

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN
&
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

FRIDAY, THE 10TH DAY OF JULY 2015/19TH ASHADHA, 1937

WA.No. 297 of 2014 () IN WP(C).10541/2013

AGAINST THE JUDGMENT IN WP(C).NO.10541/2013 of HIGH COURT OF KERALA
DATED 16-08-2013

APPELLANT(S)/PETITIONER IN THE WRIT PETITION:

P.A.CHANDRA DAS, AGED 59 YEARS,
S/O. LATE AYYAPPAN, PEYAVILA PADINJATTATHIL,
IVERKALA EAST P.O., VIA PUTHUR, KOLLAM DISTRICT.

BY ADVS.SRI.P.VIJAYA BHANU (SR.)
SRI.R.SURAJ KUMAR
SRI.SUNIL J.CHAKKALACKAL

RESPONDENT(S)/RESPONDENT IN THE WRIT PETITION:

1. STATE OF KERALA
REPRESENTED BY THE SECRETARY TO GOVERNMENT OF KERALA,
DEPARTMENT OF HOME AFFAIRS, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM 695001
2. THE DIRECTOR GENERAL OF POLICE,
THIRUVANANTHAPURAM 695001
3. THE DISTRICT POLICE CHIEF,
KOLLAM 691001
4. THE DEPUTY SUPERINTENDENT OF POLICE,
KARUNAGAPPALLY.
5. THE CIRCLE INSPECTOR OF POLICE,
KOLLAM 691001
6. THE SUPERINTENDENT OF POLICE,
CB-CID, KOLLAM 691001
7. THE SUPERINTENDENT OF POLICE,

CENTRAL BUREAU OF INVESTIGATIONS, SPECIAL CRIME BRANCH,
MALABAR HOUSE, T.C.NO 11/304, VELLAYAMBALAM,
THIRUVANANTHAPURAM 695001

8. THE DIRECTOR,
CENTRAL BUREAU OF INVESTIGATIONS, NEW DELHI 110001

R1-R5 BY GOVERNMENT PLEADER
R1-R5 BY ADDL.DIRECTOR GENERAL OF PROSECUTION SRI.TOM JOSE
PADINJAREKKARA
BY SRI.P.CHANDRASEKHARA PILLAI, STANDING COUNCIL FOR C.B.I.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 18.06.2015, THE COURT
ON 10-07-2015, DELIVERED THE FOLLOWING:

Bb

V.K.MOHANAN & RAJA VIJAYARAGHAVAN.V, JJ

W.A.297 of 2014

Dated 10th July, 2015

JUDGMENT

Raja Vijayaraghavan.J.

1. Distraught father of a 22 year old girl, whose life was snuffed out by a inhuman and barbaric act on 22.12.2006 is the appellant. The appeal was filed challenging the judgment dated 16.8.2013 in W.P.(C). 10541 of 2013 in which his prayer to direct further investigation by the 7th respondent, Central Bureau of Investigation, of Crime No.610 of 2006 of Sasthamcotta police station was found as one without merits, and the same was dismissed.

2. Vijayalakshmi, the daughter of the appellant herein, was working in a Cashew factory by name 'St.Mary's Cashew factory". On 22.12.2006 while she was returning back from work, she was gang raped, put in a sack filled

with stones while she was still alive and was immersed in a waterlogged area in the property belonging to one Babukuttan Pillai near to the brick kiln of one Ajith Kumar within the limits of Sasthamcotta Panchayath. The deceased drowned to death as well.

3. Based on the statement furnished by the appellant, on 22.12.2006 at 10.00 pm. Crime No.610 of 2006 of Sasthamcotta police station, was originally registered under the head "woman missing". The body of the deceased was recovered on the next day . Thereafter, investigation was conducted by the Circle Inspector of Police, Sasthamcotta and on 24.12.2006 at 5 P.M. , two workers from West Bengal who were working in the brick kiln of Ajithkumar, were arrested. Case rested exclusively on circumstantial evidence and the prosecution attempted to bring home the guilt of the accused on the basis of last seen theory and various incriminating circumstances and also scientific evidence.

