

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.09.2016

CORAM

THE HONOURABLE MR. JUSTICE N. KIRUBAKARAN

WRIT APPEAL No. 1181 of 2016

R. Paramasivan

..Appellant

Vs.

1. The Home Secretary,
Government of Tamil Nadu,
Secretariat, Chennai - 9.
2. The Director General of Police,
DGP Office, Mayilapore,
Dr. Radhakrishnan Salai,
Chennai - 5.
3. The Superintendent,
Central Prison,
Puzhal, Chennai.
4. Government Royapettah Hospital,
rep. by its Dean,
No.1, West Cott Road,
Chennai - 600 014.
5. The Additional Director,
Central Bureau of Investigation,
Rajaji Bhavan, Chennai.
6. The Dean,
Kilpauk Medical College Hospital,
Poonamallee High Road,
Kilpauk,
Chennai - 10.

..Respondents

Prayer: Writ Appeal as against the order dated 19.09.2016 passed in W.P.

No. 32885 of 2016.

For Appellant :: Mr.R. Sankarasubbu
assisted by
Mr.P. Vijendran

For Respondents :: Mr.C. Manishankar,
Additional Advocate General
assisted by
Mr.R. Prathapkumar,
Additional Government Pleader

J U D G M E N T

The original writ petition was filed seeking a Writ of Mandamus directing the 2nd respondent therein to take immediate and necessary steps to entrust the case, relating to the death of one Ramkumar in judicial custody to the Central Bureau of Investigation for investigation.

2. The appellant herein, who is the father of deceased Ramkumar, was the petitioner before the learned Single Judge. The deceased Ramkumar, who was in judicial custody, with regard to the murder of one “Swathi” on 24.06.2016 at Nungambakkam Railway Station, is said to have died on 18.09.2016. The Police stated that while in custody, the said Ramkumar, had bitten a live wire in the prison and committed suicide.

3. The version putforth by the Police is contested by the appellant stating that the said Ramkumar was done to death, while in prison, by the Police Officials. Lacking trust in the State machinery, the appellant herein approached this Court in W.P. No. 32885 of 2016 seeking a mandamus to transfer the investigation relating to the death of Ramkumar to the Central Bureau of Investigation.

4. During the hearing of the writ petition, the learned counsel for the appellant/petitioner waived the prayer for CBI enquiry and sought only the presence of a private Doctor, on behalf of the appellant/petitioner, at the time of postmortem of the body of Ramkumar along with Government Surgeons. The learned Single Judge, after hearing both the parties, while declining to accept the request of the appellant to nominate a Doctor of his choice, directed the inclusion of one more Doctor from another Government Hospital along with the team of three other Government Doctors nominated for that purpose.

5. The aforesaid order of the learned Single Judge declining to grant relief to the appellant/petitioner was taken up by way of an appeal before a Division Bench of this Court. After hearing both the parties, the learned Senior Judge, leading the Bench, Justice Huluvadi G. Ramesh, opined

that since the case pertains to custodial death, it would be advisable to allow an independent Forensic Expert to be present at the time of conduct of postmortem as the same would be, in no way, prejudicial to the case of the prosecution and would, in fact, fortify the stand of the State about its fairness whereas the learned Puisne Judge, Justice S. Vaidyanathan opined that the presence of an independent person with Forensic knowledge would lead to creation of doubts in the minds of the public about the arbitrary nature of the conduct of State machinery and suggested induction of one more Government Doctor in the panel of Doctors constituted for the purpose of conducting postmortem, instead of an independent person of the choice of the appellant.

6. In view of the difference in opinion, the matter was referred to My Lord The Honourable Chief Justice for listing the matter before a third Judge and that is how, the matter has come before this Court.

7. Heard Mr.R. Sankarasubbu, learned counsel appearing for the appellant and Mr.C. Manishankar, learned Additional Advocate General appearing for the respondents.

