DR. MRS. NUPUR TALWAR A

v.

C.B.I., DELHI & ANR.

(Criminal Appeal No. 68 of 2012)

JANUARY 6, 2012 B

[ASOK KUMAR GANGULY AND JAGDISH SINGH KHEHAR, JJ.]

Constitution of India, 1950:

C

Article 136 - Jurisdiction of Supreme Court to interfere with order of Magistrate taking cognizance, as affirmed by High Court - Held: The order whereby cognizance of the offence has been taken by the Magistrate, unless is perverse or based on no material, should be sparingly interfered with - In the D *instant case, it is evident from the order of the Magistrate taking cognizance that there has been due application of mind by him and it is a well reasoned order - The order of the High Court would also show that there has been a proper application of mind and a detailed speaking order has been* E *passed - Therefore, the concurrent order of the Magistrate which is affirmed by the High Court is not interfered with.*

Code of Criminal Procedure, 1973:

s.190(1)(b) - Cognizance of offence by Magistrate - Held: F *At the stage of taking cognizance of an offence, the court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record - At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the* G *facts and materials before him - In doing so, the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion irrespective of the views expressed by the police in its report and may prima*

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A *facie find out whether an offence has been made out or not.*

In the investigation by the State police, of a case of the death of a young girl and a domestic help, initially the implication of the parents of the deceased girl transpired.
B **However, when the investigation of the case was entrusted to the CBI, it filed a closure report. On a notice issued by the court, the father of the deceased girl filed a protest petition. The Magistrate then took cognizance u/s 190(1)(b), CrPC of the offences punishable u/s 302/34**
C **and 201/34 IPC against the parents of the deceased girl for committing her murder and the murder of the domestic help. On a petition u/s 397/401 CrPC, the High Court declined to interfere.**

In the instant appeal filed by the accused mother of
D **the deceased girl, the question or consideration before the Court was: what should be the extent of judicial interference by Supreme Court in connection with an order of taking cognizance by a Magistrate while exercising his jurisdiction u/s 190 of the Code of Criminal**
E **Procedure, 1973.**

Disposing of the appeal, the Court

HELD: 1.1. Section 190 of the Code of Criminal Procedure, 1973 lays down the conditions which are
F **requisite for the initiation of a criminal proceeding. At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him. In doing so, the Magistrate is not bound by the opinion of the investigating officer and he is**
G **competent to exercise his discretion irrespective of the views expressed by the police in its report and may prima facie find out whether an offence has been made out or not. [para 18-19] [41-B-C]**

H **1.2. The taking of cognizance means the point in time**

when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed. At the stage of taking cognizance of an offence, the court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record. [para 20-21] [41-D-E]

S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. and Ors. **2008 (2) SCR 36 = (2008) 2 SCC 492 -relied on**

1.3. The correctness of the order whereby cognizance of the offence has been taken by the Magistrate, unless it is perverse or based on no material, should be sparingly interfered with. In the instant case, it is evident from the order of the Magistrate taking cognizance that there has been due application of mind by the Magistrate and it is a well reasoned order. The order of the High Court passed on a criminal revision u/ ss 397 and 401 of the Code (not u/s 482) at the instance of the appellant would also show that there has been a proper application of mind and a detailed speaking order has been passed. [para 23] [42-D-F]

1.4. At this stage, sitting in a jurisdiction under Article 136 of the Constitution, this Court does not feel inclined to go into all the factual aspects of the case. Obviously, at this stage the Court cannot weigh evidence. The Court should exercise utmost restrain and caution before interfering with an order of taking cognizance by the Magistrate, otherwise the holding of a trial will be stalled. The superior courts should maintain this restrain to uphold the rule of law and sustain the faith of the common man in the administration of justice. Therefore, the concurrent order of the Magistrate which is affirmed by the High Court is not interfered with. [para 11,25 and 27] [37-D; 42-H; 43-A-G]

A **Case Law Reference:**

2008 (2) SCR 36 relied on para 26

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 68 of 2012.

B

From the Judgment & Order dated 18.3.2011 of the High Court Allahabad in Criminal Revision No. 1127 of 2011.

WITH

C SLP (Crl) No. 2982 of 2011.

H.P. Raval, Harish N. Salve, Ranjeet Kumar, Rajiv Nanda, P.K. Dey, Padmalakshmi Nigam, A.K. Sharma, R.N. Karanjawala, Manik Karanjawala, Sandeep Kapur, Shivek D Trehan, Udit Mendiratta (for Karanjawala & Co.), Binu Tamta, Dhruv Tamta for the appearing parties.