4. After investigation, final report was submitted before the jurisdictional Magistrate for offence punishable under Sections 392, 376(g), 302 and 201 r/w Section 34 of the IPC and under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

5. It is the case of the appellant that respondents 4 and 5 herein had carried out the investigation in a very shabby manner and according to the appellant, the actual culprits who were instrumental in committing the gang rape and murder, have escaped from the clutches of law. The appellant has also contended that immediately after the funeral of his daughter, the brick furnace belonging to Ajith Kumar was set on fire which, according to him, was for the purpose of destruction of evidence. Several other doubtful circumstances were noticed by the appellant which according to him probalised his version that the true facts were not unearthed by the investigating agency. The appellant submitted Exhibit P 4 representation dated 9.2.2007 before the District Collector pointing out his

grievances . As the appellant was aggrieved by the act of the Investigating Agency in arraying the workers from West Bengal as the accused, he filed representation before the higher authorities requesting for further investigation of the crime. On the basis of his request, investigation was taken over by the Crime Branch CID, Kollam Unit. It is the case of the appellant that even thereafter, the investigation did not proceed in the proper lines and that the Investigating Officers did not address the various flaws in investigation pointed out by the appellant. In order to substantiate this aspect the appellant produced Exhibit P 5 representation, which reveals that the appellant had been incessantly knocking the doors of the authorities.

6. According to the appellant, the subsequent investigation conducted by the Crime Branch CID, was just a face saving measure and they merely confirmed the findings of the earlier investigating Agency which is the local police. The material witnesses of the locality who could have given a truthful version was not examined and

no investigation was conducted with regard to the removal of all traces of evidence after the recovery of the dead body of Vijayalakshmi, was the contention of the appellant.

7. Aggrieved by the inaction , the appellant preferred W.P.(C).16418 of 2009 before this Court. This Court had directed the Investigating Agency to file a detailed statement but in the meantime, the trial in the Sessions Case had commenced. Finally, when the case came up, one of the accused was convicted and consequently , as per judgment dated 13.9.2010, the Writ petition was dismissed.

8. According to the appellant, as per the judgment dated 22.2.2010, produced as Ext.P7 in the writ petition, the Principal Sessions Judge, Kollam, after appreciation of evidence, had come to the finding that the 1st accused in the crime was guilty and he was convicted and sentenced for offence punishable under Sections 376(g), 392, 302 and 201 of the IPC and was sentenced accordingly. The 2nd

accused was acquitted of all charges holding that the prosecution has not been able to prove their case beyond the shadow of reasonable doubt as against the said accused.

9. According to the appellant, during the course of trial, while being examined under Section 313 of the Code of Criminal Procedure the 1st accused stated before the Sessions Court that his employer, Ajith Kumar and his friends Rajesh and Pushpakumar were also involved in the said crime. It was his grievance that this aspect was not investigated by the police from the very inception .

10. On the strength of this revelation, the appellant approached the Chief Minister of Kerala, by filing several representations. Thereafter, the State Government ordered an enquiry to be conducted in the matter and the statement of the appellant was recorded by the CBCID, Kollam. According to the appellant, he had stated about the involvement of three other persons also in the said

offence. Though there were materials to substantiate this aspect, the Investigating Agency did not make an attempt to produce into the matter with rectitude, is the contention of the appellant. A copy of the report of investigation was not given to him, despite placing request.

11. In the said circumstances, the appellant submitted Ext.P13 representation before the 1st respondent, the State of Kerala, to entrust the further investigation in Crime No.610 of 2006 of Sasthamcotta police station with the 7th respondent , the Central Bureau of Investigation. In the said representation, various grievances entertained by the appellant was stated. He had also highlighted the statement of one of the accused in his 313 statement about the involvement of influential persons of the locality in the commission of murder of his daughter. Since no action was taken by the 1st respondent to the representation submitted, the writ petition was preferred praying for issuance of a writ of mandamus to the 1st respondent to entrust the further investigation of Crime

No.610 of 2006 of Sasthamcotta police station to the CBI.

12. Before the learned Single Judge, the 7th respondent entered appearance and objected to the request of the petitioner and it was pointed out that, the case has already been investigated by the local police and the CBCID and that there is nothing to show that the investigation by the CBCID is defective in any manner. It was also contended that the statement made by one of the accused in his 313 statement has no value and cannot be treated as evidence to order further investigation.

