

14.10.2021

Court - 08
Item - 1-3
Matter - 438
Status - allowed
Transcriber - NANDY

CRM 2867 of 2021
(Kailash Vijayvargiya Vs. State of West Bengal)
with
CRM 6827 of 2021
(Jisnu Basu Vs. State of West Bengal)
with
CRM 6828 of 2021
(Pradeep Joshi @ NG Joshi Vs. State of West Bengal)

In Re:- Applications for **Anticipatory Bail** under section 438 of the Code of Criminal Procedure filed on 12.10.2021 in connection with Bhawanipore Police Station Case 221 of 2021 dated 09.10.2021 under Sections 376D/506(ii)/120B of the Indian Penal Code (G.R. Case No. 2913 of 2021);

And

In the matter of : **Kailash Vijayvargiya** (petitioner in CRM 6826 of 2021)
Jisnu Basu (petitioner in CRM 6827 of 2021)
Pradeep Joshi @ NG Joshi (petitioner in CRM 6828 of 2021)

.....petitioners

Mr. Mahesh Jethmalani, Senior Advocate

Mr. Kallol Mondal, Advocate

Mr. Rajdeep Majumdar, Advocate

Mr. Kabir Shankar Bose, Advocate

Mr. Mayukh Mukherjee, Advocate

Mr. Amit Mishra, Advocate

Ms. Kanika Sehgal, Advocate

Mr. Debu Chowdhury, Advocate

Mr. Pritam Roy, Advocate

Ms. Arushi Rathore, Advocate

Mr. Dhiraj Trivedi, Advocate

Mr. Lokenath Chatterjee, Advocate

Ms. Mugdha Pandey, Advocate

...for the petitioner (in CRM 6826 of 2021)

Mr. P.S. Patwalia, Senior Advocate

Mr. Kallol Mondal, Advocate

Mr. Rajdeep Majumdar, Advocate

Mr. Kabir Shankar Bose, Advocate

Mr. Amit Mishra, Advocate

Mr. Debu Chowdhury, Advocate

Ms. Kanika Sehgal, Advocate

Ms. Arushi Radhore, Advocate

Mr. Dhiraj Trivedi, Advocate

Mr. Lokenath Chatterjee, Advocate

Ms. Mugdha Pande, Advocate

...for the petitioner (in CRM 6827 of 2021)

Mr. Guru Krishna Kumar, Senior Advocate

Mr. Kallol Mondal, Advocate

Mr. Rajdeep Majumdar, Advocate

Mr. Kabir Shankar Bose, Advocate

Mr. Amit Mishra, Advocate
Ms. Kanika Sehghal, Advocate
Mr. Debu Chowdhury, Advocate
Mr. Dhiraj Trivedi, Advocate
Mr. Lokenath Chatterjee, Advocate
Ms. Mugdha Pande, Advocate

...for the petitioner (in CRM 6828 of 2021)

Mr. Saswata Gopal Mukherjee, Ld. Public Prosecutor
Mr. Swapan Banerjee, Advocate
Mr. Sanjay Bardhan, Advocate
Mr. Suman De, Advocate
Mr. Imtiaz Ahmed, Advocate
Mr. Tarun Kumar Chatterjee, Advocate

...for the State

All the aforesaid anticipatory bail applications are taken up together having its genesis from a common allegations. The case originated on the basis of an order passed by the learned Chief Judicial Magistrate, Alipore directing the complaint filed under section 156(3) of the Code of Criminal Procedure to be treated as First Information Report and thereafter the ball rolled in the corridor of investigation. Prelude to the case, is required to be adumbrated, to have the clarity of facts discernible from the allegations made by the accused against the aforesaid three petitioners.

