

GAHC020001482021



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

Case No. : Crl. Pet./2/2021

MISS IMTIONENLA WALLING
D/O REMA PONGEN, R/O VILLAGE - NOKPU, WARD NO.2, POLICE
STATION - LUNGCHEM, DISTRICT - MOKOKCHUNG, NAGALAND

VERSUS

THE STATE OF NAGALAND AND ANR
REPRESENTED BY THE PUBLIC PROSECUTOR, NAGALAND

2:MISS. IMKONGNUKSHILLA IMCHEN

D/O LATE LIMAWAPANG
R/O LAKE VIEW COLONY
H/NO.82
POLICE STATION - DIMAPUR
DISTRICT - DIMAPUR
NAGALAN

Advocate for the Petitioner : D GOGOI

Advocate for the Respondent : GOVT ADV NL

Date of judgment : 22.02.2024

**BEFORE
HON'BLE MR JUSTICE MRIDUL KUMAR KALITA**

JUDGMENT & ORDER

1. Heard Mr. D. Gogoi, learned counsel for the petitioner. Also heard Mr. K. Angami, learned Public Prosecutor for the State of Nagaland.

2. This application under Section 482 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, Ms. Imtioneula Walling impugning the charge-sheet dated 22.07.2019 filed in G.R. Case No. 689/2018 arising out of Women P.S. Case No. 65/2018 which was filed against the petitioner under Section 506/509 of the Indian Penal Code read with Section 67A of the Information Technology Act, 2000.

3. The petitioner has prayed for quashing the impugned charge-sheet No. 28/2019 dated 22.07.2019 and also prayed for setting aside the order dated 04.02.2021 passed in G.R. Case No. 689/2018, whereby learned Judicial Magistrate First Class, Dimapur had directed further investigation in the said case.

4. The facts relevant for consideration of the instant criminal petition, in brief, are as follows:-

- i. That on 25.09.2018, the respondent No. 2 Ms. Imkongnukshilla Imchen lodged an FIR (First Information Report) in the Women Police Station, Dimapur, *inter-alia*,

alleging that the present petitioner and one Mr. Palzer Tshering Lepcha, who is a resident of Sikkim has been circulating the objectionable pictures of respondent No. 2 on the social media.

- ii. On receipt of the said FIR Women P.S. Case No. 65/2018 under Section 506/509 of the Indian Penal Code read with Section 67A of the Information Technology Act, 2000 was registered.
- iii. On the basis of the said P.S. case, G.R. Case No. 689/2018 was also registered and investigation was initiated. Ultimately, on completion of the investigation, the Investigating Officer submitted the charge-sheet bearing No. 28/2019 on 22.07.2019 before the learned Chief Judicial Magistrate, Dimapur.
- iv. The G.R. Case No. 689/2018 was transferred to the Court of learned Judicial Magistrate First Class, Dimapur, who issued the processes against the present petitioner and on 04.02.2021 the case was fixed for consideration of charges. However, on that day, the learned Judicial Magistrate First Class, Dimapur directed the Investigating Officer to conduct further investigation.

5. Learned counsel for the petitioner has submitted that in the impugned order, the learned Judicial Magistrate First Class, Dimapur has observed that there are no sufficient materials to proceed against the

accused persons, however, instead of discharging the accused persons, including the present petitioner, the learned Judicial Magistrate First Class, Dimapur directed further investigation.

6. Learned counsel for the petitioner has also submitted that when the learned Judicial Magistrate First Class, Dimapur has observed in the impugned order that if the court were to proceed on the basis of materials available on record, there would be no material to exhibit or to prove during the stage of the trial and it would be an exercise in futility. Hence, it is submitted by the learned counsel for the petitioner that considering the said observations, the learned Judicial Magistrate First Class, Dimapur could not have directed further investigations to be carried out by the Investigating Officer for the purpose of collecting additional evidence as it would amount to filling up the lacuna in the prosecution's case.

