
(2011) 07 CAL CK 0089

Calcutta High Court

Case No: C.R.M No. 5336 of 2011

Sri Susanta Ghosh

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: July 18, 2011

Acts Referred:

- Arms Act, 1959 - Section 25, 27, 35
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 164, 41, 438
- Explosives Act, 1884 - Section 9(b)
- Penal Code, 1860 (IPC) - Section 143, 148, 149, 186, 302

Hon'ble Judges: Raghunath Bhattacharyay, J; Girish Chandra Gupta, J

Bench: Division Bench

Advocate: Balai Chandra Roy and Sudipto Moitra, for the Appellant; Sekhar Basu and Debasish Roy, Id. PP., for the Respondent

Judgement

Girish Chandra Gupta, J.

The Petitioner seeking anticipatory bail is a member of the legislative assembly elected from the east Garbeta assembly constituency. He has continuously been representing the people of the aforesaid constituency commencing from the year 1985. He was a minister for a very long time. He as a matter of fact was the Minister-in-Charge of Paschimanchal Unnayan Affairs during the period between 2006 and 2011. He is an FIR named accused in the case.

2. The accusation is that on 22nd September 2002 in the morning around 9 A.M. the victim Ajay Acharya, accompanied by some members of the Trinamul Congress who had earlier been uprooted from their respective residence by the miscreants of CPI(M), called at his house in the village Rainak within the jurisdiction of Keshpur Police Station. His companions included Ram Sani, Tarun Ghosh, Dil Mohammad, Raju Singh, Sk. Allauddin, Sk. Taju and many others. At that time the FIR named 40 accused persons belonging to CPI(M) Party armed with rifles, guns, pistols, bombs

and sharp weapons raided the house of the said Ajay Acharya. He and his companions were surrounded, assaulted and finally taken away to the house of Gobinda Mazhi in the Piarsala village where seven of them including Ajay Acharya were brutally killed. A complaint was lodged after intervention of the Superintendent of Police on 26.9.2002. The Officer-in-Charge of the local police station initially had refused to accept the same. The victims including the said Ajay Acharya are untraceable since then. On 4th June 2011 in the afternoon the police discovered some skeletons at Mallickdanga within the jurisdiction of Garbeta PS from near a pond known as Daserbandh. Shyamal Acharya, son of the said Ajay Acharya, on 6th June 2011 lodged the complainant alleging further that he could identify the skeleton on the basis of dhuti, ganjee, underwear and the teeth of his father. Thus Anandapur PS Case No. 36 of 2011 dated 6th June 2011 was started against those forty persons including the Petitioner.

3. The complaint dated 26th September 2002, a copy whereof is annexure B to this petition, lodged by the sister of the defacto complainant, was the basis of Keshpur PS Case No. 61 of 2002 dated 26th September 2002 under Sections 148/149/448/307/326/364/506 of the Indian Penal Code and Sections 25/27 of the Arms Act against 19 persons named therein and others. Those who took the lead role have also been indicated in the complaint. It is alleged therein that the said Ajay Acharya and his companions were shot at in the house of the said Ajay Acharya whereupon the said Ajoy Acharya struggling for life begged for water when the accused persons dragged the victims including Ajay and took them away towards the village Piarsala. Since then the said Ajay Acharya was untraceable. The nineteen accused persons named in the said written complaint did not include the Petitioner. The accused were ultimately tried and acquitted.

4. A third complaint in respect of the selfsame transaction dated 22nd September 2002 was, it appears, lodged by one Nema Charan Sarkar on 22nd September 2002, on the basis of which Keshpur PS Case No. 59 of 2002 dated 22nd September 2002 under Sections 148/149/307/302 of the Indian Penal Code was started. It was alleged therein that on 22nd September 2002 at around 10 A.M. in the morning 15 to 20 unknown miscreants armed with bombs and rifles entered the Piarsala village from the village Kota and attacked the members of the CIP(M). A severe battle took place and continued for sometime. Ultimately the unknown miscreants retreated and fled towards the village Barat. After sometime two unidentified dead bodies were noticed lying near the play ground of the village Piarsala. The said two dead bodies were subsequently identified as that of Sk. Alauddin Gayen and Sk Tajju @ Tajuddin Sk. as would appear from a copy of the written complaint and charge sheet which is collectively annexure "F" to the petition.