The starting point of an allegation is on November 29, 2018 when the accused was called by the petitioner in CRM 6826 of 2021 at his flat 'Rameswaram Apartment, situated at 19A, Sarat Bose Road, Kolkata – 700020 to desist her from pursuing her earlier complaint lodged against some of the members of the political party and in pursuit thereof they committed rape on her, one after another, and she was forced to leave the flat in a vegetated condition upon perpetration of threat on her life including her son. It is further alleged that she intended to lodge an FIR in the Women Police Station at Behala, but she had shown an apathetic attitude as no FIR was registered on her complaint. It is, further, alleged that since thereafter she was physically assaulted on

multiple occasions; more precisely, 39 times on diverse dates and places and ultimately two complaints were lodged, one at Sarsuna Police Station being Case No. 131 of 2019 dated December 20, 2019 under Section 341/506(ii)/34 of the Indian Penal Code and another at Bolpur Police Station being Case No. 89 of 2020 under Sections 341/323/325/506/34 of the Indian Penal Code. The allegation proceeds further that since, thereafter, she has been approaching different authorities to ventilate her grievances but due to dormant attitude, having shown to her, an application under Section 156(3) of the Code of Criminal Procedure was filed on November 12, 2020.

The said application was dismissed by the Chief Judicial Magistrate, Alipore on November 12, 2020, primarily on two counts, firstly, there was an abysmal delay in lodging the First Information Report of the alleged incident of November 29, 2018 and secondly, the veracity and truthfulness of the allegation is doubtful. In effect, the application was rejected sans merit in it.

The said order was assailed before this Court by filing the Criminal Revisional Application, which was registered as CRR 92 of 2021. The said application was allowed setting aside the order of the Chief Judicial Magistrate, Alipore and was remitted back for reconsideration in light of the observations recorded therein. It was further indicated that the said Chief Judicial Magistrate, Alipore would dispose of the said application within seven days from the date of receipt of the said order.

Pursuant to the said order, having communicated, the matter was taken up by the same Chief Judicial Magistrate on October 8, 2021 and solely on the basis of the directions/orders passed by this Court in exercise of the revisional jurisdiction, the complaint was directed to be treated as FIR.

Since the FIR has been registered in terms of the order of the Chief Judicial Magistrate, Alipore, investigation agencies conducted enquiry and apprehending arrest in connection therewith, the present applications have been taken out seeking benefit under Section 438 of the Code of Criminal Procedure.

Learned senior counsel appearing for the respective petitioners argued extensively taking different paths, but to the common objective.

According to Mr. Jethmalani, learned senior counsel appearing for the petitioner in CRM 6826 of 2021, there is an apparent inconsistency in the allegations of the victim lady which was succinctly narrated and/or jotted down by the Chief Judicial Magistrate in rejecting an application under Section 156(3) of the Code of Criminal Procedure. According to him, there is a fallacy in the reasoning returned by this Court in setting aside the said order and the core issue was untouched and/or overlooked by this Court. It is arduously submitted before us that there is an apparent delay in approaching the authority of the Court and there is no sufficient explanation offered by her or at least discernible from her conduct. The stresses were put on the two FIRs/complaints lodged by her in two different police stations, as indicated above, where not a single whisper could be ascertained relating to the gravity of the offence which is now alleged in the said application.

It is further submitted that the aforesaid two complaints were investigated upon and ultimately the investigating officer filed the report stating that it lacks veracity and no cognizable offence having made out. It is vehemently submitted that the Apex Court in the case of ***Priyanka Srivastava vs. State of Uttar Pradesh*** reported in **(2015) 6 SCC 287** succinctly laid down, the criteria and the

courses to be adopted in dealing with an application under Section 156(3) of the Code and there is an apparent incongruity in the order of this Court in exercise of the criminal revisional jurisdiction while interfering with the order of the Chief Judicial Magistrate. As per Mr. Jethmalani, Learned Senior Counsel, apart from the point of delay in approaching the forum or narrating the incident, the veracity and authenticity of the allegation is required to be ascertained by the Magistrate at the time of dealing with an application under Section 156(3) of the Code. It is thus submitted that posing silence while making complaint after the alleged incident is a glaring example of after thought and the personal liberty enshrined under Article 21 of the Constitution of India should be respected.