7. Learned counsel for the petitioner has submitted that, in view of the observations made by the learned Judicial Magistrate First Class, Dimapur in the impugned order, the only options available before the learned Judicial Magistrate First Class, Dimapur would have been to discharge the accused persons, including the present petitioner.

8. It is submitted by the learned counsel for the petitioner that in the absence of sufficient materials in the charge- sheet, compelling the present petitioner to continue as an accused in the case would be an abuse of the process of court.

9. Learned counsel for the petitioner has also submitted that the learned Judicial Magistrate First Class, Dimapur has also failed to take into consideration the fact that there has been an amicable settlement between the complainant and the present petitioner and to that effect, an agreement bond has also been submitted along with the charge-sheet, showing that the pending police case has been amicably settled between the parties.

10. Learned counsel for the petitioner has submitted that as there are no materials on record that would entail the conviction of the present petitioner in this case as well as the fact that a settlement has already been arrived at between the parties. Proceeding with the present criminal case would only be a futile exercise and this is an appropriate case, where the powers under Section 482 of the Code of Criminal Procedure, 1973 should be exercised. In support of his submissions, learned counsel for the petitioner has cited the ruling of the Apex Court of India in **"Kapil Gupta v. State of NCT of Delhi"** reported in **"2022 SCC Online SC 1030."** Learned counsel for the petitioner has also cited a ruling of a coordinate bench of this court in **"Rajan Gohain vs. State of Assam"** (Criminal Petition No. 122/2019 dated 25th March 2019) as well as a ruling of the Supreme Court of India in **"Yogesh v. State of Maharashtra"** reported in **"(2008)10 SCC 394."**

11. On the other hand, Mr. K. V. Angami, learned Public Prosecutor for the state of Nagaland, has submitted that the trial court was right to direct the further investigation in this case as though this case involved an offence under the Information Technology Act, 2000, however, the

investigating officer had not collected the electronic evidence on which the prosecution's case was based, like call data records, expert opinion, data history and other relevant documents.

12. It is also submitted by the learned public prosecutor that the court has the power to direct further investigation under Section 173 (8) of the Code of Criminal Procedure, 1973 even after taking of cognizance. In the impugned order itself, the learned Judicial Magistrate First Class, Dimapur has justified directing the further investigation by citing the ruling of the Apex Court of India in "**Haribhai, Vinubhai, Malviya and others Vs State of Gujarat and others**" reported in "**(2019) 17 SCC 1**"

13. I have considered the submissions made by learned counsel for both the sides and have perused the materials available on record, including the case record of PRC Case no. 377/2019 (GR case no. 689/2018).

14. The power of further investigation under Section 173 (8) of the Code of Criminal Procedure is there with the Investigating Agency/Investigating Officer. Further, this is no longer *res integra* that even the Magistrate, in an appropriate case may direct further investigation of a case by the Investigating Agency. This power continues until the trial has commenced in a criminal case. The said position of law has been clarified by the Apex Court in "**Vinubhai Haribhai Malaviya and others V. State of Gujarat and Another (Supra)**" by observing as follows :-

"25. *It is thus clear that the Magistrate's power under Section 156(3) CrPC is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a "proper investigation" takes place in the sense of a fair and just investigation by the police—which such Magistrate is to supervise—Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report is received by him under Section 173(2); and which power would continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the "investigation" referred to in Section 156(1) CrPC would, as per the definition of "investigation" under Section 2(h), include all proceedings for collection of evidence conducted by a police officer; which would undoubtedly include proceedings by way of further investigation under Section 173(8) CrPC.*

27. *Whereas it is true that Section 156(3) remains unchanged even after the 1973 Code has been brought into force, yet the 1973 Code has one very important addition, namely, Section 173(8), which did not exist under the 1898 Code. As we have noticed earlier in this judgment, Section 2(h) of the 1973 Criminal Procedure Code defines "investigation" in the same terms as the earlier definition contained in Section 2(l) of the 1898 Criminal Procedure Code*

with this difference — that "investigation" after the 1973 Code has come into force will now include all the proceedings under CrPC for collection of evidence conducted by a police officer. "All" would clearly include proceedings under Section 173(8) as well. Thus, when Section 156(3) states that a Magistrate empowered under Section 190 may order "such an investigation", such Magistrate may also order further investigation under Section 173(8), regard being had to the definition of "investigation" contained in Section 2(h).

