

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.1000 of 2016

Arising Out of PS.Case No. -null Year- null Thana -null District- PATNA

Dr. Jitendra Gupta, son of Shri Bagwati Prasad Gupta, resident of Mahrajpur Tehsil Jarsana, P.S.-Ekka, District-Firozabad (U.P.), the then Sub Divisional Officer, Mohaniya, P.S.-Mohaniya, District-Kaimur.

.... Petitioner

Versus

The State of Bihar through Vigilance Investigation, Bureau, Patna

.... Respondent

Appearance :

For the Petitioner : Mr. S. Datta, Senior Advocate
Mr. Ranjeet Kumar Pandey, Advocate
Mr. Aniket, Advocate

For the Respondent : Mr. Ramakant Sharma, Senior Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE

JUDGMENT AND ORDER

C.A.V.

Date: 28-10-2016

Should the High Court in exercise of its powers, under Article 226 of the Constitution read with Section 482 code of Criminal Procedure, set aside and quash the First Information Report (in short, FIR) as well as the investigation, which commences pursuant to the FIR, which alleges existence of circumstances indicating possibilities of commission of cognizable offences? This is the basic question, which this case has raised.

2. By making this application under Article 226 of the Constitution read with Section 482 of the Code of Criminal Procedure (in short, 'the Code') the petitioner has approached this Court seeking order (s) setting aside and quashing the FIR,

which has resulted into registration of Vigilance Police Case No. 67/2016, under Sections 7/8/13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, against the petitioner.

3. The First Information Report, which is under challenge, discloses, in brief, thus:

(i) On 08.07.2016, one Jaspreet Singh, the driver of truck No. HR-58A-9867, filed an FIR against the Sub-divisional Magistrate, Mohaniya, district-Bhabhua, alleging, *inter alia*, that on 03.07.2016, in the morning hours, the Sub-Divisional Magistrate, along with his men, came, in a Scorpio vehicle and seized the documents of four vehicles including that of the petitioner.

(ii) Thereafter, so discloses the First Information Report, the informant went to the residential office of the Sub-divisional Magistrate and pleaded for release of the vehicles' documents. According to the informant, the accused/petitioner asked him to meet his driver, Sanjay, and do what Sanjay asked. The informant claims to have accordingly approached Sanjay, all the vehicles belonging to one and the same owner.

(iii) The FIR alleged that Sanjay demanded a sum of Rs. 90,000/ for release of the vehicles' documents. At that time, the informant approached the Vigilance Police.

(iv) A trap was laid and the demanded money was

recovered from the possession of co-accused Sanjay, who gave a statement that he had collected the money on behalf of the petitioner.

(v) Based on the action taken report of the in-charge of the trap team, the Vigilance PS case got initiated. A raid was conducted at the official residence of the accused/petitioner and the documents of the truck were found from a Tata sumo vehicle parked in the compound of the said house.

4. Assailing the FIR lodged against him and the investigation that has since been pursued, in the course of which he was arrested, the petitioner has moved this Court seeking issuance of writ of *certiorari* and/or exercise of inherent powers of the High Court to quash the FIR and close the investigation. The petitioner has canvassed before the High Court that soon after taking over charge as Sub-divisional Magistrate Mohaniya, he had taken, was instructed by the Government, several measures to stop the illegal practice of over loaded trucks running on the National Highway and, in the process, he had annoyed the mafia controlling the wrong-doers and also some policemen involved in the illegal business of allowing over-loaded trucks to pass through since long. According to the petitioner, the present FIR is an attempt to frame him in false case.



5. The learned counsel for the petitioner has submitted that it is a case of no material against the petitioner and my attention has been drawn to the fact that it is not in dispute that the petitioner had not directly demanded any money from the informant or from the driver of the other three trucks. It has been argued that primary pre-requisite of an offence, under Section 13(1)(d) of the Prevention of Corruption Act, is proof of demand or request for valuable thing or pecuniary advantage from a public servant and, hence, absence of allegation for demand goes to show that prosecution's case is bound to fail.

6. Mr. S. Datta, learned Senior Counsel, appearing for the petitioner, has argued that there is not even an allegation that any money was paid to the petitioner inasmuch as the prosecution's case is that the money was demanded and received by the co-accused, Sanjay Tiwari. A search operation was conducted in the house of the petitioner; but no money has been recovered from the house. The prosecution, in fact, admit, as is evident from the counter affidavit, that there was no recovery of the demanded money or any portion thereof from the possession of the petitioner. In other words, it is a case of no demand and no recovery from the petitioner.