5. A fourth complaint in respect of the same transaction dated 22nd September 2002, it appears, was lodged by the Officer-in-Charge of the Keshpur PS on the basis of which Keshpur PS Case No. 60/2002 under Sections 143/307/186 IPC and Section

25/27/35 of the Arms Act and Section 9(b) of the Explosive Act was suo motu started. It is alleged therein that on 22nd September 2002 at about 5.00 hrs. in the morning on the basis of telephonic information the Officer-in-Charge of the Keshpur PS accompanied by armed forces reached Basudebpur at about 6.45 hrs. when he was told by the villagers that miscreants clothed in black garments with their faces covered and heavily armed were approaching the village through the paddy fields. The officer-in-charge accompanied by officers of Garbeta PS and the Deputy Superintendent of Police who already had reached the spot proceeded to the paddy field to round up the miscreants. They also fired in the blank. The miscreants were chased and some of them were apprehended including Ram Sani, Gautam Acharya, Hijli from village Garri and the rest of them escaped. Both Ram Sani and Gautam Acharya had bleeding injury on their forehead and head respectively before they were arrested, allegedly inflicted by the villagers. The officer-in-charge of the Garbeta P.S. succeeded in apprehending 10 miscreants. Thus 13 miscreants were arrested. From the possession of Gautam Acharya seven rounds of 8 mm bullets were seized. Such seizure was also made from the other arrested persons. A copy of the complaint is annexure J to this petition. 15 accused persons were ultimately charge sheeted in that case including the said Ram Sani, Gautam Acharya and Arup Ghosh.

6. Gautam Acharya referred to hereinabove is no other than the son of the said Ajay Acharya. Ram Sani and Arup Ghosh appear to have been referred to in the written complaint dated 6th June 2011, lodged by Shymal Acharya, as the companions of the victim Ajay Acharya. Sk. Alauddin and Sk. Taju, also referred to in the complaint dated 6th June 2011 as the companions of the victim Ajay Acharya, were found dead according to the charge sheet filed in Keshpur PS Case No. 59 of 2002 dated 22nd September 2002.

7. Gautam Acharya, son of the victim Ajay Acharya, was examined as PW 5 in Sessions Trial No. 5/October/2005 arising out of the Keshpur PS Case No. 61 of 2002 started on the basis of the written complaint lodged by Chandana Acharya. He during his cross-examination admitted that he was an accused and was on bail in connection with PS Case No. 60 of 2002. The following material information was elicited from him during cross-examination on behalf of the defence:

In the year 2002 I used to live with my father at Kuikota under Midnapore Municipality. At that time myself, my father and mother, my brother Shyamal and youngest sister Chandana used to reside at Kuikota. Chandana is now married. The name of husband of Chandana is Tapan Chakraborty. Her marriage took place at Bankura. It is a fact that one Arup Ghosh of village Sainara under Garhbeta P.S. was also in the jail custody with me at the relevant time in Keshpur PS Case No. 61.02 Under Sections. 25/27 of the Arms Act. It is a fact that on 22.9.2002 my father used to reside with us at Kuikota under P.S. Kotwali.

8. PW 10 in that case was the wife of the victim Ajay Acharya. She deposed, inter alia, as follows:

Myself went to the village Ranior at my house with my husband. On the way to our house at village Ranior some CPI(M) supporters chased my husband. All the accused persons who are present in court chased my husband. Since the time of chasing I am not tracing out my husband nor we have received the dead body of my husband. Goutam Acharya is my son. I cannot say what happened on that day.

9. The defacto complainant Chandana in that case deposed, inter alia, as follows:

When I was at my house at vill. Raniore at that time my father went to my house in order to meet me. I talked with my father for about 5 mnts. Some persons took my father from our house towards Raniore basar. At that time they began to assault my father. Their names are: Sona Muchi, Sona Das, Bablu Mitra, Manas Mitra, Chandi Kuila, Kailash Nayek and Debashish Pain. The accused persons were also present when they took my father from my house and assaulted him. At present I can identify by name the accd. Chandi Kuila. After the incident never met with my father. At present I do not know whether my father is living or not.