The Judgment of the Court was delivered by

GANGULY, J. 1. We have heard learned counsel for the E parties.

2. Leave granted.

3. The subject matter of challenge before this Court is an F order dated 18th March, 2011 of the Allahabad High Court whereby the High Court on a petition under Section 397/401 of the Criminal Procedure Code (hereinafter 'Code') challenging the order dated 9th February, 2011 passed by Special Judicial Magistrate (CBI), Ghaziabad in Special Case G No.01 of 2011 (*Rajesh Talwar Vs. Unknown* under Section 302, I.P.C. P.S. S.C.B. C.B.I., Delhi) refused to interfere with Magistrate's order of taking cognizance.

4. By the said order dated 9th February, 2011, the Magistrate had taken cognizance of the offences under H

Sections 302/34 and 201/34 I.P.C. against the appellant and one Dr. Rajesh Talwar. The concluding portion of the order of the Magistrate is:-

> "While rejecting the conclusion given in the Final Report by the Investigating Officer, cognizance on the basis of Police report under section 190(1)(b) of Cr.P.C. is taken under section 302/34 and 201/34 IPC against accused Dr. Rajesh Talwar and Dr. Nupur Talwar for committing murders of Arushi and Hem Raj and for tampering with the proofs. The accused be summoned for appearance on 28.02.2011. Copies be prepared."

5. The entire case arises out of an unfortunate murder of a young girl namely, 'Aarushi' in her own residence and also the murder of one Hemraj, a domestic help. It appears that the said unfortunate murder of the young girl raised some kind of a sensation in public mind and an uproar. Be that as it may, sitting in the Courts of law, we have to steer clear of the public debate and follow the course of law.

6. Initially, the investigation was conducted by the Uttar Pradesh Police in which the implication of Dr. Rajesh Talwar and Dr. Nupur Talwar, parents of the deceased victim girl transpired. Thereafter, the investigation of the case was handed over to the C.B.I. on 29th May, 2008 on the basis of a notification by the State. Prior to that, on 23rd May, 2008, Dr. Rajesh Talwar was arrested. The CBI initially filed a closure report of the investigation. On the basis of that report, an application was filed by the C.B.I. under Section 169 of the Code before the Special Judicial Magistrate, C.B.I., Ghaziabad. The contents of the said petition read as under:

> "i. That accused Rajesh Talwar was arrested in the aforesaid case on 23.5.2008. Subsequently, following expiry of his police remand, this Hon'ble Court remanded him to judicial custody upto 11.7.2008 vide order dated 2.7.2008.

A ii. That the investigation of this case is still pending and all the facts and circumstances of the case are being investigated.

iii. That during investigation, the role of accused B Rajesh Talwar was thoroughly investigated regarding the aforesaid crime.

iv. That during investigation, the poly right to psychological analysis test of accused Rajesh Talwar was conducted and no deception has been C found in the test reports.

v. That during investigation, the cloths, shoes and finger palm/foot prints of accused Rajesh Talwar was forwarded/submitted to CFSL, New Delhi for D examination and expert opinion. The Scientific examination results could not connect accused Rajesh Talwar with the crime.

vi. That in view of the above circumstances, the further judicial custody remand of accused Rajesh Talwar E is not required in the interest of justice.

Prayer

It is, therefore, prayed that Judicial custody remand of F accused Rajesh Talwar may not be extended."

7. On the basis of the aforementioned prayer of C.B.I. under Section 169 of the Code, an order came to be passed on 11th July, 2008 by the learned Magistrate and Dr. Rajesh Talwar was released on his furnishing two sureties of Rs.5 lakh G each with a personal bond of the same amount.

8. Thereafter, the C.B.I. filed another closure report on 29th December, 2010. Then, on a notice being issued by the Court, a protest petition came to be filed by Dr. Rajesh Talwar. Only H thereafter, the impugned order of the Magistrate dated 9th

February, 2011 came to be passed. The learned Magistrate in his detailed order after considering various aspects of the matter took cognizance of the offence and passed the order, quoted above.

9. It is apparent from the detailed order that the Magistrate rejected the conclusion given in the official report of the Investigating Officer and took cognizance under Section 190(1)(b) of the Code.