13. The learned single Judge after considering the contentions of the appellant as well as the 7th respondent, took note of the fact that the main contention raised by the appellant is that the 1st accused at the time of questioning under Section 313 of the Cr.P.C had made mention of the involvement of three persons namely Ajith Kumar, Rajesh and Pushpakumar. It was also taken note of the contention of the appellant that he had occasion to meet the

convicted 1st accused in the jail and the 1st accused had reiterated his stand while speaking to the appellant. After taking note of the fact that the investigation conducted by the local police was reviewed by the CBCID, it was found that there was nothing to show that the claim made by the petitioner is true. Finally, it was concluded that merely because the 1st accused had spoken about the involvement of three other persons, the same cannot be taken as a ground for ordering further investigation. It was also found that the trial of the case was already over and one of the accused who was arrayed by the prosecution as a primary culprit has already been convicted. On these grounds, the learned single Judge has held that the case was one without merits and the same was dismissed. It is against the said judgment that this Appeal is preferred reiterating the very same contention

14. It is pertinent to note that the Appeal filed by the convicted accused, Mahabul was pending before a Division Bench of this Court as Crl.A.831 of 2010. When the Writ

Appeal had come up for hearing , the Division Bench held it appropriate that W.A.297 of 2014 also be heard along with CrI.A.831 of 2010 and based on the said direction as per the orders of the Hon'ble Chief Justice, the Writ Appeal was also heard.

15. The Writ Appeal was considered by us after hearing the arguments of the counsel for the appellant and the learned ADGP in CrI.A.831 of 2010.

16. We have heard Sri.P.Vijayabhanu learned senior counsel appearing for the appellant in W.A.297 of 2014 and Sri.P.Chandrasekhara Pillai the learned Standing Counsel for the CBI, arrayed as 7th respondent and Sri.Tom Jose Padinjarekkara, the learned Additional Director General of Prosecution, in the matter .

17. The learned senior counsel, in his submissions elaborately took us through the various aspects of the prosecution case and submitted that the persons who

have been arrayed in the final report are merely scapegoats and the actual culprits responsible for this heinous crime is moving around scot free. Elaborating on the arguments, the learned Senior counsel has submitted that the investigating Agency for reasons best known to them, concentrated on marshalling evidence against the Bengali workers of Ajith Kumar instead of finding the truth. The learned Senior counsel pointed out that the recovery effected at the instance of the accused was stage managed and the scientific evidence which was the mainstay of the prosecution case was beset with inconsistencies and contradictions. Expatiating on this aspect, the learned Senior counsel also highlighted the contradictions in the evidence of the prosecution brought out through the Investigating Officer and also the Scientific Assistant. Taking us through the various representations submitted by the appellant, it was contented that the appellant has been highlighting his grievances even during the investigation stage when he noticed that the investigating agency was not proceeding in the proper

manner. According to him, the investigation was conducted in a very shabby manner with a calculated intent to let the real culprits escape. It is also submitted that the statements of the appellants under S.161 of the Cr.P.C was not recorded properly and none of the outstation workers were questioned. It is argued that various material facts to suggest the involvement of local people in the said crime was not adverted to by the investigating agency in spite of repeated requests. Though the investigating agency was informed about the efforts made by the certain known persons of the locality to destroy material evidence they did not initiate any action. It was also argued that the statement of the Bengali worker in his 313 statement would further emphasize the contention of the appellant that his apprehensions were genuine. Taking us through the judgment rendered by the Sessions Court which was produced as Ext.P7 in the writ petition, the learned Senior counsel has submitted that the learned Sessions Judge has given much emphasize to the evidence of recovery and the scientific evidence to hold that the 1st accused was guilty

of gang rape and murder. It was pointed out that the case of the prosecution is one of gang rape by the Bengali workers but the learned Sessions Judge has founded his conviction only on one accused. It was further pointed out that it is the case of the prosecution that the deceased was brutally raped in an open ground on the side of the waterlogged area belonging to Babukuttan Pillai but there was not even an abrasion on the back side of the deceased. The learned senior counsel also took us through the evidence of recovery and that of the material witnesses and pointed out the inconsistencies to emphasize the fact that the grave injustice have been committed in the instant case. The learned senior counsel has placed reliance on the judgment of this Court in **Mani M.M. v. State of Kerala (2012 (3) KLT 118)** to advance the proposition that there is no inhibition in ordering or conducting further investigation when fresh evidence throwing light on the crime previously investigated and tried by the Court comes to the notice of the police. Reliance was also placed of the judgment in **Popular**

Muthiah v. State rep. by the Inspector of Police (2006 (7) SCC 296) to bring home the point that this Court in exercise of its inherent power can direct further investigation against persons who are not charge sheeted and were not accused at the stage of trial but whom the High Court felt should have been included in the chalan. It was fairly submitted by the learned senior counsel that the said jurisdiction has to be exercised only in the most exceptional cases after applying its mind to the materials on record so as to be satisfied about the existence of a prima facie case against such persons and after ascertaining objectively as to whether any useful purpose will be served by issuing such direction particularly after long lapse of time. The learned senior counsel also placed on the decision in **Zahira Habibulla H. shake and anr. V. state (2004 (4) SCC 158)** popularly known as Best bakery case and also of para 43 in **Vinay Tyagi v. Irshad Ali @ Deepak and Others reported in (2013 (5) SCC 762)** to advance the case of the appellant and to bring home the point that this was one of those

exceptional cases where the powers under Article 226 of the Constitution of India is to be exercised to order further investigation or reinvestigation by the CBI.

