

Birendra Nath Sharma Vs Superintendent of Police, Central Bureau of Investigation, ACU- II

Court: Calcutta High Court

Date of Decision: March 3, 2005

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 164, 164(1), 164(2), 164(3), 164(4)
Prevention of Corruption Act, 1988 â€” Section 5

Citation: (2005) 3 CHN 188

Hon'ble Judges: P.N. Sinha, J

Bench: Single Bench

Advocate: Milon Mukherjee and Sandipan Ganguly, for the Appellant; Ranjan Roy and Debajyoti Adhikary, for the Respondent

Final Decision: Dismissed

Judgement

P.N. Sinha, J.

This revisional application under Sections 401 and 482 of Cr. PC is directed against orders dated 21.5.04 and 17.6.04

passed by the learned Judge, 1st Special Court, Alipore, South 24-Parganas in RC. AC 2/02A of 2003 granting pardon to two accused persons.

2. Mr. Milon Mukherjee, learned Advocate for the petitioner submitted that by the order dated 21.5.04 learned Judge allowed the prayer of

prosecution u/s 5 of the Prevention of Corruption Act (P C Act) and tendered pardon to accused No. 3 Sk. Ansu and accused No. 6 Sk. Sadiq

Mallick. Subsequently, by order dated 17.6.04 learned Judge allowed the prayer of prosecution and petition of aforesaid two persons relating to

acceptance of conditions for the tender of pardon. In view of provisions of Section 5 of the P C Act and Section 306 of Cr. PC, the learned Judge

before tendering pardon must satisfy as to whether the person accepting tender of pardon is really interested in making true and full disclosure of

the facts and circumstances of the case involving himself and other accused and, he must be ready to fulfil the conditions for grant of pardon and

thereafter only a learned Judge can grant pardon. In the instant case the learned Judge by order dated 21.5.04 granted pardon first and

subsequently by order dated 17.6.04 imposed conditions for the acceptance of pardon. Both the orders were against provisions of law relating to

tender of pardon and the said orders being illegal requires to be set aside. Accused Sadiq Ali Mallick was on bail granted by the Investigating

Officer (I. O.) which is against provisions of law. The said accused did not obtain any bail from Court and was not arrested and after acceptance

of pardon he was not sent into judicial custody. The statement of accused Sandip Sekhar @ Sk. Ansu was recorded by a Magistrate of Delhi at

Patiala Court. The learned Judge did not peruse the statement of accused Sk. Ansu and accused Sadiq Ali Mallick and did not try to ascertain

what full and true disclosure of facts and circumstances of the case they wanted to make through their statements. The learned Judge without

considering what disclosure was made by them granted them pardon and after granting pardon imposed conditions. The said orders passed by the

learned Judge were bad in law.

3. Mr. Mukherjee further submitted that the aforesaid statement of the accused persons u/s 164 of Cr. PC were not recorded in accordance with

law. Conditions laid down in Sub-sections (1), (2), (3) and (4) of Section 164 of Cr. PC were not followed. Provisions of Section 306 of Cr. PC

relates to investigation and the prosecution wanted to show Sk. Ansu and Sadiq Ali Mallick as witnesses of prosecution in the chargesheet. The

petitioner who is accused in this case would be seriously prejudiced, if such statement of aforesaid Sk. Ansu and Sadiq Ali Mallick are accepted

and they are granted pardon on such statements which were not perused by the learned Judge and were not recorded in accordance with law. The

order of the learned Judge is revisable and the said two orders should be set aside. In support of his contention Mr. Mukherjee cited the decisions

in Ramzan Sk. v. State of West Bengal, reported in 2004 C Cr. LR (Cal) 485, Suresh Chandra Bahri Vs. State of Bihar with Gurbachan Singh,

Jasbir Singh v. Vipin Kumar Jaggi, reported in 2001 Cr. LJ 3993, Bipin Behari Sarkar and Another Vs. The State of West Bengal, , Shivappa v.

State of Karnataka, reported in 1995 SCC 323 and Tulsi Singh v. State of Punjab, reported in 1996 SCC 1118.

4. Mr. Ranjan Roy, learned Advocate appearing for the Central Bureau of Investigation (CBI) submitted that the case is now at the stage of

investigation and collecting evidence and materials. The case is not at the stage of trial. During the stage of investigation, if evidence or materials are

collected, question of prejudice to accused may arise in the trial if the prosecution wants to place reliance over any evidence or material which was

not collected in accordance with law. No question of prejudice arises if such evidence or material is not at all used by the prosecution in the trial.

