

CALCUTTA HIGH COURT

The State

Vs.

Sankar Halder

Cr. Rev. No. 2508 of 1981

(Jitendra Nath Chaudhuri, J.)

03.05.1985

JUDGMENT

Jitendra Nath Chaudhuri, J.

1. The State has filed this application under Sec. 401, read with Sections 482 and 397 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code) against an order dated 19.9.81 passed by the learned Sub-Divisional Judicial Magistrate, Diamond Harbour, 24 Parganas, in Case No. G. R. 398181 under Sections 376/354 of the Indian Penal Code, committing the case to the Court of Sessions without allowing the police to make any further investigation us. 173(8) of the said Code. In the present application the accused is the opposite party No. 1 and the complainant-girl is the opposite party no. 2.

2. The victim girl (complainant) who is the opposite party No. 2 herein lodged an F.I.R. at Falta Police Station on 25.3.81 alleging inter alia that the accused (opposite party No. 1 herein) has committed offences under Sections 376 and 354-IPC in respect of her On 25.5.81 the police submitted a charge-sheet against the accused under Sections 376/ 354 I.P.C. showing the accused as absconding. On 5.6.81 the accused surrendered and was released on bail. Thereafter, the police made prayers for further investigation for ascertaining the age of the victim girl as well as for a potency test of the accused.

3. Thereafter, the victim girl made an application before the learned S.D.J.M. for further investigation by the C.I.D. West Bengal, as he alleged that certain facts showed that the local investigating agency did not properly investigate the case. She, inter alia, alleged that the investigating officer did not arrest the accused even after his application for anticipatory bail was rejected and did not take any step to arrest him. She further alleged that the investigating officer directly submitted the charge-sheet without examining material witnesses before whom the accused was alleged to have confessed his guilt.

4. On 19.6.81 the learned S.D.J.M. disposed of the application for further investigation filed by the police and the complainant by ordering further investigation u/s. 173(8) of the said Code by a separate investigating agency, viz., by the C.I.D., West Bengal. The accused was directed to appear before the Medical Officer for his medical examination, if any, on the prayer of the Officer of the C.I.D. who would be entrusted with the further investigation.

5. The accused moved the learned Sessions Judge, Alipore in revision against the said order dated 19.8.81 passed by the learned S.D.J.M., Diamond Harbour. The learned Additional Sessions Judge by his order dated 22.8.81 in the said Crl. Motion No. 182 of 1981 allowed the "motion and set aside the said order dated 19.6.81, making it clear at the same time in his said order dated 22.2.81 that "this however does not prevent the police to make any further investigation if such a case is made out under Sec. 173(8) of the Code of Criminal Procedure".

6. On 18.9.81 the O.C. Falta made an application for making, over the original Case Diary to him for investigation. By his order dated 19.9.81 (the impugned order in this application) the learned S.D.J.M. committed the case to the Court of Sessions u/s. 209 of the said Code observing that the original case diary cannot be made over to the O.C. Falta at that stage.

7. Mr. Chaudhury, the learned Advocate for the State, has submitted that by passing the impugned order dated 19.9.81 the learned Magistrate has erred in law in committing the case to the Court of Sessions before completion of further investigation and submission of a supplementary case diary and a supplementary chargesheet, if any. He has submitted that the learned Magistrate has lost sight of the express order dated 22.8.81 of the learned Additional Sessions Judge in Crl. Motion No. 1.82 of 1981 making it clear that further investigation under Sec. 173(8) of the said Code was not being precluded. He has further submitted that the learned Magistrate erred in law in not handing over the case diary to the O. C, Falta Police Station, but by directing the Court Inspector to produce the case diary before the Court of Sessions and giving liberty to the O. C. to renew his prayer before the Court of Sessions, if so advised.

8. At the time when the Rule in this Case was issued on 18.12.81 Mrs. Nag, J. of this Court ordered as follows :-

"Let the Case Diary be handed over to the D. I. G, C. I. D., West Bengal, for further investigation, But the C. I. D. will not submit the report until the matter is heard out."

9. Mr. Chaudhury has submitted that pursuant to the said order of this Court the further investigation has been completed except for the potency test of the accused. He prays that some time may be given for that purpose only. He has relied upon the provisions of Sec 173(8) and Sec. 53 of the said Code. He has relied upon the decision reported in 1977 Cri.LJ. 1797, 1981 Cri.L.J. 125 and 1976 Cri.L.J. 1680 in support of his submission regarding the scope of Sec 53 of the said Code.