8. Mr.R. Sankarasubbu, learned counsel for the appellant would make the following the submissions:

(i) Firstly, the learned counsel would contend that since the death of Ramkumar has occurred, while he was in judicial custody, there has been a failure on the part of the State to safeguard the right to life of the accused/remand prisoner. Though the accused is said to have committed suicide by biting a live wire, according to the learned counsel, the live wire, which the accused is said to have bitten, carried only 220W and it could not have caused his death, in view of the connection of the circuit to Earth Leakage Circuit Breaker (ELCB in short);

(ii) Secondly, according to the learned counsel, right from the date of arrest of the said Ramkumar on 02.07.2016, the Police was torturing him and in fact, the Police Officials tried to slit his throat, while effecting arrest and in this regard, the appellant herein, had lodged a complaint against the Police Officials concerned in Sengottai Police Station on 19.07.2016;

(iii) Thirdly, the learned counsel would submit that even while in custody, the said Ramkumar was not allowed to mingle with other remand prisoners and was kept in isolation continuously and harassed. In this context, he relied upon paragraph Nos. 46

and 121 in the judgment of the Honourable Supreme Court rendered in *Sunil Batra V. Delhi Administration and others etc.* reported in AIR 1978 SC 1675 to contend that under-trials were allowed to mingle with each other. The said paragraphs are extracted hereunder:

“46. The Tihar Jail is the scene and glimpse of it is good. Law is not a brooding omnipresence in the sky but a behavioural omnipotence on the earth, a do-don't calculus of principled pragmatism. So, any discussion of prison law problems must be preceded by a feel of the cell and surroundings. For this reason, we now set out the inspection notes left by Chief Justice Beg, who visited the 'condemned cell' along with his two brothers on the bench:

“We inspected the cell in which the prisoner was confined. We were relieved to find that conditions there did not correspond to the picture which eloquent arguments of his counsel before us conjured up in our minds. We had been led to believe that the prisoner was kept in some kind of a dungeon with only a small hole through which light could penetrate only when there was enough sunshine. It was true that the prisoner was living in a room with a cemented floor and with no bed, furniture or windows in it. The light came from a ventilator with iron bars on the wall at the back of the room and the wide gate of iron bars in front. The light was, however, enough. It is also true that there was no separate room for the petitioner to take a bath in or to answer calls of nature. But, in this very room, the site of which given on a diagram furnished by the jail authorities, water and sanitary fittings were installed in one corner of the room. In front of the room there was a small verandah with pakka walls and iron gates separating each side of it from a similar verandah in front of an adjoining cell. The entrance into this verandah was also through a similar iron gate. The inner room in which the prisoner was confined had also a gate of iron bars. All gates were with iron bars on frames so that one could see across them through the spaces between the bars. All these gates were locked. We learned that the petitioner was able to come into the verandah at

certain times of the day. At that time only, he could communicate with other similarly kept prisoners whom he could see and talk to through the iron bars. In other words, for all practical purposes, it was a kind of solitary confinement.

We did not see a separate guard for each prisoner in the row of cells for prisoners sentenced to death. All these prisoners were certainly segregated and kept apart. But it is difficult to determine, without going into the meaning of 'solitary confinement', as a term of law whether the condition in which the petitioner was kept amounted to solitary confinement'. Probably, if small windows with iron bars were provided between one cell and another, the prisoners could talk to each other also so that the confinement would no longer be solitary despite the fact that they are kept in separate adjoining cells.

The petitioner did not complain of any discomfort other than being kept in 'solitary confinement' and being made to sleep on the floor. He asked us to see another part of the prison where undertrials were kept. When we visited that part, we found dormitories provided there for under-trial prisoners who had beds there and their own bedding and clothing. They also had, in that part of the prison, radio sets, some of which belonged to the prisoners and others to the jail. The under-trials were allowed to mix with each other, play games or do what they wanted within a compound. "(emphasis supplied)

...

121. Condemned prisoners like Batra shall be merely kept in custody and shall not be put to work like those sentenced to rigorous imprisonment. These prisoners shall not be kept apart or segregated except on their own volition since they do not come under S. 30(2). They shall be entitled to the

amenities of ordinary inmates in the prison like games, books, newspapers, reasonably good food, the right to expression, artistic or other, and normal clothing and bed. In a sense, they stand better than ordinary prisoners because they are not serving any terms of rigorous imprisonment, as such. However, if their gregarious wishes induce them to live in fellowship and work like other prisoners they should be allowed to do so. To eat together, to sleep together, to work together, to live together, generally speaking, cannot be denied to them except on specific grounds warranting such a course such as homosexual tendencies, diseases, violent proclivities and the like. But if these grounds are to be the basis for revocation of advantages to the prejudice of the sentencee he should be given a hearing in brief in essential compliance with the canons of natural justice.”

