

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

MONDAY, THE 5TH DAY OF JANUARY 2015/15TH POUSHA, 1936

Crl.Rev.Pet.No. 1126 of 2012 ()

AGAINST THE ORDER IN CMP NO.3412/2011 IN CC 887/2010 of JUDICIAL FIRST
CLASS MAGISTRATE-IV, KOZHIKODE DATED 14-02-2012

REVISION PETITIONER/PETITIONER/DE-FACTO COMPLAINANT:

RAMACHANDRAN KRISHNA VARMA
AGED 51 YEARS, S/O.KRISHNA VARMA RAJA, B1-3(H3)
JEEVAN BHIMA NAGAR, KARAPPARAMBA, KOZHIKODE.

BY ADVS.SRI.M.T.SURESHKUMAR

RESPONDENT/RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-682 031.

BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
05-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

ANNEXURE 1: TRUE COPY OF THE FIR DATED 18.6.2010 IN CRIME NO.327 OF 2010 OF THE NADAKKAVU POLICE STATION.

ANNEXURE-2: TRUE COPY OF THE FINAL REPORT DATED 22.9.2010 IN CRIME NO327 OF 2010 OF THE NADAKKAVU POLICE STATION.

ANNEXURE 3: TRUE COPY OF CMP NO.3412 OF 2011 IN CC NO.887 OF 2010 FILED BY THE PETITIONER BEFORE THE JFCM-IV, KOZHIKODE DATED 15.7.2011.

ANNEXURE 4: TRUE COPY OF THE ORDER DATED 14.2.2012 IN CMP NO.3412 OF 2011 IN C.C.NO.887 OF 2010 ON THE FILE OF THE JFMC-IV, KOZHIKODE.

// TRUE COPY //

TKS

P.S. TO JUDGE

C.T.RAVIKUMAR, J.

Crl.R.P.No.1126 of 2012

Dated 5th January, 2015

ORDER

This Criminal Revision Petition is directed against the order dated 14.2.2012 passed by the Court of Judicial First Class Magistrate-IV, Kozhikode in C.M.P.No.3412 of 2011 in C.C.No.887 of 2010. The petitioner herein is the defacto complainant in the aforesaid calender case which was registered against one Vidyadharan.P.R., the accused therein for commission of offences under Sections 420, 427 and 406 of the Indian Penal Code. Annexure-1 is the FIR in Crime No.327 of 2010 registered at Nadakkavu Police Station based on the complaint filed by the petitioner herein. After conducting an investigation Annexure-2 final report was filed in the aforesaid crime and evidently, cognizance was taken thereon and it was registered and taken on file as C.C.No.887 of 2010. Annexure-2 would reveal that the allegations of commission of offences punishable under Sections 420, 427 and 406 IPC were investigated. It would reveal that besides the offences under Sections 420, 427 and 406, IPC commission of offence punishable under Section 201, IPC was also alleged against the said accused. The case of the petitioner herein is that the accused

Vidyadharan is a car mechanic and he is running a workshop in the name and style "Chakra Motors" in Nadakkavu, Kozhikode. The petitioner entrusted a Skoda Laura Car purchased by him for his sister's son bearing registration No.TN 37 BA 9750 with the accused for repairing. The accused demanded and accepted an amount of ₹ 50,000/- towards repair charges. Thereafter, on numerous times the petitioner approached the accused and demanded for the return of the car after completing the repair works. The accused assigned one or other reason on such occasions and later, the petitioner went to the workshop to get back the car and to entrust the repair works with some other person. At that point of time the accused informed him that the repair works were over and even then he did not return the car. Owing to the suspicious conduct from the part of the accused the petitioner entered into the workshop and searched for his car and found the same in the workshop. However, he was shocked to see that the original rear bumper, the rear door and other important parts of the car fitted by the manufacturer had been removed and in its place duplicate parts have been placed. According to the petitioner, on being asked about the same the accused informed him that he had fitted those parts taken from the petitioner's car in another car brought to the workshop after an accident. It is raising such allegations that the petitioner filed the complaint for

initiating prosecution proceedings against the accused. It was that complaint which was investigated and ultimately led to the registration of the aforesaid crime and ultimately in the registration of C.C.No.887 of 2010.