10. In (*Anath Kumar Naik v. State of Andhra Pradesh*¹) it has been held by the Andhra Pradesh High Court that Sec. 53 of the said Code permits examination of an accused by a Medical Practitioner as provided therein, and this must logically include examination by testing his blood, sputum, semen, urine etc, even though some pain or discomfort may result to the accused. Section 53 provides that reasonable force for making such an examination can be used.

¹1977 Cri.L.J. 1797

11. The case reported in (*Anil Anant Rao Lokhande v. State of Maharashtra*²) is a decision of a Division Bench of the Bombay High Court dealing with the scope of both Sections 53 and 173(8) of the said Code. It has been held in this case that the provisions of Section 53 of the said Code do not involve any testimonial compulsion.

12. The case reported in (*Jamshed v. State of U. P.*³) is a Division Bench decision of the Allahabad High Court holding that Section 53 of the said Code does not involve any testimonial compulsion. Both the Bombay and the Allahabad decisions have relied on the decision of the Supreme Court reported in (*State of Bombay v. Kathi Kalu Oghad*⁴), in holding that the taking of blood from an accused under Section 53 does not contravene Article 20(3) of the Constitution of India, since the same does not amount to testimonial compulsion. The Bombay High Court in the case referred to above has further relied upon a decision of the Supreme Court reported in (*State v. Pali Ram*⁵). In that case, the Supreme Court upheld the power of the trial court to direct the accused to give his specimen handwriting.

13. Miss Ghosh, the learned Advocate appearing for the opposite party no. 2 has supported the submission made on behalf the petitioner.

14. Mr. Sengupta, the learned Advocate appearing for the opposite party no. 1 (accused), has submitted that further investigation should not be allowed in this case. He has relied upon the case reported in (*Gobinda Ram Singhania v. State of West Bengal*⁶). In this case, Sudhamoy Basu, J of this Court while holding that the taking of blood or impressions of the thumb or finger, foot, palm or specimen writings do not come within the mischief of testimonial compulsion, also held that during the stage of investigation, before the stage of trial was reached, a Magistrate had no power to direct the investigating officer to produce the accused before a Medical Officer for the purpose of taking the necessary sample of blood from his body. He has further submitted, that there has been a delay in the completion of investigation even after the order passed by Mr. Nag, J. 'quoted above.

15. In my view, the decision relied upon by <BMr. Sengupta reported in 82 CWN 970</B< I> does not, in any way, debar the court from making any order for further investigation under the provisions of Section 173(8) of the said Code. Nor does the said decision, in any way, limit the ambit of Section 53 of the said Code. I hold that the, learned Magistrate in passing the impugned

order dated 19.9.81 was wrong in committing the case and directing the O.C. Falta P. S. to renew the prayer for making over the original case diary to him for further investigation u/s. 173(8) of the said Code before the learned Court of Sessions, if so advised. The learned Magistrate had lost sight of the fact that by the order dated 22.8.81, in CrI. Motion No. 182 of 1381, the learned Additional Sessions Judge had made it clear that further investigation us. 173(8) of the said Code was not being precluded. The learned Magistrate should have considered the said prayer of the O.C., Falta P. S. before committing the case to the Court of Sessions.

16. Since under the order of Mrs. Nag, J dated 8.12.81 further investigation has been almost completed, except for the potency test of the accused, as submitted by Mr. Chowdhury on behalf of the petitioner, in my view, the interests of justice require that the

²1981 Cri.L.J. 125

⁴ AIR 1961 S.C. 1808 : 1961 (2) Cr.L.J. 856

⁶82 CWN. 970

³1976 Cri.L.J. 1680

⁵ AIR 1979 S.C. 14 : 1979 Cr.L.J 17

State be given some time to complete further investigation in this case. I set aside the impugned order dated 19.9.81 passed by the learned Sub-Divisional Judicial Magistrate, Diamond Harbour and quash the commitment of the case to the Court of Sessions as ordered therein, and remand the case back to the learned Sub-Divisional Judicial Magistrate, Diamond Harbour. The State will complete the further investigation in this case and submit the supplementary case diary and a supplementary chargesheet, if any, pursuant to the said further investigation before the said learned Sub Divisional Judicial Magistrate within two months, of the receipt of the records by the learned Sub-Divisional Judicial Magistrate concerned. Thereafter, the said learned S.D.J.M. will proceed in accordance with the law and may then commit the case to the Court of Sessions if so thinks fit in accordance with law. The case diary has been handed over to the D.I.G., C.I.D., West Bengal for further investigation pursuant to the said order of Mrs. Nag, J. as stated by Mr. Chowdhury.

17. This application, accordingly, succeeds and the Rule is made absolute have not gone into the merits of the case in disposing of this application. Let the records be sent down forthwith.

Application allowed and Rule made absolute.