

GAHC010236472023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Rev.P./477/2023

KHAGEN HALOI AND 9 ORS.
S/O LT. SANTO RAM HALOI, R/O VILL- HARIBHANGA, BHAIRA SUPA,
P.S./P.O.-TIHU, DIST-NALBARI-781378

2: BILLESWAR BAISHYA
S/O LT. DHARANI BAISHYA
R/O VILL- HARIBHANGA
BHAIRA SUPA
P.S./P.O.-TIHU
DIST-NALBARI-781378

3: MRINAL HALOI
S/O BHUMIDHAR HALOI
R/O VILL- HARIBHANGA
BHAIRA SUPA
P.S./P.O.-TIHU
DIST-NALBARI-781378

4: BHUMIDHAR HALOI
S/O LT. TARANI HALOI
R/O VILL- HARIBHANGA
BHAIRA SUPA
P.S./P.O.-TIHU
DIST-NALBARI-781378

5: BHRIGUJIT BARMAN
S/O DASARATH BARMAN
R/O VILL- HARIBHANGA
BHAIRA SUPA
P.S./P.O.-TIHU
DIST-NALBARI-781378

6: LAKHI KT. KALITA
S/O LT. DEVA RAM KALITA

R/O VILL- HARIBHANGA
BHAIRA SUPA
P.S./P.O.-TIHU
DIST-NALBARI-781378

7: DASHARATH BARMAN
S/O LT. UMA CHARAN BARMAN
R/O VILL- HARIBHANGA
BHAIRA SUPA
P.S./P.O.-TIHU
DIST-NALBARI-781378

8: KULAJIT BARMAN @ KULADIP
DASARATH BARMAN
R/O VILL- HARIBHANGA
BHAIRA SUPA
P.S./P.O.-TIHU
DIST-NALBARI-781378

9: SMTI. PALKHILA BARMAN
H/O DASARATH BARMAN
R/O VILL- HARIBHANGA
BHAIRA SUPA
P.S./P.O.-TIHU
DIST-NALBARI-781378

10: NILAM HALOI
S/O BHUMIDHAR HALOI
R/O VILL- HARIBHANGA
BHAIRA SUPA
P.S./P.O.-TIHU
DIST-NALBARI-78137

VERSUS

THE STATE OF ASSAM AND 3 ORS.
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:DIRECTOR GENERAL OF POLICE
ASSAM POLICE HEADQUARTER
GUWAHATI
ULUBARI
KAMRUP (M)
ASSAM

3:SUPERINTENDENT OF POLICE
DISTRICT NALBARI
ASSAM

4:SH. RATNA KT SHARMA
SUB INSPECTOR
OFFICER IN CHARGE
TIHU POLICE STATION
NALBARI
ASSA

Advocate for the Petitioner : , S BORGOHAIN,MS. B BARUAH,MR BAPLU CHAKMA

Advocate for the Respondent : PP, ASSAM,

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 20.09.2024

Heard Mr. S. Borgohain, learned counsel for the petitioners through V.C. Also heard Mr. D. Das, learned Additional Public Prosecutor for the State respondent.

2. This is an application under Section 397 of the Code of Criminal Procedure, 1973 *read with* Article 227 of the Constitution of India against the order dated 20.09.2022, passed by the learned Judicial Magistrate First Class, Tihu in Tihu P.S. Case No. 151/2019, whereby the cognizance has been taken against the present accused/petitioner under Sections 120B/341/ 325/326/302 of the Indian Penal Code and summons were issued; and the order dated 15.05.2023, passed by the learned Session Judge, Nalbari in Sessions Case No. 15/2023, whereby

the charges were framed against the present accused/petitioners along with others under Section 120B/302 of the India Penal Code; along with a prayer for remanding the Sessions Case No. 15/2023 from the Court of learned Session Judge, Nalbari to the Court of learned Judicial Magistrate First Class, Tihu and to restore the case as Tihu P.S. Case No. 151/2019 and further to direct the learned Judicial Magistrate First Class, Tihu to proceed with the case from the stage of receiving final report under Section 173 of Cr.P.C. as Rules stipulated in the notification issued by this Court vide Notification No. HC.XI-09/2021/1/RC, dated 29.01.2022, in the light of the direction issued by the Hon'ble Supreme Court.

