IN THE HIGH COURT OF DELHI AT NEW DELHI

CRLMM 3875/2003

28.01.2004

Court on its own motion

Versus

Central Bureau of Investigation ...Respondents through : Mr. K.K. Sud, ASG, with Mr. Neeraj Jain, Advocate for respondent-CBI. Mr.Sidharth Luthra,Mr. Vaibhav Gaggar,Advocates for the accused.

CORAM:
HON'BLE MR. JUSTICE J.D.KAPOOR

1.Whether the reporters of local papers may be allowed to see the judgment?
2.To be referred to the reporter or not?
3.Whether the judgment should be referred in the Digest?

J.D.KAPOOR, J

1.Having come across the following news item in a national daily ''Statesman''of 16th September, 2003 this Court took suo moto notice as prima facie illegality in the order was writ large on the face, summoned the record, noticed the CBI and stayed its ope ration. The news item reads as follows:- ''Special Court returns CBI charge-sheet Statesman News Service NEW DELHI, Sept. 15.- The Central Bureau of Investigation was at the receiving end of the ire of a special court today with the judge declining to accept its chargesheet against an IRS official-allegedly involved in a fake visa racket during his posting in Tanzania and snubbed it for not arresting him during the investigation. Additional session Judge Mr. Prem Kumar returned the chargesheet to the agency saying it was not observing a uniform policy or norm in arresting accused persons during investigations. The court rejected CBI contention that provisions of Section 170 Cr.P .C., which requires the investigating officer to forward the accused under custody to a magistrate, did not apply in the present case. The agency chargesheet accused Rajeshwar Singhal of misappropriating Rs.23.09 lakh while acting as first secretary at the Indian High Commission in Tanzania in 1998-2000. The agency has alleged that

during his posting at Tanzanian capital Dar-es-Salaam, Singhal issued visas to the applicants by falsifying the receipts of various categories. Besides being charged under Prevention of Corruption Act for misusing the official position, he was also slapped with charges under Section 409 (criminal breach of trust) of the IPC among others.''

2.In the instant matter, case was registered against the accused in February, 2001 and chargesheet was filed in August, 2003. During this period, the accused was not arrested as CBI did not deem his arrest necessary for investigation. But now learned Sp ecial Judge wants CBI to arrest him and has ordered that unless he is produced in custody he would not accept the chargesheet little realizing that there is prescribed limit of time for offences during which the court can take cognizance.

3.So much so he came very heavily upon the CBI by observing that the CBI was not adhering to the norm in arresting the accused during the investigation and flouting the provisions of Section 170 Cr.P.C. requiring the Investigating Officer or Officer-in- charge of the Police Station to forward the accused in custody to a Magistrate where there is sufficient evidence and reasonable ground to put him on trial.

4.Now the question arises whether it is legally permissible for any criminal court to refuse to accept the chargesheet where accused is neither arrested during investigation nor produced in custody by the Investigating Officer at the time of filing the c hargesheet wherever there is sufficient evidence to try the accused. Answer is emphatic ''NO'' as Section 173 of the Code of Criminal Procedure does not permit the criminal court to adopt such a course. Such a course is even otherwise fraught with seriou consequence of failure to take cognizance of the chargesheet if it becomes barred by time in the process of procuring the custody of the accused for production before the court as law provides a limitation for taking cognizance of the chargesheet. Mom nt the chargesheet is filed, it is the duty of the court to accept it. It has no powers to return the chargesheet directing the Investigating Officer to first produce the accused in custody. It is not imperative or necessary for the officer-in-charge f the police station to forward each and every accused in custody at the time of filing of the charge-sheet wherever there is sufficient evidence to try the accused.

5. According to Section 173 of Cr.P.C three courses are open to the Magistrate or a Court:(i) It may accept the report and take cognizance;(ii) It may disagree with the report and drop the

proceedings; (iii) It may direct further investigation.

6.It is co-incident that a similar course was once adopted by a Magistrate in Gujarat way back in 1983 which was deprecated by the High Court in Deendayal Kishanchand and others vs. State of Gujarat, 1983 Crl.L.J. 1583, with the observations that a ref usal by criminal Courts either through the learned Magistrate or through their office staff to accept the charge-sheet without production of the accused persons is not justified by any provision of law and therefore whenever the police submit the charge- heet, it is the duty of the Court to accept it especially in view of the provisions of Sec. 468 of the Code which creates a limitation of taking cognizance of offence.

7. Let us first see what is command of Section 173 Cr.P.C. under which chargesheet is filed and then I shall advert to the provision of Sectiion 170 Cr.P.C. under which the learned Special Judge has returned the chargesheet.

