

GAHC010110002023



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

Case No. : Crl.Rev.P./206/2023

DHAN SINGH
S/O LATE DHUPAN SINGH
PERMANENT RESIDENT OF VILL BALIHAR, P.S. SEMERI
DIST. BHOJPUR, BIHAR-302118.

VERSUS

THE STATE OF ASSAM AND 2 ORS
REP. BY THE PP, ASSAM

2:THE SUPERINTENDENT OF POLICE

CENTRAL BUREAU OF INVESTIGATION
GOVERNMENT OF INDIA
PLOT NO. 5-B
CGO COMPLEX

LODHI
ROAD
NEW DELHI-110003.

3:THE CENTRAL BUREAU OF INVESTIGATION

ACB GUWAHATI
NH 37
BETKUCHI
P.O. GARCHUK
GUWAHATI-781035
ASSA

Advocate for the Petitioner : MR A H SARKAR

Advocate for the Respondent : PP, ASSAM

Linked Case : I.A.(Crl.)/1011/2023

DHAN SINGH
S/O LATE DHUPAN SINGH
PERMANENT RESIDENT OF VILL BALIHAR
P.S. SEMERI
DIST. BHOJPUR
BIHAR-302118.

VERSUS

THE STATE OF ASSAM AND 2 ORS
REP BY THE PP
ASSAM

2:THE SUPERINTENDENT OF POLICE
CBI
GOVT OF INDIA PLOT NO. 5 CGO COMPLEX LODHI ROAD NEW DELHI
110003
3:THE CENRAL BUREAU OF INVESTIGATION
ACB GUWAHATI
NH 37 BETKUCHI P.O. GARCHUK GUWAHTI 781035 ASSAM

Advocate for : MR A H SARKAR
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM AND 2 ORS

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 02.05.2024

Heard Ms. S. Sanyal and Mr. A.K. Singh, learned counsel for the petitioner. Also heard Mr. M. Haloi, learned Standing counsel, NCB.

2. By filing an application u/s 482 Cr.P.C. 1973, the petitioner has challenged the

order of the trial court dated 05/10/2023 whereby an additional charge was framed against the present petitioner u/s 174(A) of IPC in connection with C.R. Case no. 06/1996 (arising out of Tezpur P.S. Case no. 211/1994), pending in the court of Special Judge, Sonitpur, Tezpur.

3. The factual matrix relating to this interlocutory application is that on getting an information from a secret source about carrying of contraband goods in a truck bearing No. UHZ-1728, the said truck was intercepted at Kalia Bhumura Bridge of Tezpur on 09/04/1994 at about 11 a.m. and brought the said truck to Tezpur Police station with the driver and handyman of the said truck. The truck was parked at police station but before it could be checked thoroughly both the driver and handyman fled away taking the plea of having tea outside police station. As it was suspected of carrying contraband goods, so it was checked on 10/04/1994 in presence of the Executive Magistrate and other independent witnesses. In the course of checking about 1 ton of coal were unloaded and 241 packets of contraband wrapped with cloth found under the coal inside the truck. Accordingly, the said contraband goods were seized and a case was registered vide Tezpur P.S. Case No. 211 of 1994 u/s 20(b) of NDPS Act against Mohan Singh, driver and Ramesh Chandra Jaiswal, owner of the truck.

4. After completion of investigation, charge-sheet has been laid against the aforesaid driver and owner of the said truck but both were found not traceable to face the trial. Subsequently, the trial court after perusing the charge sheet passed the order on 13/09/1999 that the investigating officer had not made sincere investigation in the drug trafficking and directed the CBI for further investigation of the case.

5. On the basis of the said order, the CBI has registered a case and after completion of investigation, submitted charge-sheet u/s 20(b)/25/29 read with Section 8 of NDPS Act, 1985 against the present petitioner who was arrested on 27/07/2000

by the CBI. Thereafter, charge was framed against the petitioner on 08/07/2002 under the aforesaid section of law.