10. The mother of Ajay Acharya was examined as PW 12. She furnished the following amongst other information:

At that time wife of Ajoy, his son Goutam and daughter and his wife used to reside at Udaypalli, Midnapore.

11. Arup Ghosh referred to in the complaint dated 6th June 2011 was examined as PW 9 in the aforesaid case and he deposed, inter alia, as follows:

The incident took place on 22.9.2002 at about 10 a.m. at vill. Piyasala under P.S. Keshpur. At that time I was under Babla tree in hidden condition. In front of the said Babla tree there was a house but I cannot say the name of the owner of the said house. Ajoy Acharjee, Tapan Singh, Denu, Taju, Bham entered into that house. As the party member of CPI(M) chased them so they entered into the house to save their lives. There was a turmeric garden where I was in hidden condition. When I was in hidden condition under the babla tree as well as in the turmeric garden I heard shouting "Bancho, bancho" and if required please cut doen one hand." After three minutes such shouting was stopped. Thereafter, I heard sounds of three firing. All the accused persons were present at the time when I heard sounds of firings and I also saw the accused persons to assault Denu, Ala, Taju, Bham, Ajoy Acharjee and Tapan Singh in front of the kalimandir.

12. Mr. Basu, learned Counsel appearing for the State submitted that there are three places of occurrence. The first place of occurrence is the house of Ajay Acharya in the village Rainak. The second place of occurrence, according to him, is the village Piarsala where the victims were killed and the third place of occurrence is Daserbandh where the dead bodies were buried and later on the skeletons were

recovered. Mr. Basu relying on a statement recorded u/s 161 Code of Criminal Procedure of one of the witnesses, which was brought to our notice, submitted that there is clearest evidence to show that on the basis of order of the Petitioner one of the accused exhorted the assailants to finish the said Ajay Acharya amongst others. The said statement u/s 161 Code of Criminal Procedure relied upon by Mr. Basu does not prima facie appear credible to us because the same witness had earlier been examined during the trial in connection with the PS Case No. 61 of 2002 and during his evidence he did not depose any such thing. With respect to the first place of occurrence the defacto complainant Chandana in PS Case No. 61 of 2002 neither in the written complaint nor during her deposition, indicated above, involved the Petitioner. Even the other witnesses namely the wife of the victim Ajay Acharya who claims to have been accompanying her husband at the time of his abduction did not involve the Petitioner which we have noticed above. This is besides the other infirmities brought to our notice by Mr. Roy upon comparison of the material annexed to the petition.

13. As regards the third place of occurrence Mr. Basu drew our attention to a statement recorded u/s 164 Code of Criminal Procedure of one of the witnesses, in order to show that the witness and some others were employed by the Petitioner amongst others for the purpose of digging earth at Daserbandh. Even if we accept at its face value the statement made by that witness all that appears is that the Petitioner was present at the time when the earth was excavated. Merely on the basis of this circumstance it is difficult to form even a prima facie opinion as regards complicity of the Petitioner in the alleged murder of Ajay Acharya regard being had to the fact that (a) till date the investigating agency has not been able to establish any nexus between Ajay Acharya and the skeleton discovered on 4th June 2011; (b) for 9 years the garments were lying in the grave covering the dead body which has been reduced to skeleton but the dhuti, ganjee and underwear allegedly continued to remain identifiable; (c) the DNA test is yet to be conducted; and (d) no special mark of identification of the teeth was shown to us.

14. In the case of Shibram Bhowmick and Anr. v. State of West Bengal in CRM No. 1122 of 2011 to which one of us was a party the following views were expressed:

Section 41 of the Code of Criminal Procedure (hereinafter referred to as the Code) authorises the police to arrest any person in a cognizable case without warrant whereas Section 438 of the Code is an overriding power vested in the Higher Courts empowering grant of bail in non-bailable cases to persons apprehending arrest considering (i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) the possibility of the applicant fleeing from justice; and (iv) whether the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested.