The learned counsel would further contend that even at the time of arresting the said Ramkumar, the guidelines given in the judgment of the Honourable Supreme Court in ***D.K. Basu V. State of West Bengal reported in (1997) 1 SCC 416*** were not followed.

(iv) Fourthly, the learned counsel would submit that the appellant is justified in doubting the fairness of the State machinery in conducting investigation as death had occurred when the said Ramkumar was in judicial custody. In this regard, he referred to the guidelines issued by the National Human Rights Commission dated 21.11.2001 wherein it has been stated that a

Local Doctor succumbs to Police pressure, which leads to distortion of facts and therefore, postmortem examination, to be done, in cases of custodial death, and the same should be videographed. Therefore, the appellant seeks the presence of his nominee Doctor, namely, Dr.P.Sampathkumar, Head of Department, Forensic Sciences, Sri Ramachandra Medical College and Hospital, Porur, at the time of autopsy. The learned counsel also relied upon the judgment of a Division Bench of this Court in H.C.P. NO. 1541 of 2015 (*Parthiban V. State and three others*) to contend that Dr. Sampathkumar, Vice Principal, Sri Ramachandra Medical College had earlier been permitted to conduct postmortem by this Court.

(v) Fifthly, according to the learned counsel, the Police Officials are accused and the State is an offender. As the victim died while in judicial custody, there is possibility of intimidation of witnesses and tampering with documents. In this regard, he relied upon the judgment of the Honourable Supreme Court rendered in *Niranjan Singh and Another V. Prabhakar Rajaram Kharote and Others reported in (1980) 2 SCC 559*. Therefore, he would submit that to find out the cause of death, an expert of appellant's choice should be present, which will assist the

prosecution also.

9. Besides, the learned counsel for the appellant relied upon the judgment of the Honourable Apex Court in ***People's Union For Civil Liberties and Another V. State of Maharashtra and Others reported in (2014) 10 SCC 635*** wherein certain guidelines framed by The Universal Declaration of Human Rights (UDHR) have been referred to and one such guideline speaks about affording the victim's family and the legal representatives, their right to request an independent qualified representative to be present during autopsy of the victim's body. Another judgment which has been relied on by the learned counsel for the appellant is the one rendered in ***Nilabati Behera V. State of Orissa reported in AIR 1993 SC 1960*** to contend that *convicts, prisoners or under-trials are not denuded of their fundamental rights under Article 21 and it is only such restrictions, as are permitted by law, which can be imposed on the enjoyment of the fundamental right by such persons and that there is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life.* A reference has also been made to a learned Single Judge's order in W.M.P. No. 8712 of 1988 in W.P. No. 6000 of 1988 (***Baggiyam V. Collector and Another***) wherein the respondents were directed to arrange for exhumation of the daughter of the petitioners therein for conducting

postmortem.

Hence, the learned counsel seeks the presence of Dr. P. Sampathkumar, Vice Principal, Sri Ramachandra Medical College, Porur, at the time of postmortem on the body of deceased Ramkumar.

10. On the other hand, Mr.C.Manishankar, learned Additional Advocate General would submit that

(i) There cannot be any direction to include the Medical expert of the appellant's choice to be present at the time of conducting Autopsy, as there is no legal right available to the appellant.

(ii) As per Section 174(2)(v) of the Criminal Procedure Code, the body of the victim should be forwarded to the nearest Civil Surgeon or other qualified medical man appointed by the State and therefore, it is the duty of the State and not the appellant.

(iii) As per Section 176(1)(A) of the Criminal Procedure Code, a magisterial enquiry has been ordered to go into the cause of death and when such being the position, without post-mortem report, the enquiry report cannot be made ready.

(iv) A mere apprehension cannot be a ground for inclusion of the

appellant's medical expert in the team for conducting Autopsy.

(v) There is no allegation anywhere stated in the affidavit or grounds that the Doctors are incompetent or biased against the appellant and in the absence of such allegation, the appellant cannot insist for the presence of his representative.

(vi) As per the Criminal Procedure Code, the Government Surgeons alone are entitled to conduct post-mortem and if the private Doctor is allowed to take part in the Autopsy, definitely it will cause problem to the team.

(vii) The guidelines issued by National Human Rights Commission, which has been relied upon by the learned counsel for the appellant would be complied with by proper videography by police Videographer and therefore there cannot be any grievance in this regard.