2. The petitioner attributes defective investigation in this case. According to the petitioner, the Investigating Officer should have conducted proper investigation to locate the person to whom the spare parts of his car were fraudulently sold and then to search and seize those spare parts. As noticed hereinbefore, after conducting the investigation the Investigating Officer found that the records which were kept in the workshop capable of giving clue to such aspects were destroyed and therefore, he is incapacitated to conduct investigation in that regard. In such circumstances, the offence under Section 201, IPC was also added. After the learned Magistrate took cognizance of the report filed in Crime No.327 of 2010 of Nadakkavu Police Station under Section 173(2), Cr.P.C., the petitioner filed C.M.P.No.3412 of 2011 seeking further investigation under Section 173(8),Cr.P.C. The said application viz., Annexure-3 was considered by the learned Magistrate and Annexure-4 order was passed. As per Annexure-4, the said application was dismissed. It is challenging the said order that the captioned Criminal

Revision Petition has been filed.

3. I have heard the learned counsel appearing for the revision petitioner and also the learned Public Prosecutor.

4. At the very outset, it is to be noted that the petitioner has not chosen to bring on record the accused in C.C.No.887 of 2010 as a party to this petition. The petitioner cannot contend that he is unaware of the whereabouts of the accused in C.C.No.887 of 2010 and in fact, the petitioner had lodged the complaint against one Vidyadharan and ultimately the aforesaid crime was also registered against the said Vidyadharan. It is also evident that as against the said accused after the investigation Annexure-2 final report was already filed accusing him of commission of offences under Sections 420, 427, 406 and 201 IPC. I will deal with the question whether the petitioner should be made to bring the accused in the array of respondents in this case, for the purpose of seeking the relief of further investigation.

5. As noticed hereinbefore, after the learned Magistrate took cognizance on Annexure-2 final report filed in Crime No.327 of 2010 and took it on file and registered it as C.C.No.887 of 2010 the petitioner filed

Annexure-3 application. It is on that application that the impugned Annexure-4 order has been passed by the learned Magistrate. Essentially, the prayer of the petitioner was for a further investigation under Section 173(8), Cr.P.C. The only ground raised by the petitioner for seeking such a prayer is that no earnest attempt was made by the Investigating Officer to find out the stranger to whom original parts of his car were sold by the accused and to recover those parts. Paragraph 6 of the impugned order would reveal that the said aspects were considered in detail by the learned Magistrate. The prosecution records were perused by the learned Magistrate and the Magistrate arrived at the conclusion that the Investigating Officer had conducted a thorough investigation and it is only thereafter that he filed final report adding Section 201, IPC as well. It is to be noted that in Annexure-3 application the petitioner has taken up a contention that his statement was not recorded by the Investigating Officer. After perusing the records of the case the learned Magistrate found that the said contention of the petitioner is bereft of any basis as the petitioner's statement was recorded by the Investigating Officer under Section 161, Cr.P.C. and it is enclosed along with the final report. The circumstances under which Section 201, IPC was added against the accused was also considered by the learned Magistrate. It was found that one Ragesh Kumar who was

the General Manager of 'Chakra Motors' was questioned by the Investigating Officer and his statement was also recorded. As a matter of fact, that statement is also enclosed along with the final report and it would reveal that the statement is to the effect that no records were available in the workshop of the accused regarding the works done to the vehicles brought for maintenance and repair prior to April, 2010. In fact, the entrustment of the vehicle in question was in April, 2009 and therefore, the Investigating Officer could not find out the details of the person to whom parts of the petitioner's car were allegedly sold by the accused. It is obvious that during the investigation the Investigating Officer has questioned the General Manager of the workshop belonging to the accused and allegedly, it is the non-availability of records that disabled the Investigating Officer to identify the person in whose vehicle the parts of the petitioner's car were fitted. Considering such aspects the learned Magistrate found that no fruitful purpose would be served by issuing an order for a further investigation. Firstly, I will consider the question whether the accused should be given an opportunity of being heard in respect of the prayer for further investigation under Section 173(8), Cr.P.C. The decision of the Hon'ble Apex Court in **Samaj Parivartan Samudaya v. State of Karnataka (2012 (2) KLT SN 124 (C.NO.119)SC)** assumes relevance in deciding the said question.