The key word in Section 41 of the Code of Criminal Procedure is not a mere accusation but (a) a reasonable complaint or (b) credible information or (c) a reasonable suspicion in connection with a cognizable offence before power u/s 41 of the Code can be exercised. Whereas Section 438 of the Code provides for pre-arrest bail in a case of non-bailable accusation. The Court has to strike a balance between the needs of an arrest and the urgency to secure liberty to the citizen. The remedy provided u/s 438 of the Code is, as it were, a proviso to Section 41 of the Code. Whether custodial interrogation of the accused is essential in the interest of investigation is one of the vital questions to be taken into consideration while considering the prayer for pre-arrest bail.

15. Prima facie a "reasonable complaint" or a "credible information" at the moment is not on the record. As regards existence of a reasonable suspicion it can be pointed out that there are various inconsistencies in the statements of the witnesses collected by the investigating agency and the evidence already adduced by some of those witnesses. Mr. Basu submitted that they are not at the moment of much relevance. Even assuming that Mr. Basu is correct sight cannot be lost of the fact that there is no indication in the written complaint that the defacto complainant Shymal Acharya is an eyewitness. From the evidence of his brother, mother and grandmother adduced during the trial in connection with Keshpur PS Case No. 61 of 2002 noticed above his presence at the place of occurrence prima facie is highly improbable. The case appearing from the written complaint dated 6th June 2011 is inconsistent with the case to be found in the written complaint lodged by his sister contemporaneously on 26th September 2002. According to the complaint of his sister Ajay Acharya was shot at in his own house whereas according to the complaint dated 6th June 2011 the victim was killed in the house of Gobinda Mazhi. Presence of the Petitioner at the place of occurrence was not indicated in the complaint dated 26th September 2002. It is thus not possible even to form a reasonable suspicion as regards complicity of the Petitioner at this stage.

16. Mr. Basu contended that the Petitioner is a very influential person. Unless he is taken into custody he is likely to intimidate the witnesses. As a matter of fact one complaint has already been lodged by the wife of one of the witnesses alleging that owing to threats she and the members of her family are feeling insecure and her husband has consumed poison. Mr. Roy, learned Counsel submitted for the Petitioner that political vendetta is at the root of all these mischievous allegations.

17. We have considered the rival submission and are of the opinion that there is a case for an order as prayed for. In case the Petitioner misuses his liberty or refuses to co-operate with the investigation agency or in case custodial interrogation of the Petitioner becomes essential in future depending upon discovery of any definite

evidence the Court shall not be powerless to remedy the situation.

18. The prayer for pre-arrest bail, for the reasons indicated above, is allowed subject to the following conditions:

- a) The Petitioner shall not enter the territory of the district of Paschim Medinipur without leave of CJM, Paschim Medinipur until further orders. This shall not however prevent him from appearing before any Court where his presence may be required;
- b) The Petitioner shall furnish particulars of his present place of abode and make himself available for interrogation by the Investigating Agency as and when required and shall extend fullest co-operation for a meaningful investigation;
- c) No direct or indirect threat or any inducement would be made to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer; and d) further and other terms as the concerned learned Court below may think fit and proper.

19. This order of anticipatory bail would remain operative for a period of 30 (thirty) days from date. He shall be entitled to apply for regular bail. If and when such an application is made, the same shall be considered on its own merit by the appropriate regular Court. In case of violation of any of the conditions, the regular bail to be granted by the learned Chief Judicial Magistrate, Paschim Medinipur, shall automatically stand cancelled and the Petitioner shall be taken into custody.

20. This application is, thus, disposed of. It is clarified that the observations made herein are prima facie in nature and shall not preclude the Trial Court from arriving at its own conclusions on the basis of evidence which may be adduced.

21. Urgent xerox certified copy of this judgment, be delivered to the learned Advocate for the parties, if applied for, upon compliance of all formalities.

Raghunath Bhattacharyay, J.

I agree.