

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.23031 of 2016

Arising Out of PS.Case No. -5 Year- 2000 Thana -C.B.I CASE District- PATNA

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Kanchan Kumar son of late Shatrughan Prasad Kastwar, R/O C-12, Carlton
Estate-1, DLF City Phase-5, PS-Sushant Lok, Gurgaon-122009, Haryana
..... Petitioner/s

Versus

The State of Bihar through the Department of Vigilance, Govt. of Bihar,
Patna

..... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Jitendra Singh, Sr. Advocate
Mr. Harsh Singh, Advocate
Mr. Yash Singh, Advocate

For the Opposite Party/s : Mr. Ramakant Sharma(L.O.,I/C Vig.)
Mr. Rakesh Kr. Sharma, Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

6 05-10-2016 Petitioner who happens to be an accused in Special

Case No. 09/2000 arising out of Vigilance Case No. 05/2000 has
challenged the order dated 28.03.2016 passed by Special Judge,
Vigilance 1st, Patna rejecting his prayer having been made under
Section 239 of the Cr.P.C.

2. The gist of the prosecution case, as is evident that on
a complaint having been made to the vigilance regarding amassing
of property disproportionate to his known sources, misusing his
post by the petitioner who was occupying the post of Assistant
General Manager, Bihar State Financial Corporation, Patna a
preliminary enquiry was made whereupon Vigilance Case No.
05/2000 was registered followed with an investigation which
ultimately culminated by way of filing of charge-sheet leading to

Special Case No. 09/2000 followed with order of cognizance. Subsequently thereof, at the stage of framing of charge, a prayer has been made on behalf of petitioner to discharge him which has been rejected by the learned lower court by the order impugned, hence this petition.

3. It has been submitted on behalf of the petitioner that the present prosecution happens to be malicious one in the background of the fact that right from inception of the case, petitioner has challenged its reliability on account of allowing the preliminary enquiry of the case kept pending for years together without any rhyme and reason with *mala fide* intention. During midst thereof, petitioner had left the present assignment and had joined Oil and Natural Gas Corporation in the year 1996 on enhanced salary, perks and then thereafter, raid was conducted on 21.02.2000 in his absence at his house and household articles were seized from the house of the petitioner which were valued/assessed on the date of conduction of the raid, that means to say on 21.02.2000.

4. The aforesaid eventualities was not at all expected at the end of Investigating Officer in the background of the fact that the check period so identified by the prosecution happens to be in between 19.07.1974 to 29.08.1988 and so whatever activity was



expected at the end of prosecution, those should have been before departure of petitioner from the institution. Subsequent thereof, petitioner became employee of ONGC and further getting enhanced salary therefrom which the petitioner utilized during the intermediary period would not justify recovery of article in 2000, when raid was conducted to be added for the purpose of check period.

5. It has also been submitted that neither source of complain has been disclosed nor the period during which preliminary enquiry was made, but the fact remains that petitioner left the institution in the year 1996, on account thereof, the prosecution would have been initiated in the year 1996 and in likewise manner, the check period should have been from 1974 to 1996. Furthermore, identifying the household articles during course of raid in 2000 and reverting back it to the check period 1974 to 1988 itself speaks regarding callous attitude of the prosecution, and it further suggests artifice act at the end of prosecution to harass the petitioner.

6. Apart from this, it has also been submitted that during course of investigation, petitioner was noticed who appeared and explained his status wherefrom it is evident that petitioner was employed as lecturer on Research Fellow Post at



P.G. Department of Statistics, Bhagalpur from 1972-1974 having proper savings from his salary. In like wise manner, he had also stated that his wife was Principal, RPS Mahila College, Patna and her earnings/savings were not at all considered. In likewise manner, petitioner was getting handsome salary from ONGC where he was working since 1996 and so, the items which were found in the year 2000 during raid found duly explained.

7. It has also been submitted that petitioner had clearly stated that he had obtained loan from other sources, details thereof, had already been furnished which ought to have included in the aforesaid event. Furthermore, wrong calculation shown against prevailing deposits at different bank accounts shown as Rs. 55,000/- instead of Rs. 11,998/-. Furthermore, it has been submitted that the prosecution wrongly and illegally shown the property to the tune of Rs. 1,14,069/- amassed disproportionate to known sources. If the proper calculation would have been made, then in that event, no acquisition beyond the known sources is found duly surfaced whereupon, instant prosecution would not survive. That being so, the learned lower court instead of rejecting the prayer of the petitioner would have discharged the petitioner.

8. On the other hand, learned senior counsel representing the Vigilance has submitted that whatever assertions



happen to be at the end of petitioner, that has got no truth. At an initial stage, he was noticed and in pursuance thereof, petitioner had appeared and on that very moment, he had himself furnished the details which, the FIR contains and further on the basis thereof, found acquisition of more than Rs. 1,14,069/- disproportionate to the known sources.