7. The petitioner's side has drawn my attention to certain documents like gate receipts issued by the Government



of Jharkhand, which show that the truck, in question, could not have been at the place alleged in the morning of 03.07.2016 and it has, therefore, been argued that the documents go to show that the whole case of the prosecution is based on falsehood and its continuance, therefore, so argued the learned counsel, would amount to abuse of the process of the court. As I proceed further, it would transpire that even the State concedes no occurrence, as alleged in the FIR, had taken place in the morning hours of 03.07.2016. The State, thus, I must hasten to point out, admits that the alleged occurrence of taking away of the document of the vehicle by the petitioner or his associates is completely false.

8. The respondent No. 5, who is the investigating officer, has filed the counter affidavit controverting the statements made in the writ petition. The counter affidavits, when read carefully, discloses that the case of the respondent/prosecution is that co-accused, Sanjay Tiwari, demanded and received the money at behest of the petitioner and, in that context, the respondent has relied upon the statement of the co-accused recorded, under Section 161 of the Code of Criminal Procedure, to try and rope in the petitioner.

9. What is, perhaps, of great importance is that the respondent has admitted that no incident of seizing truck documents, as claimed in the First Information Report, took



place in the morning of 03.07.2016. The respondents, now, assert that the incident of seizing the vehicles' documents took place in the morning of 04.07.2016. It has been pleaded, in the counter affidavit, that though there was incorrect mentioning of date in the First Information Report, the statement of the witnesses, including the informant, recorded under Section 161 of the Code of Criminal Procedure, shows that the incident actually began in the morning of 04.07.2016. In that background, it has been argued that mere wrong mentioning of date in the FIR should not be a ground to stop the investigation and close the case.

10. In other words, the edifice of the prosecution's case is based on the confession of the co-accused allegedly made to the police, whilst under investigation. Though till now, there is no confession before the Special Judge, let us assume that the co-accused makes the confession before a Special Judge stating that he had made the demand and received the money acting on the behest of the petitioner. Law is settled that the confession of co-accused cannot be treated as substantive evidence, in the strict sense, against the petitioner and cannot be made foundation for conviction of the person/petitioner, who did not make the confession.

11. The reasons for not treating the confession of a co-accused as evidence are, broadly speaking, that the



confession of a co-accused is not given on oath. It is neither given in the presence of the accused against whom the confession is sought to be relied upon nor is the maker's version tested by cross-examination. In fact, such a confession is a much weaker type of evidence than the evidence of an approver, for, the approver is cross-examined by the accused; whereas the confession of a co-accused is not subjected to cross-examination. A reference, in this regard, may be made to ***Kashmira Singh Vs. The State of Madhya Pradesh (AIR 1952 SC 59)***, wherein the Supreme Court observed and laid down as follows:

"the confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 8. It cannot be made the foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then, of course it is not necessary to call the confession in aid. But cases may arise, where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the

other evidence and, thus, fortify himself in believing what without the aid of the confession he would not be prepared to accept
"

12. Thus, the above observations, made in ***Kashmira Singh*** (supra), were in respect of Section 30 of the Evidence Act, that is, for using the confession of a co-accused and, hence, the decision, in ***Kashmira Singh*** (supra), becomes relevant, when the confession of a co-accused is sought to be used as basis for conviction. In short, ***Kashmira Singh's*** case (supra), lays down the law of confession of a co-accused is that such confession *stricto sensu* no evidence and cannot be made foundation for the conviction of the petitioner.

13. Be that as it may, there is an allegation, *albeit* a subtle one, against the informant in the FIR itself. The informant has stated that when he approached the petitioner at his residence for release of the vehicles, the Sub-divisional Magistrate asked him to talk to his driver and do what the driver says for the release. This statement of the informant, according to Mr. Rama Kant Sharma, learned Senior Counsel, appearing for the respondents, goes to show that the co-accused, Sanjay Tiwari, had acted on behest of the petitioner, while demanding and receiving money and that there is, therefore, sufficient material against the petitioner.

14. A truck driver approaches the Sub-divisional



Magistrate of a Sub-division for release of his truck. The truck had been seized in the morning hours. The truck driver goes straight to the residence of the Sub-divisional Magistrate and not to his office. The Sub-divisional Magistrate curtly asked the truck driver (informant) to talk to Sanjay, a Grade IV employee, and do what he says for the release of the vehicle. Sanjay is the driver of the official vehicle of the Sub-divisional Magistrate. Sanjay, then, demands money for release of the vehicle and claims that money has to be given to the Sub-divisional Magistrate. This is the prosecution version of the incident. Taken as a whole, can one hold, in criminal law, that the accused was the one, at whose behest, the money was demanded by the co-accused Sanjay. On the contrary, there is not even an iota of material to show that the accused petitioner knew at any point of time or had come to know at any point of time that Sanjay had demanded money, claiming the demand to have been made by the accused petitioner.