Mr. Patwalia, learned senior counsel, appearing on behalf of the petitioner in CRM 6827 of 2021 adopt the submission of Mr. Jethmalani and submits that the closure report filed by the investigating agency on the basis of the aforesaid two complaints lodged after the alleged incident apparently leads to an inescapable conclusion that she had cooked up this story subsequently out of political vendetta. It is further submitted that though in one of such case the objection is raised by the victim lady against the closure report submitted by the investigating agency but the same has not been decided yet and the matter is still *sub judice*. He further submits that the allegation made therein is bereft of any truth in it and certain events narrated therein are conspicuously absent in the application filed by her. He further reiterates that when the narration of the incident is bereft of any material, there is no fetter on the part of the Court to extend the benefit under Section 438 of the Code.

Mr. Krishna Kumar, learned senior counsel, appearing for the petitioner in CRM 6828 of 2021 has echoed the submission of other senior counsel and he additionally submits that the order of

the Chief Judicial Magistrate rejecting an application Section 156(3) of the Code would reveal another incident of August 9, 2018 at different place but there is no written complaint nor reflection in the said application. He further submits that the victim lady who was courageous enough to lodge an FIR against other persons and the FIR has been registered and a case has been initiated against them, it is preposterous to suggest that because of the social stigma, she was shying away from approaching the Court promptly. It is further submitted that an earlier case initiated by her against other persons is still pending and in fact, the accused therein have been benefited under the provisions of Section 438 of the Code. It is thus, submitted that there is no justification of any custodial interrogation in connection with the instant case and the petitioners holding a high reputation and position in the society cannot escape the rigor of law rather should respect and obey the procedure of law and assist and cooperate with the investigation.

Per contra, Mr. Mukherjee, learned Public Prosecutor refuted the contention of the petitioners and submits that there are serious allegation made against the petitioners by the victim lady and once it has reached to the domain of investigating officer, it is imperative on the part of the investigating officer to investigate the case fairly and impartially. It is further submitted that the investigation is at nebulous stage as the victim lady showed her inability to meet with the investigating officer as she is out of town. Mr. Mukherjee further submits that the investigating officer has recorded the statement of two witnesses under section 161 of the Code disclosing the nexus with the place of alleged occurrence. It is strongly submitted that in order to unearth the truth the custodial interrogation of the petitioners is required. However, he informed the Court that the petitioners have challenged the order of this Court passed in revisional jurisdiction by filing a Special Leave petition before the

Supreme Court which is expected to be listed on October 20, 2021 and till such time, no protection should be extended to the petitioners.

On the conspectus of the aforesaid submissions and the facts discern from the applications filed before us, the actual point which fell for consideration is whether the petitioners have been able to make out a case for extending the benefit under Section 438 of the Code.

Assimilation of the facts narrated hereinabove, leads no ambiguity in our mind that the incident of November 28, 2018 has been projected affront for making out a cognizable offence for registration of an FIR against the accused persons. It is no doubt true that there has been considerable delay and the explanation offered therein, needs more scrutiny. Though it has been stated that the victim lady was running from pillar to post to ventilate her grievances, yet at times and during such interregnum period, the complaints were registered which did not disclose the alleged offence of gang-rape. Those complaints were lodged on separate set of facts where there is no whisper of gang-rape having committed by the petitioners. Even those complaints after being investigated, were dropped on the closure report filed by the investigating officer as the materials found during investigation do not instill confidence nor meet the requirement of law. There was a complete silence on the commission of rape on August 9, 2018 by the petitioner in CRM 6826 of 2021 at different place. Though it is contended she met the officers of the police station but there is no document forthcoming to corroborate such facts.

It is somewhat settled that the Magistrate shall not dispose of an application under Section 156(3) of the Code directing the registration of an FIR merely on the drop of the hat. In **Priyanka**

Srivastava (supra) the Apex Court has laid down the modalities and the procedure required to be adhered by the Magistrate before passing an order of registration of FIR in the following:-

“26. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.

27. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.