9. Had there been proper placement of his plea by a cogent and reliable evidence, at least by way of placing the appointment letter being in service from 1972 to 1974 salary slip and further the quantum of savings as well as with regard to disclosure relating to his wife being Principal of RPS College, the salary statement, quantum of savings and in likewise manner, acquisition of the articles, deposit in the relevant account on that very score, certainly, during course of calculation of acquisition in conformity to the known sources, those things would have taken place. Now, activity of the petitioner is found beyond ambit and scope of Section 239 of the Cr.P.C. whereunder meticulous, roving enquiry is not at all warranted, therefore, the learned lower court rightly rejected the prayer. In case, petitioner succeeds in substantiating the accounts with regard to excess amount whatsoever shown disproportionate to the known sources, petitioner will be acquitted.

10. The basic principle which the courts are expected to follow at the time of charge/discharge in terms of Section 239 Cr.P.C. as well as 240 of the Cr.P.C. has been discussed in detail by the Hon'ble Apex Court in *Sheoraj Singh Ahlawat v. State of Uttar Pradesh* as reported in (2013) 11 SCC 476 wherein it has been held:-

12. The case at hand being a warrant case is governed by Section 239 CrPC for purposes of determining whether the accused or any one of them deserved to be discharged. Section 239 is as under:

“239. When accused shall be discharged.—If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.”

A plain reading of the above would show that the court trying the case can direct discharge only for reasons to be recorded by it and only if it considers the charge against the accused to be groundless.

13. Section 240 of the Code provides for framing of a charge if, upon consideration of the police report and the documents sent therewith and making such examination, if any, of the accused as the Magistrate thinks necessary, the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence triable under Chapter XIX, which such Magistrate is competent to try and which can be adequately punished by him.

14. The ambit of Section 239 CrPC and the approach to be adopted by the Court while exercising the powers vested in it under the said provision fell for consideration of this Court in *Onkar Nath Mishra v. State (NCT of Delhi)* [(2008) 2 SCC 561]. That too was a case in which a complaint under Sections 498-A and 406 read with Section 34 IPC was filed against the husband and parents-in-law of the complainant wife. The Magistrate had in that case discharged the accused under Section 239 CrPC, holding

that the charge was groundless. The complainant questioned that order before the Revisional Court which directed the trial court to frame charges against the accused persons. The High Court having affirmed that order, the matter was brought up to this Court.

15. This Court partly allowed the appeal qua the parents-in-law while dismissing the same qua the husband. This Court explained the legal position and the approach to be adopted by the court at the stage of framing of charges or directing discharge in the following words: (*Onkar Nath case*) [(2008) 2 SCC 561], SCC p. 565, para 11)

“11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, *taken at their face value*, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. *What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.*”

(emphasis supplied)

16. Support for the above view was drawn by this Court from the earlier decisions rendered in *State of Karnataka v. L. Muniswamy* [(1977) 2 SCC 699], *State of Maharashtra v. Som Nath Thapa* [(1996) 4 SCC 659], and *State of M.P. v. Mohanlal Soni* [(2000) 6 SCC 338]. In *Som Nath case* [(1996) 4 SCC 659] the legal position was summed up as under: (SCC p. 671, para 32)

“32. ... if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused *might have** committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused *has** committed the offence. *It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage.*”

(emphasis supplied)

17. So also in *Mohanlal case* [(2000) 6 SCC 338], this Court referred to several previous decisions and held that the judicial opinion regarding the approach to be adopted for framing of charge is that such charges should be framed if the court prima facie finds that there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence as if to determine whether the material produced was sufficient to convict the accused. The following passage from the decision in *Mohanlal case* [(2000) 6 SCC 338] is in this regard apposite: (SCC p. 342, para 7)

“7. The crystallised judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused.”

18. In *State of Orissa v. Debendra Nath Padhi* [(2005) 1 SCC 568] this Court was considering whether the trial court can at the time of framing of charges consider material filed by the accused. The question was answered in the negative by this Court in the following words: (SCC pp. 577 & 579, paras 18 & 23)

“18. *We are unable to accept the aforesaid contention.* The reliance on Articles 14 and 21 is misplaced. ... Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini-trial at the stage of framing of charge. That would defeat the object of the Code. *It is well settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well-settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now.* It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means

hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. *At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.*

* * *

23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material."

