

Calcutta High Court (Appellate Side)

Central Bureau Of Investigation vs Rathin Dandapath And Ors on 15 May, 2014

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In the High Court at Calcutta  
Criminal Revisional Jurisdiction  
Appellate Side

Date: 15.05.2014

Court No. (31)

P.A. to S.Talukdar, J

CRR 1510 of 2014  
Central Bureau of Investigation  
Vs.  
Rathin Dandapath and Ors.

Sri Md. Ashraf Ali  
.....for the petitioner

Sri Kishore Dutta;  
Sri Biswajit Manna  
.....for the opposite parties

By filing CRR 1510 of 2014 the petitioner challenges the

Order impugned dated 30th of April, 2014 passed by the

ld. Additional Chief Judicial Magistrate (for short ACJM),

Jhargram, Paschim Medinipur in Lalgarh P.S. Case

no.4/11 dated 7th January, 2011 (GR 21/2011)

corresponding to CBI Case no. RC3/S/2011 u/s

148/149/326/307

/302 of the Indian Penal Code and Sections 25/27 of the Arms Act.

By the said order impugned dated 30th of April, 2014 the ld. ACJM was pleased to consider the prayer of the CBI for police custody of the above mentioned opposite parties. The ld. ACJM was of the view that having regard to the fact that investigation of the case has already been completed in the year 2011 and the accused persons are named in the chargesheet, the prayer of the CBI for police custody is not justified at this stage. The ld. ACJM was therefore pleased only to allow judicial custody of the opposite parties and their interrogation in presence of their ld. Lawyer. The ld. ACJM was of the further view that in connection with the said case the trial of 12 accused persons is

presently continuing before the Id. Sessions Court.

Sri Ali, Id. Counsel appearing for the CBI submits that the case relates to a serious incident at Netai village, Paschim Medinipur which occurred on 7th January, 2011. At least 9 people were killed and at least 28 suffered bullet injuries attributed to indiscriminate firing made by an unlawful assembly of the accused persons from the rooftop of the house of one of the opposite parties namely, Rathin Dandapath.

FIR was registered on the 7th of January, 2011 under the aforementioned sections of the IPC and the Arms Act and by Order of the Hon'ble High Court dated 18th February, 2011 in WP 1170(W) of 2011 with WP 1172 (W) of 2011 and WP1181 (W) of 2011 the investigation of the case was transferred to CBI. In the course of investigation several of the accused persons were arrested and charge sheet was submitted on the 4th of April, 2011 against the said accused persons including the present opposite parties.

A total of eight, including the present opposite parties were declared absconders and warrants of arrest were issued against them. On the 29th of June, 2011 upon exhaustion of process the absconding accused persons, including the present opposite parties were declared as proclaimed offenders and a list was accordingly published by the CBI.

The trial of the rest of the 12 accused persons who had been arrested was committed to the Court of Sessions at Paschim Medinipur on the 9th of August, 2011 and thereafter transferred to the Court of the Id. Additional District and Sessions Judge (Re-Designated Court), Paschim Medinipur, where the trial is now continuing.

Sri Ali submits that on the 29th of April, 2014 the CID, West Bengal informed the CBI that the present opposite parties who were absconding on and from the date of the incident, i.e. 7th January, 2011 have been arrested on the 28th of April 2014 from the State of Andhra Pradesh and they shall be produced before the Id. Court at Paschim Medinipur. On the 29th of April, 2014 the opposite parties were produced before the Id. ACJM, Paschim Medinipur and transit remand for one day was granted for their further production before the Id. ACJM, Jhargram.

On the 30th of April, 2014 the present opposite parties were produced before the Id. ACJM, Jhargram, who, by his impugned order was pleased to direct them to be lodged in judicial custody.

Sri Ali submits that the Id. ACJM, Jhargram erroneously exercised jurisdiction by directing judicial custody and thereby failed to consider the decision of the Hon'ble Apex Court in State through CBI Vs. Dawood Ibrahim Kaskar and Ors. reported in AIR 1977 SC pg. 2494 as well as the decision in Dinesh Dalmia Vs. CBI reported in 2007 (2) Calcutta Criminal Law Reporter SC 680.