During the stage of collection of material the prosecution will go on collecting evidence and materials and prosecution may use it and may not use it.

At this stage no question of prejudice to the accused arises at all and, therefore, there is no ground to set aside or cancel the order of the learned

Judge.

5. Mr. Roy further submitted that this is a case under P C Act and there is serious allegation against a public servant accepting several lakhs of

rupees illegally. The prosecution case will not depend upon the evidence of approver or accomplice. In the trial the prosecution will have to prove

its case on the basis of evidence of its officers and other persons who are conversant with the facts and circumstances of the case and approver"s

evidence can at best be the corroborative evidence and nothing more. Moreover, the evidence of approver or accomplice is itself not sufficient to

prove the prosecution case and the learned Trial Court has to consider such evidence very cautiously and carefully and will have to decide as to

whether such evidence of approver has any corroboration with the prosecution case. The legality and validity of statement of Sk. Ansu and Sadiq

Ali Mallick can be considered in the trial and not at this stage. There is no merit in the revisional application and it should be dismissed. In support

of his contention Mr. Roy referred to the decisions in Henry Westmuller Roberts Vs. State of Assam, , State of Maharashtra Vs. Damu Shinde

and Others, , State (Inspector of Police) v. N.M.T. Joy Immaculate, reported in 2004 SCC 1722, Bipin Shantilal Panchal v. State of Gujarat,

reported in AIR 2001 SC 1158, Union of India (UOI) Vs. Prakash P. Hinduja and Another, and State of M. P. v. Awadh Kishore Gupta,

reported in 2004 SCC 353.

6. After carefully considering the submissions made by the learned Advocates of the parties and perusing the revisional application and materials on

record including the impugned orders challenging which the present revisional application has been filed, I am of opinion that the submissions made

by Mr. Mukherjee for the petitioner are not acceptable. The decisions cited by him on behalf of petitioner are not applicable in this revisional

application at this stage. All the decisions cited by Mr. Mukherjee are concerning trial and some of them are even after conviction of the appellants

and, therefore, not applicable in this case as the present case is now pending during the stage of investigation only. On the other hand, some of the

decisions cited by Mr. Ranjan Roy for CBI are apposite in this case. There is basic difference between grant of pardon at the stage of investigation

for the purpose of collecting evidence and materials and, grant of pardon in the midst of a trial. The legality, illegality, irregularity and propriety of

granting pardon or the question of non-fulfilment of provisions of Sub-sections (1) to (4) of Section 164 of Cr. PC relating to recording of

statement of an accused or confessional statement of accused can be decided in the trial and the learned Trial Court can only decide whether there

was illegality or irregularity in granting pardon and recording statement of accused and whether such illegality or irregularity caused serious

prejudice to the accused amounting to miscarriage of justice. All the points raised by the petitioner in this case at this stage are wholly irrelevant.

7. In Henry Westmuller Roberts (supra) the Hon^{ble} Supreme Court observed that it is not possible to reject the confessional statements merely

because only three hours time has been given for reflection, if they are otherwise acceptable. This decision was pronounced by the Supreme Court

while deciding a special leave against conviction. It indicates that legality or illegality of a confessional statement for want of sufficient time of

reflection given to the accused can best be decided in the trial. In the instant case the accused Sadiq Ali Mallick was directed by the learned

Magistrate to be kept in segregation. It transpired that he was not taken into judicial custody and was not sent to jail but, he remained in his house

in segregation. On 21.6.02 he was produced before the learned Magistrate and the learned Magistrate confined Sadiq Ali Mallick inside his anti-

chamber for reflection at 10.30 a.m. and at 3.10 p.m. he recorded the statement of the accused. Whether the time given to the accused for

reflection was sufficient or not and, whether in such circumstances learned Magistrate should have accepted the statement as true and voluntary or

not are matters which can be decided in the trial and not during the stage of investigation. Without evidence it cannot be decided what was the

involvement of the person making the statement with the incident of crime and under what circumstances he was arrested, produced before the

Magistrate, what was his state of mental alertness, whether segregation was sufficient in the facts and circumstances of the case and whether there

was pressure of prosecution to make such statement or allurement of something for the statement or whether statement was voluntary without any

pressure or allurement etc. All these points can be decided in trial on the basis of evidence and materials on record where the learned Trial Court

would be able to consider all points of legality or illegality of recording statements and grant of pardon.

8. In State of Maharashtra (supra) a confession was recorded after full one month of his removal from police custody to judicial custody. The

Supreme Court held that the voluntariness of the confession cannot be doubted. Such observation was made by the Hon^{ble} Supreme Court while

deciding an appeal against conviction when the Court discussed the entire evidence and materials on record. In Union of India v. Prakash P.