(emphasis supplied)

19. Even in *Rumi Dhar v. State of W.B.* [(2009)6 SCC 364], reliance whereupon was placed by the counsel for the appellants, the tests to be applied at the stage of discharge of the accused person under Section 239 CrPC were found to be no different. Far from readily encouraging discharge, the Court held that even a strong suspicion in regard to the commission of the offence would be sufficient to justify framing of charges. The Court observed: (SCC p. 369, para 17)

"17. ... While considering an application for discharge filed in terms of Section 239 of the Code, it was for the learned Judge to go into the details of the allegations made against each of the accused persons so as to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirements of law."

20. To the same effect is the decision of this Court in *Union of India v. Prafulla Kumar Samal* [(1979)3 SCC 4] where this Court was examining a similar question in the context of Section 227 of the Code of Criminal Procedure. The legal position was summed up as under: (SCC p. 9, para 10)

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in

framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, 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 does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

11. In *State Of Tamil Nadu by Inspector Of Police Vigilance And Anti-Corruption Vs. N. Suresh Rajan And Others*

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State Represented By Deputy Superintendent Of Police Vigilance And Anti-Corruption. Vs. K. Ponmudi and reported in (2014) 11 SCC 709, reiterated the same.

12. Recently, in *Sonu Gupta v. Deepak Gupta* as reported in *2015(2) PLJR 321(SC)* it has been held as follows:-

It is also well settled that cognizance is taken of the offence and not the offender. Hence at the stage of framing of charge an individual accused may seek discharge if he or she can show that the materials are absolutely insufficient for framing of charge against that particular accused. But such exercise is required only at a later stage, as indicated above and not at the stage of taking cognizance and summoning the accused on the basis of prima facie case. Even at the stage of framing of charge, the sufficiency of materials for the purpose of conviction is not the requirement and a



prayer for discharge can be allowed only if the court finds that the materials are wholly insufficient for the purpose of trial. It is also a settled proposition of law that even when there are materials raising strong suspicion against an accused, the court will be justified in rejecting a prayer for discharge and in granting an opportunity to the prosecution to bring on record the entire evidence in accordance with law so that case of both the sides may be considered appropriately on conclusion of trial.

13. Now coming to the other aspect, whether at the stage of framing of charge, the document having been filed on behalf of defence would be entertainable. In *State of Orissa v. Devendra Nath Padhi* as reported in (2005)1 SCC 568, a three judges Bench have decided that at the stage of framing of charge no document at the end of the defence would be entertainable. However, the aforesaid principle has been relaxed in another judgment as reported in *Rukmini Narvekar v. Vijaya Satardekar* as reported in (2008) 14 SCC 1 wherein at para 22, it has been held:

Thus in our opinion while it is true that ordinarily defence material cannot be looked into by the Court while framing of the charge in view of *D.N. Padhi's* case ((2005)1 SCC 568), there may be some very rare and exceptional cases where some defence material when shown to the trial court would convincingly demonstrate that the prosecution version is totally absurd or preposterous, and in such very rare cases the defence material can be looked into by the Court at the time of framing of the charges or taking cognizance. In our opinion, therefore, it cannot be said as an absolute proposition that under no circumstances

can the Court look into the material produced by the defence at the time of framing of the charges, though this should be done in very rare cases, i.e. where the defence produces some material which convincingly demonstrates that the whole prosecution case is totally absurd or totally concocted..

14. The same view has also been reiterated in **2011(3) PLJR 100 SC (Harshendra Kumar D. v. Rebatilal Keley)**. After having an analytical approach of the aforesaid principle as laid down by the Hon'ble Apex Court, it is evident that in rarest of the rare case, the unimpeachable document having at the end of the accused would be entertained at the time of framing of charge. Though, assertion has been made, copy of representation having been filed at the end of the petitioner has been annexed but those are not at all legal documents or unimpeachable documents. The order impugned also lacks with regard to placement of document at the end of petitioner being unimpeachable.

15. In the aforesaid circumstances, even if considering the submissions made on behalf of petitioner, for argument's sake needs proper verification attracting roving enquiry which could be permissible only during course of trial.

16. Much emphasis has been laid at the end of the petitioner relating to valuation. With the cost of repetition, the contention of the petitioner is that as the raid was conducted on

21.02.2000, on account thereof, the valuation having been shown against the article so seized at the end of the Vigilance must be considered to be in consonance with the date of recovery. That argument happens to be fallacious in the background of the fact that from the case diary, it is evident that valuation has been estimated only. There happens to be complete absence of prima facie material whereupon one could infer that the value so affixed at that very moment was prevailing rate on the alleged date of seizure. Furthermore, to ascertain genuineness on this score will again attract roving enquiry which for the present stage is found forbidden.

17. Consequent thereupon, the instant petition is found devoid of merit and is, accordingly, rejected.

(Aditya Kumar Trivedi, J)

Patna High Court
October 5th 2016
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