Sri Ali points out that the Id. ACJM did not consider the fact that an open-ended chargesheet was filed by the CBI in the case with the rider appearing at paragraph 22 of the said charge sheet that "further investigation of this case has been kept open and the same is continuing for the purpose of collection of further evidence as well as for the purpose of arrest of absconding charge sheeted

accused persons and other accused persons, as per the provisions of Section 173 (8) CrPC. The further evidence collected in the course of further investigation of this case will be forwarded by filing supplementary charge sheet."

Sri Ali further points out that the Id. ACJM, failed to apply his mind to the fact that in the application made by the CBI for police custody in addition to the fact that further investigation as recorded by the CBI at paragraph 22 (supra) is contemplated, the present opposite parties who were absconding from the very beginning were required to be investigated in police custody for the purpose of collecting further evidence pertaining to recovery of arms and ammunition used at the time of the incident as well as the participation of other persons in the commission of the crime along with conspiracy angle.

Drawing the attention of this Court to the observations of the Hon'ble Apex Court in Dawood Ibrahim's case Sri Ali argues that the Id. ACJM completely lost sight of the mandate of the Hon'ble Apex Court keeping in mind the interests of further investigation. He precisely relies upon paragraphs 9 and 10 of Dawood Ibrahim's judgment which read as follows:-

"9. In keeping with the provisions of Section 173(8) and the above quoted observations, it has now to be seen whether Section 309(2) of the Code stands in the way of a Court, which has taken cognizance on an offence, to authorize the detention of a person, who is subsequently brought before it by the police under arrest during further investigation, in police custody in exercise of its power under Section 167 of the Code. Section 309 relates to the power of the Court to postpone the commencement of or adjournment of any inquiry or trial and sub-section (2) thereof reads as follows:

"If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may be a warrant remand the accused if in custody.

Provided that no Magistrate shall remand an accused person to custody under this Section for a term exceeding fifteen days at a time;"

10. There cannot be any manner of doubt that the remand and the custody referred to in the first proviso to the above sub-section are different from detention in custody under Section 167. While remand under the former relates to a stage after cognizance and can only be to judicial custody, detention under the latter relates to the stage of investigation and can initially be either in police custody or judicial custody. Since, however, even after cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation. If Section 309(2) is to be interpreted - as has been interpreted by the Bombay High Court in Mansuri, (1994 Cri LJ 1854) (supra) - to mean that after the Court takes cognizance of an offence it cannot exercise its power of detention in police custody under Section 167 of the Code, the Investigating Agency would

be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. We are therefore of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not an accused who is subsequently arrested in course of further investigation. So far as the accused in the first category is concerned he can be remanded to judicial custody only in view of Section 309(2), but he who comes under the second category will be governed by Section 167 so long as further investigation continues. That necessarily means that in respect of the latter the Court which had taken cognizance of the offence may exercise its power to detain him in police custody, subject to the fulfillment of the requirements and the limitation of Section 167."

It is the further submission of Sri Ali that the facts of this case are *pari materia* to the observations of the Hon'ble Apex Court in Dawood Ibrahim's case in so far as they relate to an accused who was not before the Court when cognizance was taken or when enquiry or trial was being held but was subsequently arrested in course of further investigation. Sri Ali asserts that following the dicta of the Hon'ble Apex Court in Dawood Ibrahim the detention in judicial custody of the category of the accused persons who were before the Court when cognizance was taken or when the trial is continuing can only be to judicial custody u/s 309(2) of the CrPC but in cases of accused persons like the present opposite parties the requirement of further investigation will govern their detention u/s 167 CrPC and the Court which had taken cognizance of the offence may exercise its powers to detain such accused persons who were subsequently arrested in course of further investigation in police custody, subject to the fulfillment of the requirements and limitations of Section 167 CrPC.

Sri Ali also submits that the Hon'ble Supreme Court in the case of Dinesh Dalmia (*supra*) did not alter the position of fact and law as enunciated in Dawood Ibrahim's case.