42. *There is no good reason given by the Court in these decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, Sakiri [Sakiri Vasu v. State of U.P., (2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440] , Samaj Parivartan Samudaya [Samaj Parivartan Samudaya v. State of Karnataka, (2012) 7 SCC 407 : (2012) 3 SCC (Cri) 365] , Vinay Tyagi [Vinay Tyagi v. Irshad Ali, (2013) 5 SCC 762 : (2013) 4 SCC (Cri) 557] , and Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] ; Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any*

importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h) and Section 173(8) CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light which would lead to inculcating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in Hasanbhai Valibhai

Qureshi [Hasanbhai Valibhai Qureshi v. State of Gujarat, (2004) 5 SCC 347 : 2004 SCC (Cri) 1603] . Therefore, to the extent that the judgments in Amrutbhai Shambhubhai Patel [Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel, (2017) 4 SCC 177 : (2017) 2 SCC (Cri) 331] , Athul Rao [Athul Rao v. State of Karnataka, (2018) 14 SCC 298 : (2019) 1 SCC (Cri) 594] and Bikash Ranjan Rout [Bikash Ranjan Rout v. State (NCT of Delhi), (2019) 5 SCC 542 : (2019) 2 SCC (Cri) 613] have held to the contrary, they stand overruled. Needless to add, Randhir Singh Rana v. State (Delhi Admn.) [Randhir Singh Rana v. State (Delhi Admn.), (1997) 1 SCC 361] and Reeta Nag v. State of W.B. [Reeta Nag v. State of W.B., (2009) 9 SCC 129 : (2009) 3 SCC (Cri) 1051] also stand overruled.”

15. In the instant case, the learned Magistrate has observed that though this case is a case under Section 67A of the Information Technology Act, 2000, however, the Investigating Officer has not submitted any CDR, expert opinion, data history and other relevant documents that are essential for this case. It is also pertinent to mention here in that the Investigating Officer has stated in the charge-sheet itself that the report of extraction of deleted data from the phone of the accused is awaited and the same shall be submitted as and when the report is received. However, even after two years of the submission of the charge-sheet, the additional report was not laid before the trial court.

16. The learned Judicial Magistrate First Class, Dimapur by the impugned order has directed the Investigating Officer to submit the

progress report and also directed further investigation in the case which, under the facts and circumstances of this case, this court does not find unjustified. More so, when, the offence under Section 67A of the Information Technology Act, 2000, though is a compoundable offence under Section 77A of the said Act, under certain circumstances, however, when the said offence, under Section 67A has been committed against a woman, the offence is not compoundable. **Moreover, the investigation, in this case appears to have been** shabbily conducted without collecting the relevant materials which would support the prosecution case during trial. Hence, this court is of considered opinion that under the facts and circumstances of the case, the learned Judicial Magistrate First Class, Dimapur, was right in directing further investigation of the case by the Investigating Officer.

17. However, considering the fact that considerable period of time has already lapsed, the learned Judicial Magistrate First Class, Dimapur may fix a specific time for completion of further investigation and submission of supplementary report, by the Investigating officer, in the case.

18. Further, considering the fact that the incident has occurred many years ago and this case has also been pending for a long time, the petitioner shall be at liberty to approach the learned Judicial Magistrate First Class, Dimapur for dispensing with her personal appearance before the Magistrate's court till submission of the supplementary report by the Investigating Officer.

19. With above observation, this criminal petition is hereby dismissed.
20. The registry of the principal seat of this court is hereby directed to send the record of this case along with all connected files the registry of Kohima bench immediately. On receipt of the case record, the registry of Kohima bench shall transmit the case record of PRC No. 377/19 (GR Case No. 689/18) to the court of learned Judicial Magistrate First Class, Dimapur along with copy of this judgement immediately for compliance.

Sd/-
JUDGE

Comparing Assistant