(2009) 07 CAL CK 0070

Calcutta High Court

Case No: C.R.R. No. 505 of 2009

Chandu Mondal and Another	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision: July 30, 2009

Acts Referred:

- Criminal Procedure (Amendment) Act, 1978 - Section 309
- Criminal Procedure Code, 1973 (CrPC) - Section 167(2), 170, 190, 2, 207
- Penal Code, 1860 (IPC) - Section 376, 458
- Terrorist and Disruptive Activities (Prevention) Act, 1987 - Section 20(4)

Citation: (2009) 4 CALLT 597 : (2010) CriLJ 3066 : (2011) 6 RCR(Criminal) 664

Hon'ble Judges: Partha Sakha Datta, J

Bench: Single Bench

Advocate: Milon Mukherjee and Siladitya Sanyal, for the Appellant;Krishna Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Partha Sakha Datta, J.
The order dated 23rd January, 2009 passed by the learned Additional Chief Judicial Magistrate, Kandi in the district of Murshidabad in connection with G.R. Case No. 806 of 2008 arising out of Khargram P.S. Case No. 208 of 2008 dated 24-10-1988 (2008) under Sections 376(g)/ 458 of the Indian Penal Code refusing prayer for bail on the ground of submission of challan within the period of ninety days is under challenge.

2. The two applicants were charge-sheeted u/s 376(g) of the IPC and an application for bail was moved but the learned ACJM by order dated 23rd January, 2009 observed that since charge-sheet was submitted within a period of 90 days they

were not entitled to bail, thus, overruling the contention of the petitioners that cognizance was not taken immediate after submission of the charge-sheet.

3. The question is whether an accused is entitled to be released on bail even when charge-sheet is submitted with the period of 90 days in an offence punishable with death or imprisonment for life on the ground that along with the submission of the charge-sheet cognizance was not taken.

4. Mr. Mukherjee, learned advocate appearing for the petitioners submitted that the Criminal Procedure Code does not entitle the Magistrate to order for remand after completion of charge-sheet if cognizance is not taken u/s 190, Cr.P.C. before making order for remand.

5. It is not legally inconceivable that in a case punishable with death or imprisonment for life accused can be kept as an under-trial prisoner till the conclusion of the trial from the date of arrest provided no default was committed by the investigating agency to submit charge-sheet within the statutory period of 90 days. Now unquestionably the detention from the date of arrest till the completion of investigation which includes submission of charge-sheet is authorised u/s 167(2), Cr.P.C. provided charge-sheet is laid within a period of ninety days. This is remand during investigation till submission of the charge-sheet within the period of 90 days. If charge-sheet is not filed within a period of 90 days from the date of arrest the law commands that accused has to be released on bail. The law is thus unambiguous that in a case punishable with death or imprisonment for life if charge-sheet is submitted within the period of 90 days, the accused cannot claim bail as of right and the Magistrate or the Sessions Judge has jurisdiction to refuse bail to the accused till conclusion of trial. Therefore, remand of the accused happens in two phases...the first phase being at the stage of investigation and the second stage being the stage of post-submission of charge-sheet. Section 309 of the Cr.P.C. runs as follows:
309. Power to postpone or adjourn proceedings .- (1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted without examining them, except for special reasons to be recorded in writing:

(Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him).

Explanation 1.-If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases the payment of costs by the prosecution or the accused.