10. Attention of this Court has been drawn to various parts of the CBI closure report and certain other documents by Mr. Ranjit Kumar, learned senior counsel appearing for the appellant.

11. Sitting in a jurisdiction under Article 136 of the Constitution, we do not feel inclined to go into all the factual aspects of the case. Obviously at this stage we cannot weigh evidence. Looking into the order of Magistrate, we find that he applied his mind in coming to the conclusion relating to taking of cognizance. The Magistrate has taken note of the rejection report and gave his prima facie observation on the controversy upon a consideration of the materials that surfaced in the case. We reproduce the conclusions reached by the Special Judicial Magistrate.

> "From the analysis of evidence of all above mentioned witnesses prima facie it appears that after investigation, on the basis of evidence available in the case diary when this incident occurred at that time four members were present in the house—Dr. Rajesh Talwar, Dr. Nupur Talwar, Arushi and servant Hem Raj; Arushi and Hem Raj, the two out of four were found dead. In the case diary there is no such evidence from which it may appear that some person had made forcible entry and there is no evidence regarding involvement of the servants. In the night of the incident, Internet was switched on and off in the

A house in regard to which this evidence is available in the case diary that it was switched on or off by some person. Private parts of deceased Arushi were cleaned and deceased Hem Raj was dragged in injured condition from the flat of Dr. Rajesh Talwar up to the terrace and the B terrace was locked. Prior to 15.5.2008, terrace was not locked. According to documents available on the case diary, blood stains were wiped off on the staircase, both the deceased were slit with the help of a surgical instrument by surgically trained persons and shape of injury C on the head and forehead was V shaped and according to the evidence available in the case diary that appeared to have been caused with a golf stick. A person coming from outside, during the presence of Talwar couple in the house could have neither used the Internet nor could have D taken the dead body of deceased Hem Raj to the terrace and then locked when the Talwar couple was present in the house. On the basis of evidence available in the case diary footprints stained with blood were found in the room of Arushi but outside that room bloodstained footprints were not found. If the assailant would go out after E committing murder then certainly his footprints would not be confined up to the room of Arushi and for an outsider it is not possible that when Talwar couple were present in the house he would use liquor or would try to take dead body on the terrace. Accused after committing the offence F would like to run away immediately so that no one could catch him.

On the basis of evidence of all the above witnesses and circumstantial evidence available in case diary during G investigation it was expected from the Investigating Officer to submit charge-sheet against Dr. Rajesh Talwar and Dr. Nupur Talwar. In such type of cases, when offence is committed inside a house, there direct evidence cannot be expected. Here it is pertinent to mention that CBI is the H highest investigating agency of the country in which the

public of the country has full confidence. Whenever in a case if any one of the investigating agencies of the country remained unsuccessful then that case is referred to CBI for investigation. In such circumstances, it is expected of CBI that applying the highest standards, after investigation it should submit such a report before the Court which is just and reasonable on the basis of evidence collected in investigation, but it was not done so by the CBI which is highly disappointing. If I draw a conclusion from the circumstances of case diary, then I find that in view of the facts, the conclusion of the investigating officer that on account of lack of evidence, case may be closed; does not appear to be just and proper. When offence was committed inside a house, on the basis of evidence received from case diary, a link is made from these circumstances, and these links are indicating prima facie the accused Dr. Rajesh Talwar and Dr. Nupur Talwar to be guilty. The evidence of witness Shoharat that Dr. Rajesh Talwar asked him to paint the wooden portion of a wall between the rooms of Arushi and Dr. Rajesh Talwar, indicates towards the conclusion that he wants to tamper with the evidence. From the evidence ... so many in the case diary, prima facie evidence is found in this regard. Therefore, in the light of above evidences conclusion of Investigating Officer given in the final report deserves to be rejected and there is sufficient basis for taking prima facie cognizance against Dr. Rajesh Talwar and Dr. Nupur Talwar for committing murder of deceased Arushi and Hem Raj and for tampering with the proof. At this stage, the principle of law laid down by Hon'ble Supreme Court in the case of *Jagdish Ram Vs. State of Rajasthan and another,* reported in AIR 2004 SC 1734 is very important wherein the Hon'ble Supreme Court held that investigation is the job of police and taking of cognizance is within the jurisdiction of the Magistrate. If on the record, this much of evidence is available that prima facie cognizance can be

A taken then the Magistrate should take cognizance. Magistrate should be convinced that there is enough basis for further proceedings rather for sufficient basis for proving the guilt."