15. Is it uncommon or even un-natural, in our society, for a senior government functionary to direct a person, who has, suddenly, come to his residence and sought some favour, to go and meet the subordinates? The answer has to be an emphatic "No". The subordinate staff, ordinarily, available at the residential quarter is the driver. The conduct of the Sub-divisional Magistrate, in such circumstance, in asking the



informant (truck driver) to talk to the co-accused (driver of the official vehicle), who was, at that time, at the residence of the petitioner, was the natural thing that many other officers similarly situated would do. The co-accused, then, demands money for releasing the truck from the informant (truck driver). The demand is, admittedly, not made in the presence of the petitioner. The informant does not cross check with the petitioner about the demand of money; instead, he goes and pays the money to the co-accused and, then, tries to rope in the petitioner in the offence. Nobody, in fact, made any attempt, even a feeble attempt, to ascertain from the petitioner if he had really demanded money, which Sanjay had claimed from the driver of the truck in question.

16. Two possibilities, thus, arise: Firstly, the demand is made at the behest of the petitioner. Secondly, the driver made the demand on his own without any prodding from the Sub-divisional Magistrate. If two possibilities exist, the one that favours the accused has to be adopted.

17. The conduct of a Sub-divisional Magistrate in directing the informant, who has, suddenly, entered his official residence to consult the co-accused, a government employee, albeit a driver, in the circumstance of this case, cannot be said to be unnatural. Had the informant come to the office of the Sub-divisional Magistrate and if Sub-divisional Magistrate asked



him to meet the dealing assistant and if, then, the dealing assistant would have demanded the money and said that the money was asked for by the petitioner, could we, by any stretch of imagination, fasten penal liability upon the petitioner? The answer has to be once again an emphatic 'no'.

18. Another aspect of great significance is that the FIR states, as already indicated above, that incident took place in the morning of 3/7/16. The statement of the witnesses was recorded under Section 161 of the Code. In the statement so recorded, the witnesses maintained that the incident took place on 03.07.2016. Recording of statements by the police at the police of a person, acquainted with the facts of a case, is a crucial aspect of an '*investigation*', the purpose thereof being to enable the investigating officer to analyze holistically the materials available and, then, form an opinion as to what offence, if any, has been made out against the accused persons. In this context, one may refer to the observations made by the Supreme Court, in ***Nandini Satpaty Vs. P. L. Dhani (AIR 1978 SC 1025)***, wherein a three Judge Bench of the Supreme Court has observed that the purpose of recording a statement, under Section 161 of the Code, is to bring out the maximum that the person examined knows about the incident.

19. Now, in the case at hand, the petitioner files the writ petition and encloses some documents. These



documents make it transparent that the truck being present, at the place claimed, is impossible. A counter affidavit is filed. The respondent No. 5, who is the investigating officer, has made desperate attempt to fill in the gaps and has made statement, on oath, contrary to the record. The attempt to fill in the gaps goes to show that the investigation is not *bona fide*.

20. With regard to the above, it is of paramount importance to note that the prosecution's case starts with assertion that the incident took place in the morning of 03.07.2016 and this stand has been continuously maintained till the time the petitioner, with the help of present petition, brought on record specific and positive materials to show that it is impossible for the vehicle, in question, to be available at the place where it was claimed to have been available on 03.07.2016 and having accepted this position, the Investigating Officer has had a desperate attempt to offer his explanation on behalf of the witnesses rather than the witnesses stating that they made the mistake in mentioning 3rd July, 2016, as the date of occurrence.

21. At this stage, it needs to be mentioned that the prosecutor has relied upon the respondent side has relied upon the decisions of the Supreme Court, in ***Gian Singh Vs State of Punjab***, reported in **(2012) 10 SCC 303**, ***State of Bihar Vs P. P Sharma***, reported in **1992 Supp (1) SCC 222**,

and ***Amit Kumar Vs Ramesh Chandra***, reported in **(2012) 9 SCC 460**, to canvass **before the Court** that the present case does not call for exercise of extra-ordinary jurisdiction under Article 226 of the Constitution read with Section 482 of the Code.

22. In ***Gian Singh's*** case (supra), the Supreme Court was dealing with the relative scope and ambit of Section 320 and Section 482 of the Code and the question that the three Judge Bench was called upon to answer was whether the High Court has the power, under Section 482 of the Code, to compound and close offences, which are non-compoundable. The Supreme Court opined that Section 482 of the Code begins with the word "*nothing in this Code*" and, therefore, the only inevitable conclusion is that there is no statutory bar under the Code, which can affect the inherent power of the High Court. While refusing to lay down any strait jacket formula, the Court held that to secure the ends of justice is a wholesome and definite guideline.