Per contra Sri Kishore Dutta, ld. Counsel appearing for the opposite parties draws the attention of this Court to paragraphs 21, 22 and 23 of Dinesh Dalmia's judgment. The said paragraphs read as follows:-

"21. It is also not a case of the appellant that he had been arrested in course of further investigation. A warrant of arrest had already been issued against him. The learned Magistrate was conscious of the said fact while taking cognizance of the offence.

It is now well settled that the Court takes cognizance of an offence and not the offender. [See *Anil Saran v. State of Bihar & Anr.*, (1995)6 SCC 142 and *Popular Muthiah v. State represented by Inspector of Police*, (2006)7 SCC 296.]

22. The power of a Court to direct remand of an accused either in terms of sub-section (2) of Section 167 of the Code or sub-section (2) of Section 309 thereof will depend on the stages of the trial. Whereas sub-section (2) of Section 167 of the Code would be attracted in a case where cognizance has not been taken, sub-section (2) of Section 309 of the Code would be attracted only after cognizance has been taken.

23. If submission of Mr. Rohatgi is to be accepted, the Magistrate was not only required to declare the charge sheet illegal, he was also required to recall his own order of taking cognizance. Ordinarily, he could not have done so. [See *Adalat Prasad v. Rooplal Jindal & Ors.* (2004)7 SCC 338; *Subramaniam Sethuraman v. State of Maharashtra and Anr.*, (2004)8 SCALE 733 and *Everest Advertising Pvt. Ltd. v. State, Govt. of NCT of Delhi and Ors.*, JT (2007)5 SC 529. It is also well-settled that if a thing cannot be done directly, the same cannot be permitted to be done indirectly. If the order taking cognizance exists, irrespective of the conduct of the CBI in treating the investigation to be open or filing applications for remand of the accused to police custody or judicial remand under sub-section (2) of Section 167 of the Code stating that the further investigation was pending, would be of no consequence if in effect and substance such orders were being passed by the Court in exercise of its power under sub-section (2) of Section 309 of the Code."

Sri Dutta argues that the judgment in Dawood's case (supra) has been noticed and refined by the Hon'ble Apex Court in Dinesh Dalmia's case (supra). He submits that following the dicta laid down at paragraph 23 (supra) that irrespective of the conduct of the CBI in treating the investigation to be open or filing applications for remand u/s 167(2) of the CrPC, once cognizance is taken the Court in effect and substance will be exercising powers u/s 309 (2) of the CrPC.

Sri Dutta also submits that in the facts of the present case admittedly charge sheet has been filed against the present opposite parties, cognizance taken and the trial is continuing. In such circumstances the view of the Hon'ble Apex Court in Dinesh Dalmia's case (supra) clarifying the view in Dawood Ibrahim's case (supra) shall prevail. In this connection he further draws the attention of this Court to the observations of a Full Bench of the Punjab and Haryana High Court in the State of Punjab v. Teja Singh reported in 1976 Criminal Law Journal 1648. At paragraph 8 the Hon'ble Full Bench stated as follows:-

"Now it is trite learning to say that when an earlier judgment of the Supreme Court is analysed and considered by a later Bench of that Court then the view taken by the latter as to the true ratio of the earlier case is authoritative. In any case that view is binding on the High Courts."

Heard the parties. Considered the materials on record.

It is noticed by this Court that having regard to the view of the Hon'ble Apex Court in Dinesh Dalmia's case (supra) emphasizing the legally accepted principle that if a thing cannot be done directly, the same cannot be permitted to be done indirectly, any prayer for remand by the Investigating Agency at the post-cognizance stage shall be construed to be made u/s 309(2) of the CrPC. In the opinion of this Court the observations of the Hon'ble Apex Court at paragraphs 21,22 and 23 of Dinesh Dalmia's case (supra) has clarified the law as it ought to be understood today.

For the aforementioned reasons the Order impugned of the Id. ACJM dated 30th of April, 2014 calls for no interference.

CRR 1510 of 2014 is thus disposed of.

There will be, however, no order as to costs. Urgent certified photocopies of this order, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.

(Subrata Talukdar, J.)