The Hon'ble Apex Court took note of the fact that the provisions under Section 173(8), Cr.P.C. open with a *non obstante* clause that nothing in the provisions of Section 173(1) to 173(7), shall be deemed to preclude a further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate. Ultimately, after considering all aspects with reference to the decisions in **Hemant Dhasmana v. Central Bureau of Investigation and Another (2001) 7 SCC 536** and **Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj v. State of Andhra Pradesh & ors. (JT 1999 (4) SC 537)** the Hon'ble Apex Court held that even where a charge sheet is filed the court enjoys the jurisdiction to direct further investigation into the offence and it is not necessary to hear the accused before any such direction is made. In the said circumstances, I am of the view that the question whether direction for further investigation be issued could be considered even without hearing the accused. It is to be noted that an accused cannot raise an expostulation in the matter of further investigation and in that context the maxim '*Nallus commodum capere potest de injuria sua propria*' has to be remembered. Going by that, persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. I am not oblivious of the salutary position till an accused is found guilty he is to be

presumed as innocent. I referred the maxim to say that when there is an accusation regarding the commission of an offence the alleged offender cannot be permitted to urge that it cannot be subjected to inquiry, trial or investigation, in accordance with law.

6. A bare perusal of sub-section (8) of Section 173, Cr.P.C. would make it clear that even after laying of the final report the court can order for a further investigation in appropriate cases. In fact, even without such an order the investigating agency could conduct further investigation and it is recognized under Section 173(8), Cr.P.C. (See the decision in **Sri.B.S.S.V.V.V.Maharaj** v. **State of Uttar Pradesh** reported in **1999 Crl.L.J 3661 (SC)**).

7. Even though the court is having such a jurisdiction to direct for a further investigation even after cognizance was taken on a final report filed under Section 173(2)Cr.P.C. the subsequent re-opening of the investigation could not be ordered without any basis or material on record. So also, Section 173(8) though empowers the Investigating Officer to conduct a further investigation, subject to the provisions under Section 173, Cr.P.C., even without an order from the court it cannot be a power to conduct a re-investigation and rope in evidence and proceed

against. In such circumstances, I am of the view that before passing an order for further investigation invoking the power under Section 173(8) Cr.P.C. the court concerned has to look into the question whether there exist sufficient and valid reasons to order a further investigation as the existence of power is one thing and the exercise of power is different. In this case, it is evident that the contention of the petitioner is that no attempt was made by the Investigating Officer to find out the person to whom the parts of his car were sold by the accused and also to recover those parts.

8. The learned Magistrate on going thorough the prosecution records found that the Investigating Officer had questioned one Ragesh Kumar, the General Manager of 'Chakra Motors' and recorded his statement. The said statement that forms part of the prosecution records would reveal that the said Ragesh Kumar had given a statement that no records pertaining to the maintenance and repair works prior to April, 2009 are available in the workshop. In this case, the car in question was entrusted for repair works admittedly in April, 2009. In the said circumstances, evidently, the Investigating Officer arrived at the conclusion that with the disappearance or destruction of such records it would not be possible to proceed further to identify the person in whose

vehicle such parts were fitted after taking them from the petitioner's car. In such circumstances, he added Section 201, IPC as well, in the final report. True that, if the investigating officer found that a person had caused disappearance of evidence of the offence committed with an intention to screen the offender from legal punishment he would be justified in adding the said section in the final report. Essentially, the said section is designed to punish the attempt to frustrate the course of justice. One cannot expect that when a vehicle entrusted for repairing works such works would be carried out by the General Manager of the particular concern. It is of common knowledge that such works would be carried out by workers engaged for that purpose. There is nothing on record to show that any such workers were questioned. No earnest attempt was made to identify the concerned worker/workers who carried out the repairing work in respect of the two vehicles viz, the car of the petitioner and the other vehicle which was brought to the workshop after an accident. It cannot be believed that during the period in question quite a large number of vehicles met with accident were brought to the said workshop to make the workers incapable of recollecting any information capable of identifying the vehicle or its owner. It is also to be noted that the car of the petitioner is Skoda Laura and therefore, it cannot be taken that so many such cars must have been brought for

repair to the said workshop to make it difficult for the workers to identify who had removed such parts from the car belonging to the petitioner. No effective investigation seems to have been conducted in that direction. The question is whether the Investigating Officer has made any earnest effort to find out such aspects. In this context, it has to be remembered that the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. If the further investigation would help the court in arriving at the truth and to do real, substantial and effective justice it is to be ordered (see the decision in **Rama Chaudhary v. State of Bihar** reported in **AIR 2009 SC 2308**.