8. Section 173 Cr.P.C. provides as under:- "S. 173 (1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) (i) As soon as it is completed, the officer-in-charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating -

(a) the name of the parties;

(b) the nature of the information;

(c) the name of the persons who appear to be acquainted with the circumstances of case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond, and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under Section 170.

(ii) The officer shall also communicate, in such manner as may be

prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under Section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Ma istrate, direct the officer-in-charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this Section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which Section 170 applies the police officer shall forward to the Magistrate along with the report -

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public inte est, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to Magistrate and, where upon such investigation, the officer-in-charge of the police station btains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the

form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such eport or reports as they apply in relation to a report forwarded under sub-section (2).''

9.Bare perusal of Section 173 Cr.P.C. shows that whenever a final report under Section 173 Cr.P.C. is filed for consideration by the Magistrate, two situations may arise. First, that the report may conclude that the offence appears to have been committ ed by a particular person or persons and second, that in the opinion of the officer-in-charge no offence appears to have been committed.

10.In the first eventuality, that is where the report discloses the commission of an offence, the aforementioned three courses are open to the Magistrate viz. (a) he may accept the report and take cognizance of the offence and issue process; (b) he may disagree with the report and drop the proceedings; (c) he may direct further investigation.

11.In the second eventuality i.e. where the report states that no offence appears to have been committed, the Magistrate has again three options: (a) he may accept the report and drop the proceedings; (b) he may disagree with the report and take th e view that there is sufficient ground for proceeding further, take cognizance of the offence and issue process; (c) he may direct further investigation to be made by the police.

12.Perusal of Section 173 Cr.P.C. further shows that as soon as investigation is completed the Officer-in-charge of the police station is required to forward the police report to Magistrate empowered to take cognizance of the offence in the form prescrib ed thereunder with the information contained in sub-clauses (a) to (g).

13.The very word ''Whether'' referred in clause (g) of sub-section (2) (i) shows that it is not mandatory for Officer-in-charge to forward each and every accused in custody while filing the chargesheet in non-bailable offences where there is sufficient gro und to try the case. Had there been any imperative need to forward every accused in custody, then there was no need for particulars regarding sub-clause (d) and (e) i.e. ''whether any offence appears to have been committed, and, if so, by whom'' and ''wh ther the accused has been arrested.'' This conclusion is derivative of Section 170 Cr.P.C.

14. Let us now see the import of Section 170 Cr.P.C.. It reads as under: - ''S. 170 (1) If, upon an investigation under this Chapter, it appears to the officer-in-charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer

shall forward the accused under custody to a Magistr te empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magis rate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.''

15.Word ''custody'' appearing in this Section does not contemplate either police or judicial custody. It merely connotes the presentation of accused by the Investigating Officer before the Court at the time of filing of the chargesheet whereafter the role of the Court starts. Had it not been so the Investigating Officer would not have been vested with powers to release a person on bail in a bailable offence after finding that there was sufficient evidence to put the accused on trial and it would have een obligatory upon him to produce such an accused in custody before the Magistrate for being released on bail by the Court.

16.In case the police/Investigating Officer thinks it unnecessary to present the accused in custody for the reason that accused would neither abscond nor would disobey the summons as he has been co-operating in investigation and investigation can be comp leted without arresting him, the I.O. is not obliged to produce such an accused in custody.

17.Thus, the only meaning of sub-clause (g) of sub-section (2) (i) of Section 173 Cr.P.C ''whether the accused has been forwarded in custody under Section 170'' is with regard to the information that whether the accused is being forwarded under custody or not. Nothing more nothing less. Section 173 Cr.P.C. confines to providing the said information.

18.Thus, at the most the Magistrate; for that purpose the Court empowered to take cognizance has the power to ask the prosecution to provide with further information in respect of clauses (a) to (g) of sub-section (2) (i), if these are deemed deficient a nd in no case has the power to return the chargesheet on the ground that the officer-in-charge of the police station or CBI has while filing the chargesheet not forwarded the accused in custody in ''cognizable'' and ''non-bailable'' offence where there is ev dence to try the accused in spite of the fact that the IO did not deem it necessary to arrest such a person even for the purpose of completing the investigation.

19. It appears that the learned Special Judge was labouring under a

misconception that in every non-bailable and cognizable offence the police is required to invariably arrest a person, even if it is not essential for the purpose of investigation.

