

Calcutta High Court

Biren Pramanik And Ors., Swapan ... vs State Of West Bengal on 10 May, 2002

Equivalent citations: (2003) 1 CALLT 470 HC

Author: G De

Bench: G De

JUDGMENT G.C. De, J.

1. In all these four revisional applications (CRR 506/1996, CRR 423 /1997, CRR 302/1997, CRR 303/1997) a common question was raised as to whether cognizance could be taken on the charge-sheet filed on the basis of investigation made beyond the time limit fixed by Section 167(5) of the Code of Criminal Procedure as amended in the State of West Bengal by the Code of Criminal Procedure (West Bengal Amendment) Act, 1988 which came into force with effect from 2nd May, 1989.

2. It was contended on behalf of the State that in view of the principle adopted by the Apex Court in *Durgesh Saha v. Bimal Chandra Saha* (1996 Cri LJ 1137), the Court below was justified in taking the cognizance on the basis of the chargesheet. On the other hand, the learned counsel appearing on behalf of the petitioners placed reliance on another Division Bench judgment of the Apex Court (*State of West Bengal v. Falguni Dutta and Anr.*) in support of the contention that the investigation beyond the time limit fixed by Section 167(5), without any order of extension by the Magistrate, is illegal and taking of cognizance was not justified. Accordingly, prayer was made for quashing of the proceeding.

3. Since there were divergent views expressed by different Benches of this Court as well as by the Apex Court and also keeping in view the decision of the three Judges Bench of the Apex Court in *Nirmal Kanti Roy v. State of West Bengal*, I requested Shri Milan Mukherjee, and advocate of this Court to appear as *Amicus Curiae*. Mr. Mukherjee was good enough in pointing out that before the decision in *Nirmal Kanti Roy's* case (*supra*), a Special Bench of this Court in *Sakti Sadhan Majhi v. State of West Bengal*, reported in 1994 C.Cr. LR (Cal) 137 took the view that cognizance of the offence and the trial of an accused on the basis of investigation carried on and charge-sheet submitted beyond the period of six months without any specific order from the Magistrate was bad and void. The said Bench also took the view that without a specific order from the Magistrate for continuation of investigation beyond the statutory period, the accused immediately at the expiry of the period fixed in Section 167(5) of the Code, acquired a right to be discharged from the case if the investigation was not completed and concluded within the time limit. The Special Bench was also of the view that any cognizance or trial of an offence on the basis of investigation continued and charge-sheet filed beyond the period fixed in Section 167(5), without an appropriate order from the Magistrate, was illegal and void and as such, the accused was to be discharged automatically from the case.

4. Mr. Mukherjee also pointed out that the State of West Bengal challenged the order passed by the Special Bench before the Apex Court in SLP (Crl.) No. 1242-1243 of 1995. The Supreme Court the basis of the judgment in *Falguni Dutta's* case (*supra*) set aside the judgment of the Special Bench. In *Falguni Dutta's* case (*supra*), the Apex Court took the view:

"If the investigation has been stopped on the expiry of six months or the extended period, if any, by the Magistrate in exercise of power conferred by Sub-section (5) of Section 167 of the Code, the investigation comes to an end and, therefore on the completion of the investigations Section 173(2) enjoins upon the Officer-in-Charge of the Police Station to forward a report in the prescribed form. There is nothing in Sub-section (5) of Section 167 to suggest that if the investigation has not been completed within the period allowed by that sub-section, the Officer-in-Charge of the Police Station will be absolved from the responsibility of filing the police report under Section 173(2) of the Code on the stoppage of the investigation. Therefore, the Special Court was competent to entertain the police report restricted to six month's investigation and take cognizance on the basis of thereof."

5. The same view was taken by a three Judges Bench of the Apex Court in Nirmal Kanti Roy's case (supra). This Bench of the Apex Court also duly considered the principle adopted in Durgesh Chandra Saha's case (supra) and took the view:

"In our opinion there is no conflict between the aforesaid two decisions and the ratio was applied on the factual position in each case. Nor is it at variance with the view which we have expressed above."

6. For the purpose of appreciating the view taken by the Apex Court, I deem it proper to reproduce paragraphs 7 and 8 of the judgment in Nirmal Kanti Roy's case (supra):

"The order stopping further investigation into the offence and the consequential order of discharge are not intended to be automatic sequel to the failure to complete investigation within the period fixed in the sub-section. The succeeding words in the sub-section confer power on the Court to refrain from stopping such investigation if the Investigating Officer satisfies the Magistrate of the fusion of two premises (1) that in the interest of justice it is necessary to proceed with the investigation beyond the period shown in the sub-section and (2) that there are special reasons to do so.

A reading of Sub-section (6) further shows that even in a case where the order stopping investigation and the consequent discharge of accused has been made that is not the last word on it because the sub-section opens another avenue for moving the Sessions Judge. If the Sessions Judge is satisfied that 'further investigation into the offence ought to be made' he has the power to allow the investigation to proceed. Hence we take the view that the time schedule shown in Section 167(5) of the Code is not to be treated with rigidity and it is not mandatory that on the expiry of the period indicated therein the Magistrate should necessarily pass the order of discharge of the accused. Before ordering stoppage of investigation the Magistrate shall consider whether, on the facts of that case, further investigation would be necessary to foster interest of criminal justice. Magistrate at that stage must look into the record of investigation to ascertain the progress of investigation thus for registered. If substantial part of investigation was by then over, the Magistrate should seriously ponder over the question whether it would be conducive to the interest of justice to stop further investigation and discharge the accused."