6. It was urged by the learned counsel for the petitioner that the petitioner is not FIR named accused. Nothing has been recovered from his possession also. He has been falsely implicated in the instant case merely on suspicion. The petitioner was facing trial and all along cooperated with the investigation since he was arraigned in the alleged case by the CBI. The petitioner was present on each and every day during trial even after granting bail by this court.

7. It is also the submission of the learned counsel for the petitioner that during his presence before the trial court, out of 51 witnesses only 2 prosecution witnesses were examined, since framing of charge on 08/07/2002 till 20/01/2003. Therefore, the petitioner became apprehensive that when the charge has been framed after 8 years from starting of the case and only 2 witnesses were examined, he lost his mind and became deeply depressed and took shelter at his native village –Balihar, District-Buxar, in the state of Bihar and started to serve in the temple near his house. Thereafter, he was re-arrested on 26/09/2022, from Buxar.

8. According, to learned counsel for the petitioner, on 28/09/2022, the trial court had passed the order to create a supplementary record of the case as the original case record could not be traced out but on production of the accused/petitioner before the trial court, he was remanded to judicial custody.

9. It is further argued by learned counsel for the petitioner that though the original case record is not available with the trial court but additional charge was framed u/s 174 (A) IPC. Section 174 (A) IPC provides the statutory background for invoking the said penal provisions, wherein the precondition is promulgation as well as publication of Proclamation u/s 82(1) of Cr.P.C. by the court, when the court comes to

a conclusion that without issuance of a proclamation to appear by the absconder accused at a specified place and at a specified date and time, the appearance of the accused cannot be ensured.

10. Learned counsel also has pointed out that before framing of charge u/s 174 (A) IPC, the court must pass an order specifically stating that in spite of issuance of the said proclamation containing specific direction of appearance on a specified date, time and place, the accused did not comply with the said direction of the court and hence, the accused would be adjudged as a proclaimed offender and that is why the accused would be considered to be committed an offence u/s 174(A) IPC.

11. It is further submitted that in the instant case the trial court never issued such a proclamation u/s 82(1) of the Cr.P.C. against the present petitioner. Neither any such proclamation was announced by beating of drum in and around the locality where the accused used to reside nor any such proclamation was published by pasting such proclamation notice on the conspicuous part of the house where the accused/petitioner last resided. In absence of the aforesaid statutory pre-condition provided in Section 82 (1) and (2) of Cr.P.C., no charge u/s 174 (A) of IPC can be framed against the accused/petitioner. And accordingly learned counsel for the petitioner has prayed for setting aside/quashing of the order dated 05/10/2023 passed by the learned Special Judge, Sonitpur, Tezpur on framing of charge u/s 174(A) IPC.

In support of her submission, learned counsel has placed reliance on the following case laws –

- a. (2021) CRI. L.J. 3461 (Sunil Tyagi vs. Government of NCT of Delhi and another).
- b. (2023) SCC Online Cal 1055 (Niranjan Mahato and others vs.

State of West Bengal and another).

c. (2008) 1 GLT 979 (Nazrul Islam vs. State of Assam).

d. CRR/826/2023 dated 15/03/2023 (Mayukh Ranjan Sarbadhikary @ Mayukh Sarbadhikary vs. State of West Bengal)

12. In response to the submission of the learned counsel for the petitioner, Mr. Haloi has vehemently opposed in quashing of the proceeding in connection with framing of additional charge against the petitioner u/s 174 (A) IPC. Learned standing counsel CBI has submitted that it is usually the accused who is interested in delaying the proceedings. Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed the first question to be put and answer who is responsible for the delay.

13. Learned Standing counsel has further pointed out that herein in this case, delay was caused as the accused/petitioner was absconded for a long time i.e., 19 years. Due to absence of the accused/petitioner the trial court issued warrant of arrest and proclamation by following the procedure as per section 82 of Cr.P.C. After examination of the concerned executing officer, the petitioner was declared absconder. Under such backdrop, the question of quashing of framing of additional charge u/s 174 (A) IPC does not arise at all.