20.Rather the law is otherwise. In normal and ordinary course the police should always avoid arresting a person and sending him to jail, if it is possible for the police to complete the investigation without his arrest and if every kind of co-operation i s provided by the accused to the Investigating Officer in completing the investigation. It is only in cases of utmost necessity, where the investigation cannot be completed without arresting the person, for instance, a person may be required for recover of incriminating articles or weapon of offence or for eliciting some information or clue as to his accomplices or any circumstantial evidence, that his arrest may be necessary. Such an arrest may also be necessary if the concerned Investigating Officer or Officer-in-Charge of the Police Station thinks that presence of accused will be difficult to procure because of grave and serious nature of crime as the possibility of his absconding or disobeying the process or fleeing from justice cannot be ruled ou .

21.The liberty of a citizen is of paramount importance and a constitutional guarantee and cannot be incised and therefore the police or Investigating Agencies should not remain under the impression that in every cognizable and ''non-bailable'' offence the y should invariably arrest the offender. Power to arrest is altogether different than the need for arrest. Unless a person is required for custodial interrogation and investigation cannot be completed without his arrest, arrest may be necessary. In c se investigation can be completed without his arrest and he extends all kind of co-operation, he should not be arrested. No authority howsoever powerful or mighty can be allowed to deny a person his liberty as it hits at the very foundation of democrati structure. In this regard, I cannot resist the temptation of reproducing the observations made by the Supreme Court in Joginder Kumar vs. State of UP and ors. (1994) 4 SCC 260 which are very pithy and have force in law. These are as under:- ''No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The Police Officer must be able to justify the arrest apart fro his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent

for a Police Officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as o the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter.''

22.Because of the view taken by the Special Judge and return of the charge-sheet by forcing the CBI to arrest the accused which it otherwise never felt the necessity of arresting him even for the purpose of investigation, and apprehension of the accused being denied the benefit of bail in spite of offence being devoid of high magnitude and severe punishment this Court feels constrained to give certain directions based on the legal position and several judgments including those delivered by me recently

(i) Suresh V. Chaturvedi vs. M/s. AES Control Pvt. Ltd., Crl.M.

(M) 2970/2003 decided on 24th July, 2003, (ii) Pratap Singh Gaekwad and Ors. vs. State of NCT of Delhi and Anr. Crl.M. (M) 1848/2003 decided on 30th October, 2003, (iii) Sudhir Natha

i vs. Central Bureau of Investigation, Crl.M.(M) 2848/2003 decided on July 24th , 2003} to the police and the investigating agencies as well as to the courts competent to take cognizance of the offence and try the accused for guidance and compliance. T ese are :- Directions to the Police/Investigating Agencies like CBI etc. :-

(1)Investigating Officer, be of police station or special agency like CBI shall not arrest any person accused of having committed a cognizable and non-bailable offence until it is very necessary for the purpose of investigation or custodial interrogation say for recovering incriminating articles or weapons of offence or eliciting information as to his accomplices etc. or for any other purpose that may help in gathering evidence to prove his guilt.

(2) Arrest should always be avoided if the investigation can be completed even otherwise and the accused gives full co-operation in completing the investigation.

(3) Arrest may be necessary, if the offence alleged is of grave nature and prescribes severe punishment and there is a likelihood of an offender either absconding or not appearing on being summoned or his fleeing away from justice or judgment.

23.For instance it is the experience of this court that in offences under Sections 498A/406 IPC which are much abused provisions and exploited by the police and the victims to the level of absurdity and are of such nature which can be investigated withou t arrest and do not fall under the aforesaid category viz. being of highest magnitude and prescribing severest punishment or minimum punishment, every relative of husband, close or distant, old or minor is arrested by the police. By arresting such relat ves whose arrest may not be necessary for completing the investigation as it can be completed by recording the statement of victim, her parents and other witnesses, police assumes the role of breaker of homes and not the maker as once any relative of he husband is sent to jail, the marriage ends for all practical purposes and divorce and other miseries are bound to follow. Unless the allegations are of very serious nature and highest magnitude arrest should always be avoided.

24.In this court everyday ten to twenty matters for quashing the FIRs under Sections 498A/406 IPC are taken up as all marriages end in divorce where relatives of husband or other are sent to jail. Unfortunately, sufferers are young girls between the age s 20 to 28 years. Very few cases end up in full trial and conviction. These are the offences whose deterrence has proved worse than remedy.

25.It was in view of this malady that this Court had strongly recommended to make the offence under Section 498A IPC bailable and compoundable if society wants to salvage and save the institution of marriage. This Court again reiterate its recommendatio ns to the Government.