B 12. Assailing the said order, a Criminal Revision was filed before the High Court under Sections 397 and 401 of the Code, not by Dr. Rajesh Talwar, father of the girl but by Dr. Mrs. Nupur Talwar, her mother.

C 13. The High Court passed its order dated 18th March, 2011 after a detailed consideration of the factual aspects and legal questions involved in the matter of taking cognizance and the same order is impugned before us.

14. In the concluding portion of its order, High Court held:

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"However, considering the facts of the case it is directed that in case the revisionist surrenders before the Special Judicial Magistrate (C.B.I.), Ghaziabad and applies for bail within a period of two weeks from today her bail application shall be dealt with in accordance with the law expeditiously."

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15. On the next day i.e. 19th March 2011, which was a Saturday, a Bench of this Court entertained at 7 P.M. an SLP against the High Court's order and passed the following order:-

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"List on the notified date. In the meanwhile, there shall be stay as prayed for. However, the petitioners shall deposit their passports with the trial Court on Monday i.e. 21.03.2011."

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16. Since then, the matter has remained pending before this Court.

17. Now the question is what should be the extent of judicial interference by this Court in connection with an order of taking

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cognizance by a Magistrate while exercising his jurisdiction under Section 190 of the Code. A

18. Section 190 of the Code lays down the conditions which are requisite for the initiation of a criminal proceeding.

19. At this stage the Magistrate is required to exercise sound judicial discretion and apply his mind to the facts and materials before him. In doing so, the Magistrate is not bound by the opinion of the investigating officer and he is competent to exercise his discretion irrespective of the views expressed by the Police in its report and may prima facie find out whether an offence has been made out or not. B C

20. The taking of cognizance means the point in time when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence which appears to have been committed. D

21. At the stage of taking of cognizance of offence, the Court has only to see whether prima facie there are reasons for issuing the process and whether the ingredients of the offence are there on record. E

22. The principles relating to taking of cognizance in a criminal matter has been very lucidly explained by this Court in *S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. and Ors.* – (2008) 2 SCC 492, the relevant observations are set out: F

> "19. The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of" and when used with reference to a court or a Judge, it connotes" to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view G H

A to initiating proceedings in respect of such offence said to have been committed by someone."

20. "Taking Cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his B mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or C not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance."

(para nos. 19 and 20 at page 499 of the report)

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23. The correctness of the order whereby cognizance of the offence has been taken by the Magistrate, unless it is perverse or based on no material, should be sparingly interfered with. In the instant case, anyone reading the order of the E Magistrate taking cognizance, will come to the conclusion that there has been due application of mind by the Magistrate and it is a well reasoned order. The order of the High Court passed on a Criminal Revision under Sections 397 and 401 of the code (not under Section 482) at the instance of Dr. Mrs. Nupur F Talwar would also show that there has been a proper application of mind and a detailed speaking order has been passed.

24. In the above state of affairs, now the question is what G is the jurisdiction and specially the duty of this Court in such a situation under Article 136?

25. We feel constrained to observe that at this stage, this Court should exercise utmost restrain and caution before interfering with an order of taking cognizance by the H Magistrate,otherwise the holding of a trial will be stalled. The

superior Courts should maintain this restrain to uphold the rule of law and sustain the faith of the common man in the administration of justice.

26. Reference in this connection may be made to a three Judge Bench decision of this Court in the case of *M/s. India Carat Private Ltd. Vs. State of Karnataka & Anr.* (1989) 2 SCC 132. Explaining the relevant principles in paragraphs 16, Justice Natarajan, speaking for the unanimous three Judge Bench, explained the position so succinctly that we would rather quote the observation: as under:-

> "The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer; and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused..."

27. These well settled principles still hold good. Considering these propositions of law, we are of the view that we should not interfere with the concurrent order of the Magistrate which is affirmed by the High Court.

28. We are deliberately not going into various factual

A aspects of the case which have been raised before us so that in the trial the accused persons may not be prejudiced. We, therefore, dismiss this appeal with the observation that in the trial which the accused persons will face, they should not be prejudiced by any observation made by us in this order or in
B the order of the High Court or those made in the Magistrate's order while taking cognizance. The accused must be given all opportunities in the trial they are to face. We, however, observe that the trial should be expeditiously held.

C 29. The appeal is accordingly disposed of.

R.P. Appeal disposed of.