14. It is further submitted by learned Standing counsel, CBI that the

petitioner during trial was released on bail by this court and thereafter he was absconded and came to be declared as proclaimed offender.

In support of his submission, learned standing counsel, CBI has relied on the following case laws –

- a. (1992) 1 SCC 225 (Abdul Rahman Antulay and others vs. R.S. Nayak and another).
- b. (2016) 0 Supreme (Gujarat) 640 (Md. Hussain Abdul Rahman Shaikh vs. Union of India)

15. Undisputedly, the petitioner did not appear before the trial court despite issuance of warrant of arrest and subsequently proclamation and attachment. No cogent document has emerged on record to infer if the petitioner was prevented by any compelling reasons not to appear before the trial court for such a long period. It is an admitted fact that the petitioner had knowledge that the trial was going on before the learned Special Judge, Tezpur. Under such backdrop, it can be said that intentionally the petitioner did not appear before the trial court to dispose of the matter.

16. On perusal of the record produced by the CBI, it reveals that initially warrant of arrest was issued against the petitioner. As it was reported by the executing officer that the petitioner was not available in the address given in the warrant of arrest, the trial court after acceptance of the report of the executing officer, P & A was issued.

17. A plain reading of Sub- section (1) of section 82 Cr.P.C. would show that if a court has 'a reason to believe' that a person, despite, issuance of warrant

against him, is concealing or absconding himself so that such warrant remains unexecuted, the court may publish a written proclamation, requiring the person to appear at a specified place and time, which is not less than 30 days from the date of publishing of such proclamation.

18. The expression "*reason to believe*" appearing in sub-section (1) of Section 82 Cr.P.C., means sufficient cause to believe. Section 26 IPC also explicates that a person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing but not otherwise. Thus, 'reason to believe' that a person against whom a warrant of arrest is issued is either absconding or concealing himself should be reflected by the material placed on record before the court. The use of expression '*so that such warrant cannot be executed*' further implies that a person must be attributed with the knowledge that such warrant has been issued against him and his abscondence or concealment is intentional.

19. On perusal of section 82(4) Cr.P.C., it is observed that the use of the expression '*after making such inquiry as it thinks fit*' implies that at the time of pronouncing a person as 'proclaimed offender', the concerned court has to satisfy itself that the steps indicated in section 82(1) Cr.P.C. are scrupulously followed. The court is required to record reasons either after taking evidence or without evidence that the person against whom warrant was issued has absconded or concealed himself, so that such warrant cannot be executed.

20. It is deemed expedient to refer to the decision rendered in the case of **G. Sagar Suri vs. State (NCT of Delhi) and another**, reported in **2003 SCC Online Delhi 759**, wherein it has been held as follows –

“it is manifest from the provisions of section 82 Crpc that before

publishing the written proclamation requiring the accused to appear under the provisions of Section 82 Crpc, the court has to record the reasons either after taking evidence or without evidence, that a person against whom warrants have been issued has absconded or is concealing himself so that such warrants cannot be executed. The procedure for publication of the proclamation is laid down in sub-section 2 of section 82. Sub section (1) provides that the court shall wait for thirty days after publication of the proclamation for the appearance of the accused and it is only after processes u/s 82 Crpc are exhausted that the next step u/s 83 is to be taken by the court.”

21. In the case of ***Rajesh Ebrahimkutty Majidhabeevi vs. State (Government of NCT of Delhi) and another***, reported in ***2021 SCC Online Delhi 4642***, also held that the provision of section 82(1) and (2) Cr.P.C., should be construed strictly and before issuing process, the concerned court has to record its satisfaction that the accused has absconded or is concealing himself to avoid execution of warrants.

22. According to the learned counsel for the accused/petitioner, learned Special Judge did not apply his mind when the charge was framed u/s 174 (A) IPC as the trial court has failed to prove the fact that the requirement u/s 82 Cr.P.C. has been followed. It is further contended that the special judge also erred in law in not disclosing any of the documents which are part of the charge-sheet and has been relied on by the prosecution.

