

CASE NO.:
Appeal (crl.) 1211 of 2006

PETITIONER:
Sasi Thomas

RESPONDENT:
State & Ors.

DATE OF JUDGMENT: 24/11/2006

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T
(Arising out of S.L.P. (Crl.) No. 1540 of 2006)

S.B. Sinha, J.

Leave granted.

One Achamma (deceased) was married with Jose Paul Respondent No. 4 herein. After their marriage, they went to USA. Jose Paul was a Vice-President in a reputed bank in USA. The deceased was a nurse. They obtained naturalized citizenship in USA. Allegedly, the couple was not leaving a happy married life. Respondent No. 4 developed intimacy with one divorcee, viz., Lissy P.C. The deceased thereafter came back to India with her children on five years visa. She purchased a house in the year 1994. In 1996, Respondent No. 4 also came back to India. Appellant is her younger brother. She died on 24.01.1998. She was stated to have died of heart failure. Respondent No. 5 gave a certificate to that effect. The appellant made complaints to various authorities whereupon the body was exhumed on 22.04.1998. Thereupon only a post mortem was conducted. A final opinion was given on 18.06.1998 stating that she died of Organo Phosphorous Insecticide poisoning. No injuries on her person could have been found as mentioned in the report. The appellant contended that the dead body had injuries.

One Shri Durairaj, Inspector of Police who investigated into the matter issued a final form stating that the deceased could have committed suicide.

A writ petition came to be filed by the appellant herein praying that further investigation in terms of Sub-section (8) of Section 173 of the Code of Criminal Procedure should be directed to be carried out by the Central Bureau of Investigation (CBI). By an order dated 14.07.2000, further investigation was directed to be done by CB-CID. They submitted another final report on 19.11.2002 charging Respondent No. 4 for commission of offence of abetment of suicide under Section 306 and Respondent No. 5 for commission of offence under Section 201 of the Indian Penal Code.

Cognizance of the offence was taken. The trial has already commenced and it is stated that 47 witnesses have been examined. The appellant filed an application before the High Court of Madras purported to be under Section 482 of the Code of Criminal Procedure inter alia praying for further investigation in the aforementioned case by the CBI. A learned Judge of the said Court dismissed the said application stating:

"The learned counsel appearing for the petitioner would submit that some poisonous substance was found in the intestine of the

deceased as per the post mortem examination. He would further contend that there are materials already collected by the investigating agency, which makes out an offence under Section 302 of I.P.C. The first respondent had conducted the investigation and laid charge sheet for offences under Sections 306 and 201 of I.P.C. Now, the case is ripe for trial after the charges have been framed by the learned Assistant Sessions Judge, Ooty. The charge can be altered at any time under Section 216 of Cr.P.C., by the trial court, if it comes to the conclusion that a different offence is attracted.

Considering the facts and circumstances of the case, this Court finds that further investigation at this distance of time is not necessitated..."

The appellant is, thus, before us.

Mr. V.J. Francis, learned counsel appearing on behalf of the appellant, would submit that the High Court was not correct to take the said view without taking into consideration two important developments in the case, viz. a case from heart attack was made out at an initial stage, whereafter a case of abetment of suicide was made out, which would go to show as to how the investigation has been carried out both by the general police or by the CB-CID in the State of Madras.

The learned counsel would contend that there are various circumstances which would clearly point out that Respondent No. 4 murdered the deceased, some of which are as under:

- i. The death of Smt. Achamma was alleged to be sudden as per the version given by the servant of respondent no. 4 to the petitioner. This proved to be false later on.
- ii. The petitioner had asked the respondent no. 4 to keep the dead body of his sister till the arrival of all her relatives. This request was turned down by respondent no. 4 and the dead body was ready for burial at 2 pm on 25.1.1998.
- iii. No post mortem was conducted on the dead body.
- iv. Respondent no. 5 informed the petitioner that the cause of death of the deceased was heart attack and Respondent No. 5 had tried her best to revive the body.
- v. The deceased was said to be seriously sick from 6.30 p.m. on 24.1.1998, but she was taken to the hospital only at about 12.30 night. The body was carried to the hospital at the back of the jeep accompanied by the Respondent No. 4, one Father Mathew Edakkara, another brother of the Respondent No. 4 and one Shri Mathukutty and Shri Mani. Thereafter the information was conveyed by Respondent No. 4 about death after about 3 am on 25.1.1998.
- vi. The Respondent No. 4 was alleged to have been found happy after the death of his wife and he was found drinking happily in front of the room of the deceased, without letting anybody go in.
- vii. The children of the deceased had made a complaint to the Judicial Magistrate that their 'Daddy' was in the habit of beating their mother

