Hon^{ble} 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 u/s 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.

14.1 For better appreciation of the aforesaid submissions it would be just and proper to reproduce the relevant observations of the Hon^{ble}

Supreme Court, which are as below:

31. Having discussed the scope of power of the Magistrate u/s 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 direct

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.

15. 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.

16. 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 mala fide intention. However, I do not feel it necessary to discuss other aspects in detail at this stage.

17. 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.

18. 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.

19. Sri R.P. Sharma, learned senior counsel for the complainant and Mr. P.N. 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.

20. 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

Hon"ble 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 u/s 173 Cr.P.C.

21. 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.

22. 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.

23. 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.

24. 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. 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.