It is an ardent duty of the Magistrate not only to ascertain that cognizable offence has been committed but also to verify the truth in the allegations as no responsible citizen should embark the journey of harassment in the hands of another citizen. Even in

Mukul Roy vs. The State of West Bengal reported in **2018 SCC Online Cal 4861**, the Single Bench of this Court has succinctly and broadly laid down the parameters to be scrupulously followed by the Magistrate while exercising the power under Section 156(3) of the Code which runs thus:-

Therefore, I direct that Learned Registrar General shall take immediate steps for issuance of suitable guidelines to all the Chief Judicial Magistrates, Chief Metropolitan Magistrates, Additional Chief Judicial Magistrates, Additional Chief Metropolitan Magistrates, Judicial Magistrates through the District Sessions Judges and Metropolitan Magistrates, Calcutta of all the Districts of the State of West Bengal, which guidelines are laid down for application of judicial mind by the Learned Judicial Magistrate while invoking power under Section 156(3) of the Code, as under—

- 1. The learned Magistrate would be well advised to verify the truth and the veracity of the allegations, regard being had to the nature of allegations of the case.*
- 2. There has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3) of the Code of Criminal Procedure.*
- 3. Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed which are the sine qua non for application under Section 156(3) of the Code.*
- 4. An application under Section 156(3) of the Code should be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made.*
- 5. A number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed.*
- 6. Learned Magistrate would also be aware of the abnormal delay in lodging of the FIR in initiating criminal prosecution.*

The law as enunciated above leave no ambiguity that while invoking the power under Section 156(3) of the Code, the Magistrate not only shall verify the truth and veracity and authenticity of the allegation in the perspective thereof, but also the person affirming an affidavit must ensure that the allegation made therein is true and there is no element of falsity therein. It is beyond the cavil of doubt that it is an ardent duty of the Magistrate to find out the element of an offence from a complaint and the veracity and the truthfulness, thereof, at least, *prima facie*, must be found out.

All the senior counsel appearing for the petitioners have uniformly submitted that the findings of the High Court in setting aside the order of the Chief Judicial Magistrate at Alipore suffers from glaring infirmity and inconsistency. As indicated above, the said order is challenged before the Supreme Court and the matter is pending, thereon and likely to be listed on October 20, 2021. Since, this Court remitted the application back to the Chief Judicial Magistrate, Alipore for reconsideration in the light of the observations made thereon and the initiation of the present proceeding is an outcome of such direction, once the ball has rolled to the Supreme Court, we feel that the aforesaid aspect cannot be overlooked at this juncture.

Furthermore, learned Public Prosecutor contended before us that the investigation is at the nebulous stage and there is no possibility of recording the version/statement of the victim lady on or before October 16/17, 2021, we feel that the petitioners are entitled to an interim protection. Since the origin of the instant case is founded upon the order of this Court, scrupulously followed by the Chief Judicial Magistrate, in allowing an application under Section 156(3) of the Code, the matter is largely depends upon the outcome of the Special Leave Petition and till such time, we feel that the petitioners should not be deprived of the personal liberty.

In view of the inconsistency pointed out hereinabove and that the matter is pending before the Supreme Court, we extend the benefit of Section 438 of the Code of Criminal Procedure as an interim measure till October 25, 2021.

Accordingly, we direct that in the event of arrest, the petitioners, namely, **Kailash Vijayvargiya, Jisnu Basu and Pradeep Joshi @ NG Joshi** shall be released on interim bail upon

furnishing a bond of Rs. 10,000/- each, with two sureties of like amount each, one of whom must be local, to the satisfaction of the arresting officer and also subject to the conditions as laid down under Section 438(2) of the Code of Criminal Procedure, 1973 and on further condition that the petitioners shall not tamper with the evidence and intimidate witnesses in any manner, whatsoever.

The interim bail shall remain effective till October 25, 2021.

It is vehemently submitted by Mr. Swapan Banerjee, Learned Advocate for the State after taking leave of the Learned Public Prosecutor that certain observations made hereinabove, more particularly on the order passed by the Chief Judicial Magistrate, as well as by this Court in revisional jurisdiction, may have a persuasive effect in a pending matter before the Supreme Court.

We do not think, the apprehension to be correct. Each matter is required to be decided independently and on the basis of the materials placed before the Court. The observation made at the time of passing an interim bail is tentative in nature and, therefore, such apprehension is unfounded.

Let the matters be listed on **October 25, 2021** before the available Vacation Bench.

(Harish Tandon, J)

(Kaushik Chanda,J.)