(the deceased).

viii. On or about 16.3.1998 an application being made on behalf of the two children of the deceased, the Judicial Magistrate, Gudalur, had passed an order that the children be kept in the Hostel run by Mr. Herman. Despite the said specific order, Respondent No. 4 had taken away the children. No orders were obtained by Respondent No. 4 for their custody by him.

ix. The final report given by the Police Surgeon and Professor of Forensic Medicine of Coimbatore, Medical College, had reported that the deceased had died of Organo Prosperous Insecticide Poisoning.

x. On the basis of the said report dated 18-06-1998 the police had converted the whole incident from heart attack to one of suicide by the deceased herself by consuming poison. This was neither the case of Respondent No. 4 nor Respondent No. 5/Doctor, who had attended on her when the body was taken to the Pushpagiri Medical Hospital, where Respondent No. 5 was there.

xi. If the incident of consuming poison by the deceased as based on the report submitted by the post mortem doctor on 18.6.1998 there was no reason as to why such a report was not submitted by the police till 2002.

xii. One of the persons who accompanied the body (of the person who had committed suicide or had heart attack) is one Father Mathew Edakkara, Principal of Morning Star School. It is on record that the said priest was given a Maruti car by Respondent No. 4, as he had helped the family, and also to buy property.

xiii. Driver Shri Mani who had taken the deceased to Hospital, stated that he had brought the poison, and kept in the store room.

xiv. The Respondent No. 4 had suddenly gone to the United States to settle the Insurance Claim and get the benefits.

Our attention has been drawn to the counter-affidavit filed by Respondent No. 1 herein which is to the following effect:

"5. That there is no evidence to prove that it was a case of murder. The petitioner has listed out fourteen points in paragraph No. 5 to create suspicion against Jose Paul in respect of the death of Achamma. Certainly they are material circumstances to prove that Jose Paul was behind the death of his wife Achamma. These facts would support the case of the prosecution that Jose Paul committed cruelty as a result of which his wife achamma could have committed suicide. But these fourteen points are not sufficient to prove a theory that Jose Paul murdered his wife Achamma, as suspected by the petitioner."

Mr. R. Sundaravaradan, learned senior counsel appearing on behalf of the State, on the other hand, would contend that this Court should not exercise its discretionary jurisdiction to direct further investigation at this stage in the matter as the same would amount to a re-investigation.

Mr. K.V. Vishwanathan, learned counsel appearing on behalf of Respondent No. 4, would submit that if sufficient evidences are brought on

record, the Trial Judge could alter the charge in exercise of its jurisdiction under Section 216 of the Code of Criminal Procedure.

Mr. Dayan Krishnan, learned counsel appearing on behalf of Respondent No. 5, submitted that the question of directing a further investigation as against Respondent No. 5 does not arise as he has been charged only under Section 201 of the Indian Penal Code.

Before us, a counter-affidavit has been filed on behalf of the CBI. In its counter-affidavit the CBI has supported the impugned judgment.

Mr. A. Sharan, learned Additional Solicitor General, however, would contend that the same may be treated to be withdrawn and in the event, this Court forms an opinion that a case has been made out for further investigation, the CBI would take up the same.

The learned Additional Solicitor General urged that unfortunately it is possible that adequate materials had not been collected during investigation and in the event it is found that the investigating officers have failed to perform their statutory duties, this Court may issue appropriate direction in exercise of its jurisdiction under Article 142 of the Constitution of India.

Proper and fair investigation on the part of the investigating officer is the backbone of rule of law. A proper and effective investigation into a serious offence and particularly in a case where there is no direct evidence assumes great significance as collection of adequate materials to prove the circumstantial evidence becomes essential. Unfortunately, the appellant has not been treated fairly. When a death has occurred in a suspicious circumstance and in particular when an attempt had been made to bury the dead body hurriedly and upon obtaining apparently an incorrect medical certificate, it was expected that upon exhumation of the body, the investigating authorities of the State shall carry out their statutory duties fairly. The appellant alleges that no fair investigation has been conducted. It is clearly a matter of great concern that the authorities did not become alive to the situation. Although the dead body was buried on the premise that she died of heart attack, a final report was submitted stating that she might have committed a suicide. We do not know on what material, such an opinion was arrived at by the investigating officer. It is only because of the persistent efforts on the part of the appellant to move the High Court, a further investigation was directed to be made by CB-CID. Another final report was submitted that Respondent Nos. 4 and 5 have committed the offence under Sections 302 and 201 respectively.