If a defective investigation is sensed by the court and if a further investigation would help the court to do real and substantial justice it would only be in the interest of justice to order a further investigation. I have carefully gone through the case diary which would reveal that none of the workers then employed in the workshop was questioned as part of the investigation. The investigating officer had questioned only one Ragesh Kumar, the General Manager of Chakra Motors and he had recorded only his statement to the effect that the records regarding the maintenance and repair works prior to April, 2009 were not available. If a further investigation is made, the possibility of getting further evidence

which would enable the court to find out the truth cannot be ruled out in this case. The learned counsel for the petitioner relied on the decision of a Division Bench of this Court in **Shaji v. State of Kerala** reported in **2003(2) KLT 929** in support of the contention for a further investigation. The learned counsel brought my attention to paragraph 20 (5) of the said judgment. Paragraph 20 contains the circumstances under which a further investigation could be ordered. Paragraph 20(5) reads thus:-

“20(5) If the complainant files a petition saying that real culprits were not included in the final report or there is lacuna in the investigation which will cause failure of justice and if the Magistrate after considering the matter comes to the *prima facie* conclusion that proper investigation was not conducted, he is not helpless, the Magistrate will be free to order further investigation to avoid failure of justice.”

It is evident from the aforequoted portion of the said judgment that in case the complainant concerned files a petition contending that the real culprit is not included in the final report or there is lacuna in the investigation which would cause failure of justice, it requires a serious consideration. In this case, evidently, the petitioner sought for further

investigation raising such contentions. The observations made hereinbefore would reveal the lacuna in the investigation. Merely, because the investigating officer has added an offence under section 201, IPC, that by itself cannot be a factor for dissuading the court from ordering a further investigation. I have no hesitation to hold that the apprehension of the petitioner that if trial is conducted with the evidence collected this far, it would ultimately result in failure of justice, is having substance. It will not be inapposite in this context to refer to a decision of the Hon'ble Apex Court in **H. N. Rishbud and another v. State at Delhi (AIR 1955 SC 196)** wherein it was held that where the objection to the effect that the investigation is illegal is taken out at the earlier stage of the trial the court would have to take necessary steps to get the illegality cured and the defect rectified, by ordering such investigation as the circumstances of an individual case might call for. Such a course is not altogether outside the scope of the scheme of the Code of Criminal Procedure. This, according to me, is the desirable and rightful course open to the court not only, because it might ultimately enable the court to arrive at the truth and to do real and substantial justice but also for the reason that it might enable the court to obviate a possible prejudice that might cause and might make him to wait till the conclusion and then to discharge the difficult burden of establishing that failure of justice has

been occasioned. The Hon'ble Apex Court referred to Section 537, Cr.P.C. (the old Code) and observed thus:-

"If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in -'**Prabhu v. Emperor**', **AIR 1944 PC 73 (C)** and .- '**Lumbhardar Zutshi v. The King**', **AIR 1950 PC 26 (D)**."

These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present cases with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

In the said context the present position available can be understood by referring to Section 465, Cr.P.C. and it reads thus:-

"465. Finding or sentence when reversible by reason of error, omission or irregularity.-(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or

other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

The aforesaid reasonings will squarely suit in the present position of law, as well, as is obvious from the provision of law under Section 465, Cr.P.C. Once the trial was proceeded and concluded the party has to make out that there was, in fact, failure of justice.

In the said circumstances, I am of the view that it is an eminently fit case where a further investigation, to obviate a possible prejudice and also to enable the court to find out the truth and to do real and substantial justice, has to be ordered. I do not propose to issue any specific direction regarding the manner or aspects in which further investigation is to be conducted. In the circumstances, there will be a direction to the investigating officer in Crime No. 327 of 2010 of Nadakkavu Police Station to conduct a further investigation taking note of the observations made hereinbefore. Till a report under section 173(8), Cr.P.C. is filed before the court all further proceedings in

C.C.No.887 of 2010 shall stand stayed. The investigating officer shall conduct further investigation and file a report, in accordance with law, as expeditiously as possible and upon such filing of further report proceedings in C.C.No.887 of 2010 shall be continued, in accordance with law.

This revision petition is disposed of, accordingly.

Sd/-
C.T.RAVIKUMAR
Judge

dlk/TKS