23. On the other hand, learned Standing counsel, CBI would submit that prior to filling of supplementary charge sheet, two witnesses have been examined out of 63 witnesses. Referring to the contents of supplementary charge-sheets, he

would submit that from the order of the trial court, it reveals that before issuing proclamation, the trial court has examined the executing officer and after accepting the report, the P & A was issued. At this stage, the proceedings before the trial court cannot be quashed only on the technical ground whether the trial court has followed the provisions of section 82 Cr.P.C. or not, as well as framing of charge u/s 174 (A) IPC.

24. Hon'ble Supreme court in the case of **M. E. Shivalingam Murthy vs. CBI**, reported in **(2020) 2 SCC 768** has observed as follows –

“17. This is an area covered by a large body of case law. We refer to a recent judgment which has referred to the earlier decisions viz. P. Vijayan v. State of Kerala (2010) 2 SCC 398 and discern the following principles :

17.1 If two views are possible and one of them give rise to suspicion only as distinguished from grave suspicion, the trial Judge would be empowered to discharge the accused.

17.2. The trial Judge is not a mere post office to frame the charge at the instance of the prosecution.

17.3. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the police or the documents produced before the Court.

17.4. If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross examination or rebutted by the defence evidence, if any, "cannot

show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial”.

17.5. It is open to the accused to explain away the materials giving rise to the grave suspicion.

17.6 The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

17.7. At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

17.8 There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.”

25. In view of the aforesaid legal principles set out by the Supreme Court when the submissions of the petitioners are examined, it reflects that when there are two possible views and one of them gives rise to suspicion only, the trial Judge would be empowered to discharge the accused but when a grave suspicion comes to fore, no discharge can be made. In the instant case, prima facie reading the statement of witnesses along with the documents raises a grave suspicion. While examination of charge-sheet shows that there are sufficient grounds to proceed, which include the statement recorded by the police and the documents produced before the Court. At this stage, the documents which are produced by the prosecution are not required to be

examined on the admissibility and the Court has to consider the broad probabilities, the total effect of the evidence and documents produced before the Court. This would not entitle the Court to make roving enquiry into pros and cons. It is settled principle that at the time of framing of charges, the probative value of the material on record cannot be gone into and the material brought on record by the prosecution has to be accepted as true. The documents produced by the prosecution shows that there exist some materials which can form the basis of drawing up a charge.

26. Likewise in ***State of Bihar Vs. Ramesh Singh***, reported in ***AIR 1977 S.C 2018***, the Hon'ble Supreme Court held that at the beginning and the initial stage of the trial, the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is further held that it is not obligatory for the judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The Court further held that the standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused, is not exactly to be applied at the stage of deciding the matter under section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction.

27. The Hon'ble Supreme Court in ***Kanti Bhadra Shah and another Vs. State of West Bengal***, reported in ***(2000) 1 SCC 722***, observed that if there is no legal requirement that the trial court should write an order showing the reasons for framing a charge. The judgment observed that why should the

already burdened trial courts be further burdened with such an extra work. The time has reached to adopt all possible measures to expedite the court procedures and to chalk out measures to avert all roadblocks causing avoidable delays. The Court further observed that if a Magistrate is to write detailed orders at different stages merely because the counsel would address arguments at all stages, the snail-paced progress of proceedings in trial courts would further be slowed down.

28. In ***Munna Devi Vs. state of Rajasthan***, reported in ***AIR 2002 SC 107***, the Hon'ble Supreme Court held that the revisional power under the Code of Criminal Procedure cannot be exercised in a routine and casual manner. While exercising such powers, the High Court has no authority to appreciate the evidence in the manner as the trial and the appellate courts are required to do. Revisional powers could be exercised only when it is shown that there is a legal bar against the continuance of the criminal proceedings or the framing of charge or the facts as stated in the FIR even if they are taken at the face value and accepted in their entirety do not constitute the offence for which the accused has been charged. The Supreme Court further held that it was premature for the High Court to say that the material placed before the trial court was insufficient for framing of charges.