18. On the other hand, the learned counsel for the 7th respondent, Sri.K.Chandrasekhara Pillai, with characteristic flair and vehemence has submitted that the apprehension expressed by the appellant are on the basis of mere surmises and the investigation conducted by the local police and the crime Branch thereafter, did not reveal that anyone other than the two Bengali workers were involved in the commission of the crime. It was pointed out that the Circle Inspector and two Officers of the rank of Deputy Superintendent of Police have conducted investigation during various stages and no other conclusion could be reached by them. It was pointed out that the local police have conducted a fool proof investigation and their conclusion was based on scientific evidence and recoveries on the strength of the disclosure statement made by the accused. According to the learned counsel, the heinous

crime was perpetrated by the two out of State workers and the learned Sessions Judge had exhaustively considered all the circumstances and concluded that all the circumstances unerringly pointed to the guilt of the workers who were arrayed as accused. Several decisions were placed before us by the learned Standing counsel for the CBI to substantiate that the contentions of the appellant are hollow and there was no need for any further investigation. Finally, It was submitted that ordering investigation in a case of instant nature by the premier investigating agency of the country is unwarranted. No exceptional circumstance was brought out, that too after the elapse of almost nine years from the date of incident to entrust the investigation with the elite agency. It was also argued that this is a case based exclusively on circumstantial evidence and the long lapse of time would have wiped off all circumstances from the face of earth. The learned counsel also placed reliance on the judgment in **State of Karnataka v. Suvarnamma (2015 (1) SCC 323)** to advance the position that even if there are minor

lapses in the investigation the role of the Court is to ascertain the truth from the materials on record and minor discrepancies that occur in evidence are to be ignored. It was submitted basing on **State of Panjab v. Jagir Singh (1974 2 SCC 277)** that a criminal trial is not like a fairy tale wherein one is free to give flight to ones imagination and fantasy. It concerns itself only with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. It was submitted that the apprehensions expressed by the appellant are nothing but imaginations in his mind and the unsettling of the final report and ordering of further investigation was not warranted. Finally, the learned Standing Counsel submitted that the writ petition and also the writ Appeal are merit less and the same be dismissed. He also placed reliance on **Vinay Tyagi v. Irshad Ali @ Deepak and Others reported in (2013 (5) SCC 762)** to bring home the point that the re-investigation/ further investigation should be directed by superior courts sparingly , only in exceptional cases where investigation already conducted is

so unfair, tainted, mala fide and in violation of settled principles of investigative canons that it pricks the judicial conscience of the courts .

19. Sri. Tom Jose Padinjarekkara, the learned Additional Director General of Prosecution submitted with much vehemence and clarity that there was nothing to doubt in the prosecution case. According to the learned ADGP, the finding in the charge was based on the materials which was revealed during investigation. The conclusion arrived at by the investigating agency was vindicated by the finding of the Sessions Judge as regards the involvement of the out of State worker who was arrayed as the 1st accused. It was pointed out that this Court will not be justified in ordering re-investigation or further investigation in a case of this nature as the appellant himself is in the dark, even at this stage, as regards the identity of the assailants as claimed by him. It was pointed out that it would be a wrong precedent to unsettle the considered judgment and finding of the learned Sessions Judge based

on some statements made by one of the accused in his 313 statement. To fortify his arguments, the learned ADGP has placed reliance on **Sangeet and Another v. State of Haryana (2012 (11) SCALE 140), Neel Kumar @ Anil Kumar v. State of Haryana (2012 (5) SCC 766) , Munshi Prasad and Others v. State of Bihar (2002 (1) SCC 351), Mohanan V. State of Kerala (2000 (2) KLT 562), State of Maharashtra v. Suresh (2000 (1) SCC 471), Earabhadrapa v. State of Karnataka (1983 (2) SCC 330), Baiju v. State of M.P. (1978 (1) SCC 588), Mangaraju v. State of Andra Pradesh (AIR 2001 SC, 2677), Govinda raju v. State of Karnataka (2013 Crl.Law Journal 4710), NCT of Delhi v. Sunil (2001 (1) SCC 652) and Mohan Anna Chavan v. State of Mahaarashtra (2008 (7) SCC 561).**

20. We have to confess that we are facing a very extraordinary situation. At the time of hearing the appeal filed by the convicted accused against the sentence of

conviction under Section 302 and 376(2)(g) of the IPC , the father of the victim is before us asserting that the wrong person has been convicted. We have meticulously gone through the evidence in Crl.A.831 of 2010, and the discussions from para 42 of the judgment onward will reveal our conclusions with regard to the various circumstances. We deem it fit and proper to observe that the judgment in Crl.A.831 of 2010 shall form part of this judgment.