6. Therefore, remand of the accused is very well permissible, so far as the language of Sub-section (2) of Section 309 is concerned, to the judicial custody till the conclusion of the trial or till he is bailed out after taking cognizance of an offence. The bone of contention is whether the order of remand after refusing bail immediate after submission of the charge-sheet within a period of 90 days by the learned Magistrate but without taking cognizance of an offence upon receipt of such charge-sheet to the judicial custody is authorised by any provision of law. Mr. Mukherjee produced before me the Forty First report of the Law Commission of India which recommended overhaul amendment of the Cr.P.C. that culminated in the enactment of the Criminal Procedure Code, 1973 to submit that the Law Commission was so conscious of the position that remand of the accused to judicial custody was recommended to be divided into two parts, the first part being at the stage of investigation and the second part being after taking cognizance of offence, and recommended a provision which is now in statute as Section 309 of the Cr.P.C. after scrapping the old committal proceeding, Mr. Mukherjee further referred to the recommendation of the Law Commission for amendment of Section 167, Cr.P.C. as a result of which the present one has been enacted so as to authorize detention till a period of 90 days from the date of arrest. Thus, it is submitted that barring these two phases where remand can be justified, there cannot be any lawful remand of an accused to judicial custody after submission of charge-sheet within the period of 90 days without taking cognizance of offence. A decision in Ram Deo Mahato v. State of Bihar which is a Division Bench decision of Patna High Court reported in Raradeo Mahto Vs. State of Bihar, and the decision in Gyanu Madhu Jamkhandi and Others Vs. The State of Karnataka, (Karnataka) have been cited. Mr. Mukherjee also has drawn the Court''s attention to the decision in Matabar Parida, Bisnu Charan Parida, Batakrushna Parida and Babaji Parida Vs. The State of Orissa, . In Natabar Parida, Their Lordships of the Supreme Court observed that the Court does not have any inherent power of remand of an accused to any custody unless the power is conferred by law. Analysing the provision of Section 167(2) of the old Code it was

observed that except that section there was no other section which in clear or express language confers upon a Magistrate the power of remand beyond the period of 15 days during the period of investigation and before taking cognizance of an offence. It was pointed out that power of remand is located in Section 167(2) of the old Code and the High Court was wrong in assuming that the power existed u/s 344 of the old Code. Therefore, in terms of the decision power of remand after submission of charge-sheet has not been questioned in view of Section 344, Cr.P.C. (old). For the purpose of determination of the issue involved in the case before me the following observation of the Hon''ble Supreme Court in the aforesaid case is relevant and this is as follows:

It is also clear that after the taking of the cognizance the power of remand is to be exercised u/s 309 of the New Code. But if it is not possible to complete the investigation within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a "paradise for the criminals, "but surely it would not be so, as sometimes it is supposed to be, because of the Courts. It would be so under the command of the Legislature.

7. The point at issue is whether even when charge-sheet is submitted within a period of 90 days from the date of arrest remand can be authorized without taking cognizance of offence. The Karnataka case is in a different facts situation and does not relate to the question we have posed. The decision in R.D. Mahato (supra) which has been banked upon by Mr. Mukherjee rules that the Court has no inherent power of remand of an accused to any custody unless the power is conferred by law. It has been held at paragraph 15 of the judgment that in the absence of any provision in the code enabling the Magistrate to pass an order of remand of an accused to custody after the submission of the report in final form and before taking cognizance of offence the order of remand cannot be said to be warranted by law. This is the point specifically urged by Mr. Mukherjee. Mr. Mukherjee does not dispute the proposition of law that accused can be remanded to custody u/s 309(2) of the Cr.P.C. which is at the stage of post-submission of charge-sheet and upon taking cognizance of offence.

8. Now before we directly come to the issue at hand we must remand ourselves of the legal position as has been enunciated by the Hon''ble Supreme Court in Sanjoy Dutt v. State through CBI reported in 1994 SCC (Cri) 1433 : AIR 1994 SCW 3857 : 1995 Cri LJ 476 and the decision in Dr. Bipin Shantilal Panchal Vs. State of Gujarat, . In Sanjoy Dutt (supra) it has been held as follows:

The "indefeasible right" of the accused to be released on bail in accordance with Section 20(4)(bb) of the TADA Act read with Section 167(2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is enforceable by the accused only from the time of default till the filing of

the challan and it does not survive or remain enforceable on the challan being filed (Emphasis mine). If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released, on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by provisions relating to the grant of bail applicable at that stage.

9. The same principle has been reiterated in Dr. Bipin Shantilal Panchal Vs. State of Gujarat, , where Sanjoy Dutt (AIR 1994 SCW 3857 : 1995 Cri LJ 476) was referred to and held that if an accused person wants to exercise his right to be released on bail for the failure of the prosecution to file charge-sheet within the maximum time allowed by law he cannot contend that he had indefeasible right to exercise it at any time notwithstanding the fact that in the mean- time the charge-sheet is filed. From the two decisions it is clear that if charge-sheet is filed within the statutory period of 90 days bail cannot be claimed as a statutory right because statute does not enjoin any right on the accused to claim bail after charge-sheet is submitted.