7. So from the above discussion, it is sufficiently clear that the order of stopping further investigation into an offence and the consequential order of discharge are not intended to be

automatic sequel to the failure to complete investigation within the time limit fixed in Section 167(5). Before ordering stoppage of investigation or before taking cognizance on a charge-sheet, it is incumbent upon the Magistrate to look into the record of investigation to ascertain the progress of investigation so far made and if It is found that substantial part of investigation was by then over, the Magistrate is required to come to a conclusion as to whether it would be proper in the interest of justice to stop further investigation and discharge the accused, or cognizance is to be taken on the basis of the investigation made during the time limit as extended from time to time, if any.

8. Mr. Mukherjee also drew the attention of this Court to a Full Bench decision of this Court in Kelyan Kumar Das v. State West Bengal decided on 13th July, 1998 and reported in 1998 (II) CHN 136 in which the principle adopted by the Apex Court in Nirmal Kanti Roy's case on 23.4.1998 was not considered, but in fact, took the same view expressed by the Apex Court in Nirmal Kanti Roy's case. The Full Bench, of course, considered the decision of the Apex Court in Sakti Sadhan Majhi's case (supra), Falguni Dutta's case (supra) and Durgesh Chandra Saha's case (supra) along with other important decisions on the subject and the majority view practically reiterated the view taken by the Apex Court in Nirmal Kanti Roy's case.

9. Thus the Full Bench took the view that if the investigation of a case is not completed within the statutory period envisaged in Section 167(5) as amended in West Bengal, the discharge of the accused is not automatic. If the Magistrate takes cognizance on a police report, he is required to consider as to whether the material collected in course of the investigation during the time limit was sufficient or not. On the other hand, if the Magistrate decides to drop the proceeding and refuses to take cognizance of the case, a duty and obligation are cast upon him to issue a notice to the informant, who set the investigation machinery into motion by lodging the FIR so that the informant can come to the Court and make an attempt to persuade the Magistrate not to drop the proceeding. It is also viewed that if the Magistrate decides to drop the proceeding the injured victim of the offence or his relative, if the victim dies, has a right to be heard before the Magistrate.

10. In all the instant cases, it appears that the Court below took cognizance of the offence immediately on filing of the charge-sheet without taking into consideration as to whether cognizance was to be taken on the basis of the investigation done during the statutory period, along with the extended period, if any. There is nothing on the record to show or Indicate that the learned Court below had any occasion to consider the principles adopted by the Full Bench of this Court or the Apex Court discussed hereinabove. Hence the taking of automatic cognizance on the basis of entire police report without taking into consideration the provision of Section 167(5) is not justified in law and hence the order of taking cognizance is liable to be set aside.

11. But since a police report has been filed, it is incumbent upon the learned Magistrate to examine the same and thereafter, to come to a conclusion, at the time of taking cognizance, and to specify upto which period of investigation was taken into consideration. If there was no extension to the period of investigation as envisaged in Sections 167(5) and 167(6) of the Code, the taking of cognizance is to be limited to the statutory period, If it is found that taking of cognizance on the basis of police investigation was not possible, notice is to be issued to the defacto complainant before passing any final order.

12. In this connection, it would not be out of place to Indicate that the West Bengal Amendment in respect of Sub-section 167(5) came into force on 2nd May, 1989 and as such, the period fixed by that section, is to be counted from 2nd May, 1989 inasmuch as the amendment has not been given retrospective effect, and in the section itself it is not specifically said that it will have retrospective effect, it is a settled principle of law that procedural law cannot have any retrospective effect unless specifically expressed in the provision itself. The provision of Section 167(5) accordingly has no retrospective effect.

13. Lastly, I deem it proper to direct the Courts competent to take cognizance of an offence on the basis of police report to fix the date of submission of the police report at least on or before the last date of the period fixed under Section 167(5) of the Code so that the investigating agency is not misled looking at the date, which may be a later date after the expiry of the statutory period generally fixed by the Court for submission of the police report. It is made clear that simply fixing a date beyond the statutory period does not enlarge the period of investigation automatically within the meaning of Section 167(5). With this comment all the four applications are disposed of.

14. The impugned orders as regards taking of cognizance along with the subsequent orders passed in each of these proceedings are set aside and liberty is given to the Court below to reconsider the police report in the light of the observations made hereinabove. All interim orders vacated.

Let a xerox copy of this order duly countersigned by the Assistant Registrar (Court) be kept in the records of CRR 302/97, CRR 303/97 and CRR 423/97 and another copy be sent to the Courts below along with LCR, if any. This judgment do govern the fate of all the four revisional applications indicated hereinabove.

At the close, I think Mr. Milan Mukherjee for his valued submission before this Court as Amicus Curiae and his assistance is highly appreciated by this Court.

The Registrar General is directed to circulate a copy of this judgment to all the District and Sessions Judges and the Chief Metropolitan Magistrate Calcutta for communication to the concerned Judicial Officers under them for guidance.

Criminal section do supply urgent xerox copy of this order to the parties, if applied for.