(viii) As far as the Judgment relied on by the learned counsel for the appellant reported in **(2014) 10 Supreme Court Cases 635 (People's Union for Civil Liberties and another vs. State of Maharashtra and others)** is concerned, the said Judgment is in respect of police encounters and therefore, the said Judgment is not applicable to the facts of the case.

(ix) Mr.C.Manishankar, learned Additional Advocate General relying on

the Judgment reported in **1992 (1) MWN (Cr.) 156 (P. Murugan vs. State of Tamil Nadu and 3 others)** would contend "that the post mortem to be conducted by the Doctors and the report of the Sub Collector, who conducts enquiry in the case are enough to know the cause of the death, which may be useful for proper and fair investigation to bring out the truth.

(x) As far as the Judgment relied upon by the counsel for the appellant in H.C.P.No.1541 of 2015, it is submitted by the learned Additional Advocate General that it was a honour killing case and therefore, the said Judgment is not applicable to the facts of the case.

11. Heard the learned counsel on either side and perused the materials available on record.

12. Though so many contentions have been raised by both the appellant and countered by the Additional Advocate General regarding arrest, non following of certain guidelines, separation of the victim from other remand prisoners and the assault of the police officials on the victim, at the time of arrest on 02.07.2016, the relevant issue which has been referred to this Court is only with regard to the right of the appellant to have a medical expert of his

choice to be present at the time of Autopsy to be conducted on the body of the deceased Ramkumar.

13. It is true that the son of the appellant, namely, Ramkumar died in judicial custody in the Jail on 18.09.2016. The version of the police is that the said Ramkumar snapped the live wire and committed suicide. A perusal of the Accident Register dated 18.09.2016 would reflect that Ramkumar died due to electric shock. According to the appellant, the said death is said to have been caused because of the assault of the police in the Jail, whereas the Police contend that it is a suicide. Only to bring out the truth about death, the appellant seeks for an independent medical expert along with medical team nominated by the Government to be present at the time of conducting Autopsy.

14. Though the appellant is of the apprehension that the Doctors will be biased in favour of the police and the truth will not come out, the only relevant material, which has been placed before this Court is the Guidelines of the Universal Declaration of Human Rights (UDHR) for effective prevention and investigation of extra-legal, arbitrary and summary executions. In the Judgment reported in **(2014) 10 SCC 635**, cited supra, in paragraph No.28, the Hon'ble Supreme Court has held as follows:-

“28. The Universal Declaration of Human Rights (UDHR) has framed certain general principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions. The principles so framed by the UDHR are intended to guarantee independence while investigating police killings and help in preventing potential for abuse, corruption, ineffectiveness and neglect in investigation”.

At this juncture, it is relevant to extract hereunder provision 16 of the UDHR:-

“ Affording the victim's family and legal representative the right to request that an independent qualified representative be present during the autopsy of the victim's body”

A perusal of the aforesaid provision would make it clear that it deals with affording victim's family and legal representatives, the right to request an independent qualified representative be present during autopsy on the victim's body. If at all the appellant has got any suspicion with regard to the calibre or fairness of the Doctors, the appellant can ask for appointment of an independent qualified representative and not an independent qualified

representative of his choice, as contended by the appellant. As already pointed out, the victim died in the judicial custody and to know the cause, autopsy is to be conducted by qualified Doctors. To discredit the fairness of the Doctors, no material has been placed either in the affidavit or before this Court except the oral contentions made in the Court. Mere apprehension, as rightly pointed out by Mr.C.Manishankar, learned Additional Advocate General, cannot be the basis to suspect or discredit the Doctors, who are highly qualified. Resultantly, the appellant cannot insist upon an independent qualified expert of his choice at the time of conducting Autopsy. Further, it would create practical problems for the Government surgeons nominated by the State. Moreover, conducting Autopsy is a very serious issue and no third party can have any role even if he is highly qualified and it is not known as to how he would conduct himself at the time of Autopsy. Therefore, the request of nomination for qualified representative of appellant's choice at the time of conducting Autopsy on the body of Ramkumar was rightly declined by the learned Single Judge. Therefore, this Court agrees with the view taken by Mr.Justice S.Vaidyanathan, who opined that an independent person with forensic knowledge would infact lead to creation of doubt in the minds of the public about the nature of investigation conducted by the State Machinery.

15. As per Section 174(2)(v) Cr.P.C. only the police officials have

forwarded the body of the deceased to the surgeons for Autopsy. Moreover, the Magisterial enquiry under Section 176(1)(A) has been ordered and the Magistrate could not conclude the enquiry because autopsy was not conducted.