10. Now the Magistrate in terms of Clause (I) of Sub-section (1) of Section 437 of the Cr.P.C. cannot release an accused if the Magistrate has reasonable ground to believe that the accused has been guilty of an offence punishable with death or imprisonment for life. Power to grant bail in such a situation during the stage of investigation rests with the Sessions Judge and the High Court but the power is discretionary depending upon the merit of the case. It is inconceivable that when the Magistrate has no right to release an accused on bail during the period of investigation when he has reason to believe that the accused has committed offence punishable with death or imprisonment for life, the same Magistrate can grant bail upon submission of charge-sheet which is filed within the period of 90 days simply on the ground that cognizance was not taken. Refusal of bail and remand of the accused to custody after submission of charge-sheet is conferred by the law. Therefore, the question posed by Mr. Mukherjee is that there is under the law no bridge to connect pre-trial detention u/s 167(2) of the Cr.P.C. and detention u/s 309(2) of the Cr.P.C. and during this intermediate period after exhaustion of the provision of 167(2) of Cr.P.C. and before invoking of the power u/s 309(2), Cr.P.C. the accused has a right to bail. This submission has been disputed by the State and it is submitted that the law does not conceive of any vacuum or gap in between the so-called artificial canal to connect the two roads. According to the State in view of the decision of the Hon''ble Supreme Court in plethora of cases two of which have been mentioned above, right to bail is lost soon after charge-sheet is submitted within the statutory period of 90 days and the non-taking of cognizance of offence is virtually a myth and figment of imagination.

11. This exact point was dealt with by a Full Bench decision of Patna High Court in Rabindra Rai v. State of Bihar and this Full Bench decision has expressly overruled the decision in Raradeo Mahto Vs. State of Bihar, relied on by Mr. Mukherjee. Their Lordships of the Patna High Court referred to R.D. Mahato in this case and did not approve of the decision. Here the question arose whether accused can claim right to bail on the ground that though charge-sheet was submitted within the statutory period of time no cognizance was taken. It was held that the period running from submission of charge-sheet till an order of commitment is made u/s 209 of the Cr.P.C. is a period of inquiry within the meaning of Section 2(g) of the Cr.P.C. and it has to be deemed that the inquiry has commenced since submission of charge-sheet till order of commitment is made. The Full Bench decision of Patna High Court in Rabindra Rai Vs. State of Bihar, , observed as follows:

It cannot be disputed that after submission of the charge-sheet Magistrate can remand an accused person to custody only under Sub-section (2) of Section 309. That sub-section on plain reading applies at the stage of inquiry or trial. This leads to the question as to when an inquiry within the meaning of Sub-section (2) of Section 309 commences? According to the counsel for the petitioner any such inquiry shall commence only after taking cognizance on the basis of charge-sheet/ Police report. Sub-section (2) of Section 309 of the Code is as follows:

If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may be by a warrant remand the accused if in custody.

What is meant by taking cognizance has been explained from time to time by different Courts, including the Supreme Court. In a nutshell the expression "taking cognizance" means application of mind. In one of the earliest cases on the point in the case of Dalu Gour and Others Vs. Moheswar Mahato, it was pointed out that "the expression ''cognizance'' has not been defined in the Code. There are several decisions to the effect that taking cognizance does not involve any formal action or indeed action of any kind, but occurs as soon as a Magistrate, as such applies his mind to the suspected commission of an offence." There has been a common practice that Magistrates before whom police report/charge-sheet is submitted they mention on the order sheet that cognizance had been taken. But to establish in a particular case that cognizance had been taken any such order saying that cognizance has been taken is not a must. As such, an inquiry within the meaning of Section 309(2) may commence before the Magistrate no sooner charge-sheet is submitted so as to vest him power of remand under Sub-section (2) of Section 309 of the Code. This aspect of the matter has recently been considered by the Supreme Court in the case of State of Uttar Pradesh Vs. Lakshmi Brahman and Another, . From the judgment of that case it will appear that the accused concerned had

surrendered before the Magistrate on November 2, 1974, charge-sheet was submitted on February 5, 1974, i.e. beyond the statutory period of sixty days as it was under original Code prior to amendment of Section 167(2) by the Criminal Procedure (Amendment) Act, 1978. There is nothing in the judgment to show that in that particular case cognizance had been taken on the date of the submission of the charge-sheet. A question arose whether an order of remand could have been passed u/s 309(2) of the Code between the period commencing from the date of submission of the charge-sheet and passing of an order of commitment u/s 209 of the Code. In that connection it was held as follows:

Thus, from the time the accused appears or is produced before the Magistrate with the police report u/s 170 and the Magistrate proceeds to enquire whether Section 207 has been complied with and then proceeds to commit the accused to the Court of Session, the proceeding before the Magistrate would be an inquiry as contemplated by Section 2(g) of the Code.

After making a reference to Sub-section (2) of Section 309, it was further observed:

If, therefore, the proceedings before the Magistrate since the submission of the police report u/s 170 and till the order of commitment is made u/s 209 would be an inquiry and if it is an inquiry, during the period the inquiry is completed, Section 309(2) would enable the Magistrate to remand the accused to the custody.

In view of the clear enunciation of the position that an inquiry within the meaning of Section 2(g) of the Code shall deem to have commenced since the submission of the police report, and shall continue till an order of commitment is made u/s 209, it is difficult for this Court to hold that such inquiry shall commence only after a formal order is passed by the Magistrate saying that cognizance has been taken. Once it is held that inquiry commences since the submission of the police report/charge-sheet there should not be any difficulty in holding that the Magistrate has during that period power to remand the accused in terms of Sub-section (2) of Section 309 of the Code.

12. This Full Bench decision, I find takes recourse to the decision of the Hon''ble Supreme Court in State of Uttar Pradesh Vs. Lakshmi Brahman and Another, where it has been held as follows:

Thus, from the time the accused appears or is produced before the Magistrate with the police report u/s 170 and the Magistrate proceeds to enquire whether Section 207 has been complied with and then proceeds to commit the accused to the Court of Session, the proceeding before the Magistrate would be an inquiry as contemplated by Section 2(g) of the Code. We find it difficult to agree with the High Court that the function discharged by the Magistrate u/s 207 is something other than a judicial function and while discharging the function the Magistrate is not holding an inquiry as contemplated by the Code. If the Magistrate is holding the inquiry obviously Section 309 would enable the Magistrate to remand the accused to

the custody till the enquiry to be made is complete. Sub-section (2) of Section 309 provides that if the Court, after taking cognizance of an offence or commencement of trial, finds it necessary or advisable to postpone the commencement or adjourn any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, any may by a warrant remand the accused if in custody. There are three provisos to Sub-section (2) which are not material. If, therefore, the proceedings before the Magistrate since the submission of the police report u/s 170 and till the order of commitment is made u/s 209 would be an enquiry and if it is an inquiry, during the period the inquiry is completed, Section 309 would enable the Magistrate to remand the accused to the custody.

13. This being the position of law that the period from submission of charge-sheet till the order of commitment is made is a period of enquiry within the meaning of Section 2(g) of the Cr.P.C. it can be said that Magistrate has during that period power to remand the accused in terms of Sub-section (2) of Section 309 of the Cr.P.C. We may conveniently refer to the provision of Section 209 which gives the Magistrate a power of remand within the period of enquiry and this power u/s 209, Cr.P.C. and the power u/s 309(2) of the Cr.P.C. cannot be said to be mutually exclusive. Section 209 with Clauses (a) and (b) reads as follows:

209. Commitment of case to Court of Session when offence is triable exclusively by it.- When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall:

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until, the conclusion of, the trial.

14. In Ramayan Singh Vs. State of Bihar and Another, , the Division Bench of Patna High Court observed as follows:

The word ''cognizance'' has not been defined under the Code. Section 190, which falls under Chapter XIV with the heading "Conditions Requisite for Initiation of Proceedings" only provides that the Magistrate may take cognizance of offences under three Clauses (a), (b) and (c). It is difficult to define the meaning of taking cognizance. Whether in a case cognizance has been taken or not depends upon the facts and circumstances of the case. In Ajit Kumar Palit Vs. State of West Bengal, , the Supreme Court held that "The word ''cognizance'' has no esoteric or mystic significance in criminal law or procedure. It merely means - become aware of and when used with reference to a Court or Judge, to take notice of judicially. Taking

cognizance does not involve any formal action; or indeed action of any kind, but occurs as soon as a Magistrate, as such applies his mind to the suspected commission of an offence.