26. Arrest of a person for less serious or such kinds of offence or offences those can be investigated without arrest by the police cannot be brooked by any civilized society. Directions for Criminal Courts :-

(i)Whenever officer-in-charge of police station or investigating agency like CBI files a chargesheet without arresting the accused during investigation and does not produce the accused in custody as referred in Section 170 Cr.P.C the Magistrate or the co urt empowered to take cognizance or try the accused shall accept the chargesheet forthwith and proceed according to the procedure laid down in Section 173 Cr.P.C. and exercise the options available to it as discussed in this judgment. In such a case the Magistrate or court shall invariably issue a process of summons and not warrant of arrest.

(ii) In case the court or Magistrate exercises the discretion of issuing warrant of arrest at any stage including the stage while taking cognizance of the chargesheet, he or it shall have to record the reasons in writing as contemplated under Section 87 Cr.P.C. that the accused has either been absconding or shall not obey the summons or has refused to appear despite proof of due service of summons upon him.

(iii) Rejection of an application for exemption from personal appearance on any date of hearing or even at first instance does not amount to non-appearance despite service of summons or absconding or failure to obey summons and the court in such a case shall not issue warrant of arrest and may either give direction to the accused to appear or issue process of summons.

(iv) That the Court shall on appearance of an accused in a bailable offence release him forthwith on his furnishing a personal bond with or without sureties as per the mandatory provisions of Section 436 Cr.P.C

(v)The Court shall on appearance of an accused in non-bailable offence who has neither been arrested by the police/Investigating agency during investigation nor produced in custody as envisaged in Section 170 Cr.P.C. call upon the accused to move a bail application if the accused does not move it on his own and release him on bail as the circumstance of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. Reason i simple. If a person has been at large and free for several years and has not been even arrested during investigation, to send him to jail by refusing bail suddenly, merely because chargesheet has been filed is against the basic principles governing gra t or refusal of bail.

(vi)That the Court shall always keep the mandatory provisions of Section 440 Cr.P.C. in mind while fixing the amount of bail bond or surety bond which provides that the amount of bond shall never be ''excessive'' amount and take into consideration the fina ncial condition, the nature of offence and other conditions, as ''Excessive'' amount of bond which a person is not in a position to furnish amounts to denial of bail in a non-bailable offence and conversion of bailable offence into non-bailable offence as he fundamental concept of granting bail on bond is security of appearance of the accused person to answer the charges and face the trial. Nothing more nothing less. Principles that govern the grant of refusal of bail in other kinds of cases and shall be followed in letter and spirit are as under:-

(a) Bail should not be refused unless the crime charged is of the highest magnitude and the punishment of it prescribed by law is of extreme severity;

(b) Bail may be refused when the court may reasonably presume, some evidence warranting that no amount of bail would secure the presence of the convict at the stage of judgment;

(c) Bail may be refused if the course of justice would be thwarted by the person who seeks the benignant jurisdiction of the Court to be freed for the time being;

(d) Bail may be refused if there is likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice; and

(e) Bail may be refused if the antecedents of a man who is applying for bail show a bad record, particularly a record which suggests that he is likely to commit serious offences while on bail.

(f) Similarly, the Court shall not while releasing a person on bail put any condition, say in the form of deposit of extra amount or FDR etc. of any amount which is beyond the conditions permissible under Section 439 Cr.PC.

27.This Court has laid down aforesaid law in various cases decided from time to time for the guidance and compliance of the subordinate courts but it is with great anguish and pain that this Court observes that it has come across a large number of orders passed by the subordinate courts in complete violation of the law laid down by this Court and Supreme Court in many more other cases.

28.There is no gain saying the fact that the disobedience or disregard of the law laid down by the High Court by the subordinate courts is not only against the very concept of rule of law but also verges on contempt of court as subordinate courts are, by way of constitutional provisions, bound by the decision of the local High Court as is every court of the country including the High Courts, bound by the decisions of the Supreme Court by virtue of provisions of Article 141 of the Constitution. If the s bordinate courts start ignoring the law laid down by their High Courts and start acting contrary thereto, then not only the legal anarchy will set in but the democratic structure of the country, rule of law and concept of liberty of citizens will be th first casualty.

29. Motion is disposed of with the aforesaid directions.

30.In view of the wide ramifications of the law laid in this case and cases referred therein and for the benefit of the society and people at large, Registrar General of this Court is directed to send the copy of the Judgment to Police Commissioner for g uidance and compliance by the SHOs/Investigating Officers and to all the Judicial Officers of Delhi and to the Director, Central Bureau of Investigation.

January 28, 2004 (J.D.KAPOOR)
sk/ssb JUDGE