21. After analyzing the evidence in that case we have observed that the investigation conducted by PW33 and reviewed by PW35 and also Sri.P.S.John, the Deputy Superintendent of Police, who is no more, has not been very fair and full proof. The investigation was less than satisfactory. It was borne out that the evidence let in by the Investigating Officer was contradictory to the evidence of material witnesses and also the scientific assistant. The seizure of incriminating materials from the scene does not appear to be believable. It is also found that the

recoveries effected at the instance of the accused was unreliable and it created shadow of doubts in our mind. After exhaustively considering the evidence let in by the prosecution in a case based exclusively on circumstantial evidence, we acquitted the accused holding that he is entitled to the benefit of reasonable doubt .

22. At this juncture it has to be mentioned that while extending the benefit of doubt to the accused we have taken note of the various aspects which sowed seeds of doubts in our mind in the mode adopted by investigation Officer to reach the conclusion in the final report. Though it is stated that the investigation conducted was reviewed by DYSP P.S.John, no document is placed either in the Criminal Appeal or in the writ petition . We fail to understand as to how the superior police officer who reviewed the investigation conducted by the circle inspector did not notice the incongruities in the evidence of recovery and the scientific evidence which were so apparent and also the contradictory statement of the

witnesses. That leads us to the conclusion that the investigation conducted by the CBCID also left a lot to be desired and they were merely following the foot steps of the earlier agency.

23. The crime was committed on 22.12.2006 and several aspects of evidence brought to our notice reveal that the investigation was casually done and we felt that the grievance expressed by the appellant are well founded. At the same time, we also take note that the main contention raised by the appellant is with regard to the statement given by the 1st accused in his 313 statement which by itself cannot be taken as sufficient enough reason to order further investigation or re-investigation as prayed for by the appellant/petitioner .

24. It has been held by this court that Investigation of the crime is within the domain of the police. For the reason that once a crime has been investigated and charge filed against one or more accused persons and the trial

proceeded against him ending in his conviction/acquittal, it does not postulate that where fresh evidence throwing light on the crime previously investigated and tried by the Court comes to the notice of the police, it cannot be probed at all. (See **Mani M.M. V State of Kerala 2012 (3) KLT 118**) As far as the convicted accused is concerned as he has already been tried of an offence charged against him and as he has undergone substantial part of the sentence after the initial order of conviction and later acquitted in the Appeal filed by him, he will be entitled to the insulation from further prosecution in respect of such offence on the principle 'autre fois acquit' or 'autre fois convict' as enjoined and mandated under S.300 of the Code.

25. At the same time, it does not appear to us that this is one of those cases where we will be justified in ordering re-investigation by the CBI. At the same time, while acquitting the 1st accused, after granting him benefit of doubt, we have issued a direction to the State Police

Chief to entrust the matter relating to Crime No.610 of 2006 of the Sasthamcotta police station with an Officer of utmost integrity and investigative prowess to look into the various aspects of the case and to consider whether further investigation or re-investigation, as the case may be, is required. We deem it appropriate that the Officer so entrusted with the investigation may submit a report before the State police Chief and the said authority may take appropriate action in accordance with law if any new facts come to light.

26. We have taken this extra ordinary decision because of the special facts and circumstances and since we have a genuine doubt in our mind that the actual truth has not been unraveled during investigation. we are of the considered view that , attempt will have to be made at least at this stage, to trace out the truth.

27. In the result, this Writ Appeal is disposed of directing the State Police Chief to entrust the matter

relating to Crime No. 610 of 2006 of the Sasthamcotta police station with an Officer not below the rank of a Superintendent of Police, of utmost integrity and investigative prowess, to look into the various aspects of the case and to consider whether further investigation or re-investigation as the case may be is required. The said Officer shall submit a report within 4 months from the date of entrustment before the State Police Chief and the said authority shall take appropriate action in accordance with law, if any new facts come to light.

With the above directions the Appeal is disposed of.

Sd/-

V.K.MOHANAN
Judge

Sd/-

RAJA VIJAYARAGHAVAN.V.
Judge

MrCs

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