3. It is submitted by Mr. Borgohain, learned counsel for the petitioners, that in the present case, the learned Judicial Magistrate First Class, Tihu took cognizance on receipt of the charge-sheet filed under Section 173 Cr.P.C. and from the Order dated 20.09.2022 itself, it is seen that the charge-sheet was accompanied with one sketch map of P.O., search and seizure list, inquest report, P.M. report, injury report, FSL report and with the brief facts of the case along with the names of the accused as well as the witnesses. He further submitted that after filing of the charge-sheet, the copies of the documents as well as the statement of the witnesses recorded under Section 161 Cr.P.C. were provided to the present petitioners complying the provision of Section 207/208 Cr.P.C., but the learned Judicial Magistrate First Class did not provide the list of documents or the witnesses which were collected/recorded by the I.O. during investigation, though the same were not relied by the prosecution. He submitted that at the time of filing of the charge-sheet, the learned Court below did not consider this aspect of the case nor any direction was given to the Investigating

Authority to provide the same. He further submitted that the Hon'ble Apex Court in the case of **Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In re. v. State of Andhra Pradesh and Ors., (2021) 10 SCC 598**, has clarified this aspect in detail in paragraph No. 11 of the judgment, which reads as under:

"11. The amici pointed out that at the commencement of trial, accused are only furnished with list of documents and statements which the prosecution relies on and are kept in the dark about other material, which the police or the prosecution may have in their possession, which may be exculpatory in nature, or absolve or help the accused. This court is of the opinion that while furnishing the list of statements, documents and material objects under [Sections 207/208, Cr. PC](#), the magistrate should also ensure that a list of other materials, (such as statements, or objects/documents seized, but not relied on) should be furnished to the accused. This is to ensure that in case the accused is of the view that such materials are necessary to be produced for a proper and just trial, she or he may seek appropriate orders, under the Cr. PC. 3 for their production during the trial, in the interests of justice. It is directed accordingly; the draft rules have been accordingly modified. [Rule 4(i)]"

4. Mr. Borgohain further submitted that in view of the guideline of the Hon'ble Apex Court, all the High Courts, including this Court also, made the amendments for High Court Criminal Rules and Orders and as per the explanation of Chapter 14(i) of the aforesaid Notification dated 29.01.2022, it provides that the list of statements, documents, material objects and exhibits shall specify statements, documents, material objects and exhibits that are not relied upon by the Investigating Officer. Accordingly, he submitted that as per the guideline of the amended Criminal Rules of this Court also, the I.O. is to provide the list of documents and the list of witnesses etc. which are not relied by the prosecution. But, in spite of such specific guideline laid down by the Hon'ble Apex Court as well as by the amended provision of Criminal Rules and Orders of this Court, the learned Judicial Magistrate First Class did not comply with those provision and did not provide any list of documents or the witness to

the present petitioners complying the said provision. The learned Session Judge also did not comply with the aforesaid provision and without applying judicial mind framed the charges against the present petitioner only considering the materials available in the Case Diary. Accordingly, Mr. Borgohain submitted that it is a fit case wherein the matter may be remanded to the Court of learned Judicial Magistrate First Class, Tihu from the Court of learned Session Judge, Nalbari and to restore the case as Tihu P.S. Case No. 151/2019 and further to direct the learned Judicial Magistrate First Class, Tihu to proceed with the case from the stage of receiving final report under Section 173 of Cr.P.C. by setting aside the order of taking cognizance dated 20.09.2022 by the learned Judicial Magistrate First Class, Tihu as well as the order of framing charge dated 15.05.2023 by the learned Session Judge, Nalbari.

5. In support of his submission, Mr. Borgohain, learned counsel for the petitioners, further relied on a decision of this Court passed in the case of **Padma Rani Mudai hazarika Vs. Union of India & Ors.**, reported in **(2013) 6 GLR 6**, and further emphasized on paragraph No. 12 of the judgment, which reads as under:

"12. The learned amicus curiae, Dr. Saraf, has submitted, we find with great justification that when an order is made contrary to a decision of the Supreme Court, such an order would be non est, without jurisdiction and violative of article 141 of the Constitution of India and an order of this nature – even if not set aside – would be void and have got to be completely ignored as if no such order was ever passed or existed. The reference, made, in this regard, by Dr. Saraf, to the case of Sri Krishna Singh v. Mathura Ahir and Others, (1981) 4 SCC 421, is not wholly misplaced, wherein the Supreme Court observed and held as under:

18. It was contended by Mr. Asthana that O. XXI, R. 29 was amended by

Section 72 of Act 104/1976 which introduced the following words : "or of a decree which is being executed by such Court." The amendment is of no avail to Sri Krishna Singh because the words "such Court" appear in the amendment also. Furthermore, the execution in the instant case was first filed before the City Munsiff who alone had the jurisdiction to proceed under O. XXI, R. 29. As the execution case was transferred to the Civil Judge, he ceased to have any jurisdiction in the matter. Thus, on this ground also the order of the Civil Judge and as affirmed by the District Judge in revision is a nullity. Moreover, the judgment of the Civil Judge in view of the circumstances detailed above appeared to us to be an order passed in defiance of and in disobedience to the clear directions given by us and the decree passed by us in C.A. 1802/1971 and therefore would be non est and absolutely without jurisdiction and violative of Art. 141 of the Constitution of India.