23. In ***State of Bihar Vs P. P Sharma*** (supra), the Supreme Court was dealing with a fact situation, where charge sheet had been filed and matter was pending before the Special Judge to decide on cognizance and at that juncture, without waiting for the order of the Special Judge, the High Court had exercised its extraordinary jurisdiction under Article

226 and 227 of the Constitution to quash the criminal case. In that case, the Supreme Court observed that treating the affidavits filed and documents produced, in the writ petition, as evidence, was not proper and it was held that the High Court committed serious error in putting an end to the prosecution at its inception by going into merits in a pre-trial.

24. The fact situations of that cases, relied upon by Mr. Sharma, learned Senior Counsel, appearing on behalf of the respondents, is not similar to the case at hand inasmuch in **P. P Sharma** (supra), investigation was complete and Investigating Officer had filed the charge sheet under Section 173 of the Code, which had been forwarded to the Special Judge; whereas, in the case at hand, the investigation is in progress. In such Circumstances, the Supreme Court, as already indicated above, observed that materials, collected by the investigating officer, were under the gaze of the judicial scrutiny of the Special Judge and the High Court, therefore, ought to have waited for the Special Judge to pass the order taking or refusing to take cognizance before exercising its power under Article 226 of the Constitution. It was in that background that the Supreme Court held that the High Court could do well to discipline its action not to quash proceedings in exercise of inherent jurisdiction, when the matter is under judicial scrutiny of the Special judge.



25. The reliance on the case of **Amit Kumar** (supra), is also totally misplaced inasmuch in **Amit Kumar's** case (supra), the High Court had interfered with the order of the trial Judge framing charge under Section 306 IPC against the accused person. The Supreme Court opined that framing of charge, in a sessions triable case, is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code and if materials exist, even if they are weaker than *prima facie* case, charge can be framed. It was in such factual matrix that the Supreme Court laid down that High court can exercise its jurisdiction under Section 482 of the Code only when there is palpable error by the trial court, while framing the charge and/or when the order is perverse.

26. At this juncture, the *ratio*, laid down in the case of **State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335**, may be profitably invoked, wherein the Supreme Court while summarizing the discussion in paragraph 102, held against clause No. 5 that where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, a case for quashing is made out. When the improbability of events, taking place on 03.07.2016, was brought to the notice of Court an attempt was made to change

the very date of occurrence of offence.

27. In the light of the law laid down in Bhajan Lal's case (supra), it becomes clear that when the allegation, made in the First Information Report, against the petitioner are considered, as a whole, it becomes inherently improbable for any prudent man to reach a just conclusion that there is sufficient ground for proceeding against the present petitioner. A strong case of quashing, therefore, is clearly made out by the petitioner.

28. To put it little differently, the allegations, in the present case, are on the face of it outlandish, because the prosecution's case all along has been that the incident took place in the morning of 03.07.2016 and from the perusal of the statements of witnesses in the case diary, it is quite clear that this stand has been maintained till the time the petitioner brought on record specific materials to show that it is impossible for the vehicle, in question, to be available at the place, where it was claimed to have been available on 03.07.2016. Having becoming wiser after reading the writ petition, the Investigating Officer has filed an affidavit contrary to his own case diary and claims that the incident took place on 04.07.2016. In my considered view, these are allegations against the petitioner, which, on the face of it, cannot be taken seriously by any reasonable person. In short, the allegations

contained in the First Information Report, when considered, as a whole, in the light of the materials available on record, makes it clear that the allegations are so absurd and inherently improbable that no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

29. What, thus, is transparent is that none of the three decisions, relied upon by the respondents helps its cause. In fact, the Supreme Court, in **Gian Singh** (supra) and **PP Sharma** (supra), observed that no strait jacket formula is permissible or practical and held that High Court would exercise its power, on the basis of the facts presented before it, to prevent abuse of the process of the court and/or secure the ends of justice.

30. When the facts, as alleged, remain uncontroverted cannot lead to conviction, the trial, so far as present petitioner is concerned, would be a futile exercise and, hence, his prayer for quashing the FIR against him and closing the case so far as the present petitioner is concerned. In India, the courts would not, ordinarily, quash a criminal proceeding merely because of the reason that at the end of the trial, conviction of the person, facing the trial, appears impossible on account of insufficiency of material. This restriction is, however, not a restriction of universal application. Hence, in a given case,

it is possible to quash a criminal proceeding if, it is, on the basis of the materials available, reasonable to reach a conclusion that at the end of the trial, the accused would have to be acquitted.

31. Because of what has discussed and pointed out above, this Court is clearly satisfied that the FIR and the consequential investigation so far as the same relate to the present petitioner are concerned, it would be nothing but abuse of the process of Court. Necessarily, therefore, the FIR and the investigation so far as the same relate to the present petitioner need to be set aside and quashed.

32. In the result and for the foregoing reasons discussed above, this writ petition succeeds and the FIR, along with its consequential investigation, are hereby set aside and quashed.

(I. A. Ansari, CJ)

Pawan/-

AFR/NAFR	A.F.R.
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