While doing so, it is not known, whether fourteen circumstances enumerated by the appellant herein had been duly taken note of and investigation in this behalf had been carried out. Although the CBI in its counter-affidavit has supported the impugned judgment of the High Court but as noticed hereinbefore, it without looking into the documents opined that although the said circumstances are relevant but they themselves had not proved commission of offence of murder of the deceased by Respondent No. 4 herein. We regret to state that it was not expected of the CBI to file such an affidavit. Even the learned Additional Solicitor General appearing on behalf of the CBI was not satisfied therewith and as indicated hereinbefore sought to withdraw the same.

The investigating officer and particularly CB-CID should have made a thorough investigation. If the allegations made by the appellant are correct, the same depicts a sordid state of affairs.

The job of the investigating officer is to make investigation in right direction. The investigation must be in consonance with the ingredients of the offence. It cannot be haphazard or unmethodical.

We may notice that in *MC v. Bulgaria* [15 BHRC 627], where the investigation was carried out in a case of rape of minor by two boys as to

find out as to whether she was subjected to sexual intercourse upon applying a force in contradistinction "with her consent". The European Court of Human Rights referring to Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 opined that the general approach should be :

- (a) the existence of a positive obligation to punish rape and to investigate in rape cases.
- (b) the modern conception of the elements of rape and its impact on the substance of member states' positive obligation to provide adequate protection.
- (c) the court's task.

As regards application of the court's approach, it opined:

"180. Furthermore, it appears that the prosecutors did not exclude the possibility that the applicant might have not consented, but adopted the view that in any event, in the absence of proof of resistance, it could not be concluded that the perpetrators had understood that the applicant had not consented (see the text of the prosecutors' decisions in paras 64 and 65, above). The prosecutors forwent the possibility of proving the perpetrators' mens rea by assessing all the surrounding circumstances, such as evidence that they had deliberately misled the applicant in order to take her to a deserted area, thus creating an environment of coercion, and also by judging the credibility of the versions of the facts proposed by the three men and witnesses called by them (see paras 21, 63 and 66-68, above).

186. As regards the government's argument that the national legal system provided for the possibility of a civil action for damages against the perpetrators, the court notes that this assertion has not been substantiated. In any event, as stated above, effective protection against rape and sexual abuse requires measures of a criminal law nature (see paras 124 and 148-153, above).

187. The court thus finds that in the present case there has been a violation of the respondent state's positive obligations under both arts 3 and 8 of the convention. It also holds that no separate issue arises under art 13 of the convention."

It was further found that there has been a violation of Articles 14 and 41 of the Convention and on that ground granted damage of 8000 euros to the prosecutrix besides costs and expenses.

Indisputably, in a given case, this Court can direct an investigation by the CBI. [See *Paramjit Kaur (Mrs.) v. State of Punjab and Others* (1996) 7 SCC 20]

In *Gudalure M.J. Cherian and Others v. Union of India and Others* [(1992) 1 SCC 397], this Court held:

"8. It is obvious from the affidavit of the Senior Superintendent, Police that the nuns who are victims of the tragedy are not coming forward to identify the culprits in an identification parade to be held by the Magistrate. The petitioners on the other hand, have alleged that the four persons who have been set up as accused by the police are not the real culprits and the police is asking the sisters

to accept the four arrested persons as culprits. In the face of these averments and keeping in view the facts and circumstances of this case, we are of the view that ends of justice would be met if we direct the CBI to hold further investigation in respect of the offences committed between the night of July 12 and 13, 1990 as per the FIR lodged at Police Station, Gajraula."

Yet recently, in *Ramesh Kumari v. State (NCT of Delhi) and Others* [(2006) 2 SCC 677] this Court directed the CBI to register a case and investigate the complaint filed by the appellant therein in September, 1997. [See also *Shashikant v. C.B.I. & Others* 2006(11) SCALE 272]

The powers of this Court both under Articles 32 and 142 of the Constitution of India are plenary in nature.

The High Court or this Court in exercise of the said power is entitled to reach injustice wherever it is found. But, it is not a case where cognizance had not been taken. It is not even a case where a direction under Sub-section (8) of Section 173 of the Code of Criminal Procedure can be issued at this stage. It is also not a case, in our opinion, to interfere with the trial of the case.

Reliance has been placed by Mr. Sundaravaradan on *Amar Chand Agarwala v. Shanti Bose and another* [AIR 1973 SC 799] wherein for quashing the charges at a preliminary stage, the High Court was found to have relied on oral and documentary evidences adduced on behalf of the complainant in presence of accused. The said decision, although in our opinion, cannot be said to have any direct application in the instant case but signifies the justifiability or otherwise of exercise of the jurisdiction of this Court at this stage.