19. It was submitted by Mr. Sorabji that even if the order of the Civil Judge, which was upheld in revision by the District Judge, was legally erroneous it had to be formally set aside by bringing the matter before this Court in special leave. Where an order is absolutely non est and non-existent, it need not be set aside but would have to be completely ignored as if no such order was ever passed or existed."

6. Mr. Borgohain further submitted that vide order dated 15.02.2024, this Court had directed the learned Trial Court below not to pass any adverse order against the present petitioners. But, in spite of the said order, the case is proceeding with an observation by the learned Session Judge that there is no stay order passed in this case and vide order dated 30.08.2024 the learned Session Judge, Nalbari had asked for clarification from the Registry in that regard. He further submitted that in such a situation and circumstances, the order passed by the learned Judicial Magistrate First Class, Tihu as well as the learned Sessions Judge, Nalbari is absolutely without jurisdiction and violative of Article 141 of the Constitution of India as it is the duty cast upon the Magistrate to go through the papers submitted with the report under Section 173 Cr.P.C. and to ask the Investigating Officer to submit the list of documents which he did

not rely with a further direction to furnish the same to the accused persons.

7. Mr. Das, learned Additional Public Prosecutor, has submitted in this regard that it is the admitted fact that the Hon'ble Apex Court had passed some guideline and in pursuant to the said guideline, this Court had also amended the Criminal Rules and Orders whereby the Investigating Authority has to supply the documents and the list of witnesses which were not relied by the prosecution. But, here in the instant case, it is seen that there is no mention at all in the present petition as to what kind of document the accused/petitioners want to rely upon which were not forwarded along with the charge-sheet filed by the I.O. under Section 173 Cr.P.C. nor there is any list of witnesses which were withheld by the prosecution which may be relevant for the defence to establish their case. Thus, in such a situation, there cannot be any order directing the learned Trial Court below to direct the I.O. to submit the documents which were not relied by the prosecution. He further submitted that there may be a case wherein no other documents were collected during the investigation or there may be a situation wherein no other witnesses were withheld by the I.O. and in that circumstance, there cannot be any reason to stay the proceeding wherein the heinous allegation has been brought against the present accused/petitioners. Accordingly, Mr. Das, learned Additional Public Prosecutor, has submitted that there is no ground of allowing the present petition or to remand back the case before the learned Judicial Magistrate First Class, as prayed for by the petitioners.

8. After hearing the submissions made by the learned counsel for both sides and on perusal of the case record etc., it is seen that admittedly there is no

dispute that the case has been charge-sheeted against the present accused/petitioners under Section 120B/302 IPC and it is also admitted by the accused/ petitioners that all the relevant documents and the evidence of the witnesses, which were relied by the prosecution at the time of filing the charge-sheet, were already furnished to them complying Section 207/208 Cr.P.C. The only grievance of the present accused/petitioners is that they were not provided with the documents/names of the witnesses which are not relied by the prosecution by complying the amended provision of the Criminal Rules and Order of this Court which was amended as per the guideline issued by the Hon'ble Apex Court. But, in the same time, it is also admitted fact that there is no mention about any other documents which may be seized in connection with this case or the evidence of witnesses which were examined by the Investigating Officer during the investigation of this case. More so, it is a case under Section 302 IPC wherein the important documents relied by the prosecution are the search and seizure list, sketch map of the P.O., P.M. report etc., which were already furnished to the accused/petitioners. Furthermore, even if it is presumed that any witnesses are withheld by the prosecution, which may be relevant for the defence, there cannot be any bar to adduce the evidence of those witnesses which may be beneficial for the accused/petitioners to prove their defence. It is an admitted fact that it was the duty of the learned Magistrate concerned and the Investigating Officer to submit the list of document or the list of witnesses which are being withheld by the prosecution or not relied though collected/recorded during investigation, but without any specific mention or information regarding the documents as well as witnesses which were alleged to have been withheld by the prosecution, in such a circumstance, this Court is of the opinion that there cannot be any stay of

further proceeding at this stage and the matter could not be remand back to the learned Judicial Magistrate First Class to direct the Investigating Officer to proceed with the case from the stage of receiving final report under Section 173 of Cr.P.C.

9. In view of above, this Court is of the view that the petitioners have not made out a case requiring interference of this Court in the order dated 20.09.2022, passed by the learned Judicial Magistrate First Class, Tihu in Tihu P.S. Case No. 151/2019 and the order dated 15.05.2023, passed by the learned Session Judge, Nalbari in Sessions Case No. 15/2023. Resultantly, I do not find merit in this petition and accordingly, the same stands dismissed.

10. However, this Court find it justified to direct the learned Sessions Judge, Nalbari to pass an order directing the Investigating Officer to produce the list of witnesses or documents, if any, which were withheld not relied by the prosecution. It is directed accordingly.

11. The criminal revision petition stands disposed of in terms of above.

JUDGE

Comparing Assistant