Thus, the word ''cognizance'' does not require any formal action and when the Court applies its mind judicially to the relevant material on record then it is said to have taken cognizance. In the scheme of the Code, it has not been treated a stage like investigation, inquiry or trial. There are only three stages in criminal case, namely, Investigation, Inquiry and trial depending upon the types of cases. The power of detention and remand has been provided during the aforesaid stages if the accused is not on bail.

After going through the Code, the intention of the legislature is this that once the investigation comes to an end and the final form is submitted before the Court, he applies his mind, then an enquiry or trial, as the case may be, is treated to have commenced and the Magistrate and the Court is empowered to remand the accused to judicial custody if he in custody or appears. If this view will not be taken and the submission advanced on behalf of the petitioner would be accepted, the person accused in a serious case not released on bail during investigation will get bail immediately after submission of the charge-sheet by postponing the taking of cognizance by one ground or the other. For example, if a charge-sheet is submitted and the Court is closed for any reason or the Bench Clerk does not put up the file before the Chief Judicial Magistrate for taking cognizance on that date or on subsequent date for a week or so, then the accused will be entitled to be released on the ground that the remand was illegal on the ground of lack of jurisdiction in the Court to remand the accused. The Legislature can never be presumed to have intended such an absurd and unjustified situation."

15. Again another Division Bench decision of Patna High Court in Sambhu Nath Singh Vs. State of Bihar, , dealt with the exact situation and observed as follows:

In our opinion, in view of the aforesaid pronouncement by the Supreme Court and the judgment of the Full Bench of this Court, it is difficult to hold that an enquiry within the meaning of Section 2(g) of the Code shall commence only after a formal order is passed by the Magistrate saying that cognizance was being taken on the basis of the police report. It need not be pointed out that it is almost settled by series of judgments of the Supreme Court and this Court that the expression taking cognizance means only application of judicial mind to the offences alleged. As such once the Magistrate takes note of the police report submitted against the accused concerned it shall be deemed that cognizance has been taken and an enquiry has commenced within the meaning of Section 2(g) of the Code.

16. In State Rep. by Inspector of Police and Others Vs. N.M.T. Joy Immaculate, the Hon''ble Supreme Court observed as follows:

Section 167, Cr.P.C. empowers a Judicial Magistrate to authorise the detention of an accused in the custody of police. Section 209, Cr.P.C. confers power upon a Magistrate to remand an accused to custody until the case has been committed to the Court of Session and also until the conclusion of the trial. Section 309, Cr.P.C. confers power upon a Court to remand an accused to custody after taking cognizance of an offence or during commencement of trial when it finds it necessary to adjourn the enquiry to trial.

17. Having considered Sanjoy Dutt (1994 AIR SCW 3857 : 1995 Cri LJ 476 (supra) and State of Uttar Pradesh Vs. Lakshmi Brahman and Another, the position boils down to this:

1. Right of bail ceases to be statutory, once charge-sheeted is filed within ninety days from the date of arrest.

2. As held in Uttar Pradesh v. Lakshmi Brahman the proceedings before the Magistrate since the submission of the police report and till the order of commitment is made u/s 209 would be an enquiry within the meaning of Section 2(g) of the Cr.P.C.

3. Taking cognizance of offence is a mental phenomenon that takes place after submission of charge-sheet falling within the stage or period of inquiry that ends with the order of commitment.

4. When it is so, as held in State of Uttar Pradesh v. Lakshmi Brahman during the period the inquiry is completed Section 309(2) would enable the Magistrate to remand the accused to the custody.

5. Provision of Section 209(a) which falls within the domain of inquiry and the provision of Section 309, Cr.P.C. cannot be said to be mutually exclusive.

18. Accordingly the order of the learned Additional Chief Judicial Magistrate, Kandi, Murshidabad cannot be faulted.

19. Application is dismissed.

20. Urgent xerox certified copy, if applied for, be given to the parties as expeditiously as possible.