29. In ***State of Maharashtra Vs. Salman Salim Khan & Anr.***, reported in ***AIR 2004 SC 1189***, the Hon'ble Supreme Court held that though it is open to a High Court entertaining a petition under section 482 of the Code to quash charges framed by the trial Court, same cannot be done by weighing the correctness or sufficiency of evidence. In a case praying for quashing of the charge, the principle to be adopted by the High Court should be that if the entire evidence produced by the prosecution is to be believed, would it

constitute an offence or not. The Court held that the truthfulness, the sufficiency and acceptability of the material produced at the time of framing of charge can be done only at the stage of trial.

30. Recently in ***Bhawna Bai Versus Ghanshyam and others***, reported in ***(2020) 2 SCC 217 (Para 13)*** the Hon'ble Supreme Court held that the circumstances alleged by the prosecution indicate that there are sufficient grounds for proceeding against the accused, then, in such a case, at the time of framing the charges, only prima facie case is to be seen; whether the case is beyond reasonable doubt, is not to be seen at this stage. It was further held that at the stage of framing the charge, the court has to see if there is sufficient ground for proceeding against the accused. While evaluating the materials, strict standard of proof is not required; only prima facie case against the accused is to be seen. Referring to the earlier decisions, the Supreme Court reiterated that for framing of charges under Section 228 CrPC, the Court is not required to hold elaborate enquiry and is not required to record detailed reasons, but only prima facie case is to be seen.

31. While applying the aforesaid principles, it is clear that at the stage of framing of charge, the court is not required to meticulously weigh the evidence and the prima facie view of the matter is to be taken into consideration. If the criminal court on consideration of the material on record, finds that a prima facie case is made out and a grave suspicion exists about the involvement of the accused in the crime alleged, it is expected to frame the charge and put the accused on trial. As such at the initial stage of trial, the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not required to be meticulously judged, all that is required is that the court must be satisfied that with the material available, a prima facie case is made out for the accused to

stand trial.

32. In the present case, when the petitioner failed to appear before the trial court when the trial was going on and was declared absconder, supplementary charge-sheet for commission of offence u/ s174 (A) was filed by the investigating agency. Offence u/s 174 (A) IPC though independent in nature is an offshoot of the initial charge sheet pending trial before the special judge court. No separate investigation is required to be conducted as the orders of the court declaring the petitioner to be proclaimed offender are part of the record in the main case. The object and purpose to incorporate section 174 (A) IPC, primarily is to ensure that the accused does not scuttle investigation or trial by remaining absconded without valid or sufficient reasons. In such a scenario when the suspect or accused absconds possibility of valuable evidence to be washed away cannot be ruled out. Since, CBI had jurisdiction to investigate the main offence, cognizance by the court for commission of offence under section 174 (A) IPC or framing of charge under the said section of law cannot be termed as illegal or without jurisdiction.

33. Prima facie there was sufficient and enough material to proceed for commission of offence u/s 174 (A) IPC against the present petitioner. Arguments regarding due procedure not followed before declaring the petitioner 'proclaimed offender' and whether the petitioner was prevented by compelling circumstances and there was no intentional default in non appearance on his part, are all subject matter of trial. At this stage, what would be the impact of non availability of original case record is required to be appreciated/taken up by the trial court and this court while exercising the power of revision would restrain itself to pass any observations as of now. Hence, I do not find any substance in the submission of the learned counsel for the petitioner that prima

facie there is no material on record to justify the framing of charge against the petitioner by the trial court.

34. In view of the foregoing discussion, the order passed by the learned Special Judge, Sonitpur, Tezpur whereby the learned Special Judge has framed additional charge u/s 174 (A) IPC against the present petitioner do not warrant any interference by this Court. In the result, the revision being devoid of any merit, is dismissed.

35. It is clarified that this court has not expressed any opinion on the merits of the case and whatever is observed and stated herein above is solely for the purpose of disposal of the present petition.

36. With the above observation, the I/A stands disposed of accordingly.

JUDGE

Comparing Assistant