Hinduja (supra) the Hon^{ble} Supreme Court observed that, ""Thus the legal position is absolutely clear and also settled by judicial authorities that

the Court would not interfere with the investigation or during the course of investigation which could mean from the time of the lodging of the First

Information Report till the submission of the report by the Officer-in-Charge of Police Station in Court u/s 173(2), Cr. PC, this field being

exclusively reserved for the investigating agency." This decision makes it clear that during the stage of investigation the Court should interfere into

progress of investigation.

9. In State v. N. M. T. Joy Immaculate (supra) there was search and seizure on the basis of confession obtained during illegal remand to police

custody. It was held by the Supreme Court that the admissibility or otherwise of a piece of evidence has to be judged having regard to the

provisions of the Evidence Act. The Evidence Act or the Code of Criminal Procedure or for that matter any other law in India does not exclude

relevant evidence on the ground that it was obtained under an illegal search and seizure. The Hon"ble Supreme Court clearly observed that, "This

being the law, Direction (b) given by the High Court that the confession and alleged recovery has no evidentiary value is clearly illegal and has to be

set aside. The effect of the confession and also the recovery of the incriminating article at the pointing out of the accused has to be examined strictly

in accordance with the provisions of the Evidence Act." In the instant case the learned Judge granted pardon to the accused Sk. Ansu and Sadiq

Ali Mallick first by order dated 21.5.04 and thereafter by order dated 17.6.04 imposed the conditions for the grant of pardon. Whether the said

action of the learned Judge was wholly illegal or irregular and whether, it caused prejudice to the accused amounting to miscarriage of justice are

matters to be considered in the trial and not at this stage. Moreover, evidence of accomplice or approver cannot be the base for conviction of any

accused. Evidence of accomplice or approver has to pass two tests namely, it must be assessed or judged by the learned Trial Court with great

care and caution if used in evidence in the trial and, the second condition would be that the evidence of accomplice must corroborate the

prosecution case and there must be corroboration of other prosecution witnesses with the evidence of accomplice. All these questions cannot be

decided during the stage of investigation and, therefore, for the present these questions are not at all entertainable.

10. The case is pending at the stage of investigation and at this stage neither this Court nor the learned Judge, 1st Special Court would act in such a

manner which may close the path of prosecution to collect evidence and materials. It is equally true that the materials and evidence collected during

investigation may be used by the prosecution to prove its case in the trial or may not be. If in the trial such statement of Sk. Ansu and Sadiq Ali

Mallick are used, question of illegality or prejudice, if any, would arise in the trial and the learned Trial Court would be the best person to judge or

assess whether there was any illegality or irregularity in granting pardon to the said persons and in recording their statements and the learned Trial

Court will decide whether there was any prejudice thereby to the accused amounting to miscarriage of justice.

11. The aforesaid discussion makes it clear that there is not merit in the revisional application and the impugned orders passed by the learned

Judge, 1st Special Court cannot be quashed or set aside. In State v. N. M. T. Joy Immaculate (supra) it was indicated by the Hon"ble Supreme

Court that illegal remand order of accused was already acted upon. The petition to set aside that order became infructuous and the High Court

erred in allowing the same. The Supreme Court also indicated that the said order being a purely interlocutory order, revision against the said order

is not maintainable. There is of course difference between an illegal remand order and order granting pardon during the stage of investigation. In

spite of difference, the said orders cannot be revised and cannot be set aside at this stage. It has already been made clear that illegality, invalidity of

the order and the order of granting pardon as well as the manner of recording their statement u/s 164 of Cr. PC can be decided only during trial

and not at this stage. In view of the aforesaid discussion the revisional application being devoid of any merit stands dismissed.

12. I make it clear here that I have not entered into merits of the case and the observation made by this Court are for the purpose of this revisional

application only and the learned Judge would arrive at his own decision at the time of trial in accordance with law without being influenced in any

way by the observation of this Court.

13. Send a copy of this order to the learned Judge, 1st Special Court, Alipore for information and necessary action.

14. Urgent xerox certified copy be given to the parties, if applied for, expeditiously.

Later:

15. After delivery of the judgment Mr. Ranjan Roy, learned Advocate for the CBI submits that copy of the order may be sent to the learned

Special Court at Alipore by a Special Messenger. Send a copy of this order to the learned Judge, 1st Special Court by a Special Messenger at the

cost of the CBI to be deposited by 4.3.05.