We may furthermore notice that a Division Bench of this Court in *Rajesh and Others v. Ramdeo and Others* [(2001) 10 SCC 759] refused to direct a fresh and further investigation opining:

"\005Since the investigation agency has already filed the charge-sheet on the basis of which the accused persons are being proceeded against, if any further materials are available, the Court may alter the charge framed. In the circumstances, we have no hesitation to come to the conclusion that the High Court has overstepped its jurisdiction in issuing the impugned direction calling upon further investigation into the matter, which in our considered opinion, would be an abuse of the process of the court\005"

This decision albeit is not supported by any reason. It has not taken into consideration the binding precedents as was urged by the learned Additional Solicitor General. But, as at present advised, we do not intend to take a contrary view.

We may, however, note that in *Hasanbhai Valibhai Qureshi v. State of Gujarat and Others* [(2004) 5 SCC 347], a Division Bench of this Court stated the law, thus:

"10. Therefore, if during trial the trial court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case

warrant or necessitate.

11. Coming to the question whether a further investigation is warranted, the hands of the investigating agency or the court should not be tied down on the ground that further investigation may delay the trial, as the ultimate object is to arrive at the truth."

As such an option is maintainable, we have no doubt that the learned Judge if any occasion arises, may take recourse thereto.

We may furthermore notice that this Court in *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others* [(2004) 4 SCC 158] opined:

"18. According to the appellant *Zahira* there was no fair trial and the entire effort during trial and at all relevant times before also was to see that the accused persons got acquitted. When the investigating agency helps the accused, the witnesses are threatened to depose falsely and the prosecutor acts in a manner as if he was defending the accused, and the court was acting merely as an onlooker and when there is no fair trial at all, justice becomes the victim.

54. Though justice is depicted to be blindfolded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of courts and erode in stages the faith inbuilt in the judicial system ultimately destroying the very justice-delivery system of the country itself. Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings.

55. The courts, at the expense of repetition we may state, exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth. It cannot be oblivious to the active role to be played for which there is not only ample scope, but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice, in a case where the role of the prosecuting agency itself is put in issue and is said to be hand in glove with the accused, parading a mock fight and making a mockery of the criminal justice administration itself."

Such a direction, thus, can be issued where there had been complete failure of justice and in a case where the investigating and prosecuting agencies were found to have not performed their role in the manner it was

expected to do.

The question has again been considered by this Court in Rajiv Ranjan Singh 'Lalan' (VIII) and Another v. Union of India and Others [(2006) 6 SCC 613] wherein referring to Union of India v. Sushil Kumar Modi [(1998) 8 SCC 661, this Court opined:

"\005It is thus clear from the above judgment that once a charge-sheet is filed in the competent court after completion of the investigation, the process of monitoring by this Court for the purpose of making CBI and other investigative agencies concerned perform their function of investigating into the offences concerned comes to an end and thereafter, it is only the court in which the charge-sheet is filed which is to deal with all matters relating to the trial of the accused including matters falling within the scope of Section 173(8). 38. We respectfully agree with the above view expressed by this Court. In our view, monitoring of the pending trial is subversion of criminal law as it stands to mean that the court behind the back of the accused is entering into a dialogue with the investigating agency. Therefore, there can be no monitoring after the charge-sheet is filed."

The decisions referred to hereinbefore clearly show that the Trial Court even is not powerless. It, if a case is made out, can exercise its discretionary jurisdiction under Section 311 of the Code of Criminal Procedure as also Section 391 thereof. In the event of open marshalling of the evidence, it comes to the opinion that a case has been made out for alteration of charge, it indisputably can do so in exercise of its power under Section 311 of the Code of Criminal Procedure. In a given case again it can consider the question from the viewpoint of the appellant herein as regards the existence of circumstances which point out to the guilt of the Respondent No. 4.

We are also of the opinion that it is a fit case where the appellant should be permitted to engage a lawyer on his behalf who would assist the public prosecutor. We place on record that the learned Counsel for the State assured us that the same shall not be objected to. We hope and trust that in the event the State is of the opinion that the prosecution should be conducted by a public prosecutor of repute and having sufficient experience, it would not hesitate to appoint one.

We would also direct the learned Trial Judge if any occasion arises therefor, to exercise his power under Section 311 of the Code of Criminal Procedure upon considering the facts and circumstances of this case.

We may reiterate that although it is not beyond the jurisdiction of this Court to direct further investigation by the CBI as contradistinguished from reinvestigation at this stage, but we decline to do so keeping in view the fact that 47 witnesses including the appellant himself have already been examined and recourse thereto can be taken if during trial a case therefor is found to be have been made out.

This appeal is disposed of with the aforementioned directions.