16. The privy council in *King Emperor V. Khwaja Nazir Ahmad reported in Indian Appeals Vol. LXXI 203* held that the statutory duty of the police to investigate the case cannot be interfered with and the relevant paragraph is extracted as follows:-

“In their Lordship's opinion, however, the more serious aspect of the case is to be found in the resultant interference by the court with the duties of the police. Just as it is essential that every one accused of a crime should have free access to a court of justice so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of

the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to intervene in an appropriate case when moved under s. 491 of the Criminal Procedure Code to give directions in the nature of habeas corpus. In such a case as the present, however, the court's functions begin when a charge is preferred before it, and not until then. It has sometimes been thought that s. 561A has given increased powers to the court which it did not possess before that section was enacted. But this is not so. The section gives no

new powers, it only provides that those which the court already inherently possesses shall be preserved and is inserved, as their lordships think, lest it should be considered that the only powers possessed by the court are those expressly conferred by the Criminal Procedure Code and that no inherent power had survived the passing of that Act.”.....

17. As already stated, as per the Criminal Procedure Code, the body of the victim has been referred to the Surgeons and in this regard the Government has nominated three surgeons viz.,

1. Dr.S.Selvakumar, Professor, Forensic Science, KMC, Kilpauk Chennai;
2. Dr.Manikandaraja, Assistant Professor, Forensic Science, KMC, Kilpuak, Chennai; and
3. Dr.K.V.Vinod, Assistant Professor, Forensic Science, KMC, OD @ Government Roaypettah Hospital, Chennai.

However, the learned Single Judge while passing the order in the writ petition, nominated another Doctor from another Hospital viz., Dr.Balasubramanian, Professor, Forensic Medicines, Stanley Hospital, Chennai along with three member team. Apart from that, Justice S.Vaidyanathan, also suggested induction of one more Doctor in the Post Mortem panel instead of an independent person of the appellant's choice.

18. The appellant is the father of the deceased Ramkumar, who was accused of murdering Swathi, a Software Engineer and the said Ramkumar died in Judicial custody. Though the apprehension of the appellant is without any basis and not sustainable, only to clear the alleged apprehension, **this Court directs the Director of All India Institute of Medical Sciences (AIIMS), New Delhi to depute a Forensic expert, well experienced in conducting post mortem, to join the team of four member medical team to conduct post-mortem on the body of the deceased Ramkumar, which now lies in the mortuary of Royapettah Hospital, Chennai. The four Government surgeons and AIIMS surgeon as a team shall conduct post mortem on the body of the deceased Ramkumar on 23.09.2016 or 24.09.2016 or any other day, in any event, on or before 27.09.2016. Only to clear the cloud and in an endeavour to do complete justice, without discrediting or causing aspersion on the State Government Doctors, this order is passed.**

19. The State shall make special and necessary arrangements for the nominated Doctor of the AIIMS for travel by Air and the travel and accommodation at Chennai and also his return to New Delhi. It goes without saying that the State shall make all necessary security arrangements to avoid any untoward incidents during the presence of the Doctor at Chennai. The expenses, in this regard, will have to be borne by the State.

20. The respondent State is directed to pay a sum of Rs.50,000/- (Rupees fifty thousand only) to the AIIMS Doctor as a token of appreciation for the service to be rendered by him to the State. After the Post mortem, it is open to the State to handover the body of the deceased Ramkumar to his father Mr.R.Paramasivan.

21. The Reference made to this Court is answered as follows:-

“This Court agrees with the view taken by Justice S.Vaidyanathan

that the presence of an independent person with forensic knowledge would lead to creation of doubt in the public about the nature of the investigation made by the State machinery”.

However, this Court includes one Doctor from AIIMS, New Delhi, along with four Government Surgeons to conduct postmortem.

22.09.2016

nv/rg

(Note to Office: Issue order copy today (23.09.2016))

Note: Registry is required to place the order to the Hon'ble Chief Justice to get appropriate order so that the order could be communicated as an urgent one to the Director of All India Institute of Medical Sciences, New Delhi, through Telephone as well as through fax for the purpose of conducting post mortem on 23.09.2016 or 24.09.2016 or any other day on or before 27.09.2016)

N. KIRUBAKARAN, J.

nv/rg

W.A. No. 1181 of 2016

22.09.2016