

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AURANGABAD**

CRIMINAL WRIT PETITION NO. 956 OF 2016

Suman w/o Dattu Lokhande ...Petitioner

VERSUS

The State of Maharashtra & anr. ...Respondents

.....

Shri N.V.Gaware, advocate for petitioner

Shri N.T.Bhagat, A.P.P. for respondent no.1

Shri N.B.Narwade, advocate for respondent no.2

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CORAM : N.W.SAMBRE, J.

DATED : 20th October, 2016

PER COURT :-

Heard learned counsel for the parties.

2. It is the case of prosecution and the complainant that the complainant's husband Rohidas was murdered by accused persons on 19.2.2012 by giving dash by a Tempo resulting into registration of Crime No. 22 of 2012 punishable under Section 279, 338, 304-A of the Indian Penal Code.

3. Respondent/complainant thereafter gave statement to the Assistant Police Inspector, Police Station, Ambhora on 31.8.2013 expressing her doubt that accused persons have murdered her husband. The final report under Section 173 (2) of the Code of Criminal Procedure Code was tendered by the investigating officer.

4. At that stage, on 10.2.2014 the complainant moved an application Exh.5 praying for further investigation pursuant to the provisions of Section 173(8) of the Code of Criminal Procedure. On the said application, report dated 12.4.2014 was submitted by the investigating agency depicting that there is no necessity to direct further investigation, as the earlier investigation and the conduct of the complainant takes to the only conclusion that offence under Section 302 of the Indian Penal Code is not demonstrated or inferred from the investigation.

5. The learned Magistrate thereafter vide order passed below Exh.5 i.e. application preferred by the complainant directed further investigation pursuant to the provisions of Section 173 (8) of the Code of Criminal Procedure Code, which is questioned in the present petition.

6. Learned counsel for the petitioner Shri Gaware would make following submissions.

(a) that the original complainant has already taken benefit of the offence, which was registered earlier, punishable under Sections 279 and 304-A of the Indian Penal Code, as she has received the compensation.

(b) that the provisions of Section 173 (8) of the Code of Criminal Procedure Code cannot be invoked at the behest of the complainant.

(c) That the necessary ingredients of Section 302 of the Indian Penal Code are not prima facie satisfied. As such

there was no necessity for directing further investigation in the matter and further investigation, if to be ordered, the accused should have been heard on the said issue.

7. Per contra, Shri Narwade, learned counsel for respondent no.2 submits that it is pursuant to the order of the Division Bench of this Court in Criminal Writ Petition No. 1025 of 2013, the application below Exh.5 came to be moved.

8. The investigating agency has submitted report in view of order passed by the learned Magistrate and has stated that there is no necessity to proceed further in the investigation for offence punishable under Section 302 of the Indian Penal Code. However, it is the Magistrate who exercises his powers pursuant to the observations made by the Division Bench, referred supra, in Criminal Writ Petition No. 1025 of 2013 and proceeds to pass an order on further

investigation in exercise of the powers under Section 173 (8) of the Code of Criminal Procedure Code. He would rely upon the judgment of the Apex Court in the matter of **Reeta Nag vs State of West Bengal and others**, reported in (2009) 13 SCR 276, particularly paras 19 and 20 of the said judgment which read thus :

“ 19. What emerges from the above-mentioned decisions of this Court is that once a charge-sheet is filed under Section 173(2) Cr.P.C. and either charge is framed or the accused are discharged, the Magistrate may, on the basis of a protest petition, take cognizance of the offence complained of or on the application made by the investigating authorities permit further investigation under Section 173(8). The Magistrate cannot suo moto direct a further investigation under Section 173(8) Cr.P.C. or direct a re- investigation into a case on account of the bar of Section 167(2) of the Code.

20. In the instant case, the investigating authorities did not apply

for further investigation and it was only upon the application filed by the de facto complainant under Section 173(8), was a direction given by the learned Magistrate to re-investigate the matter. As we have already indicated above, such a course of action was beyond the jurisdictional competence of the Magistrate. Not only was the Magistrate wrong in directing a re-investigation on the application made by the de facto complainant, but he also exceeded his jurisdiction in entertaining the said application filed by the de facto complainant. "

9. Having considered the rival submissions of the parties, it is required to be noted that initially the investigation, pursuant to the provisions of Section 173(2) of the Code of Criminal Procedure, after receipt of first information report under Section 154 of the Code of Criminal Procedure, vide Crime No. 22 of 2012, was conducted and charge sheet for offences punishable under Sections 279, 304-A of the Indian

Penal Code came to be filed.

10. Application Exh. 5 moved by complainant speaks of the information received by the complainant as regards involvement of accused persons in commission of crime under Section 302 of the Indian Penal Code, as it is claimed that her husband was murdered.

11. Thereafter the Division Bench of this Court had an occasion to consider the complaint in Criminal Writ Petition No. 1025 of 2013, particularly in the light of statement of the complainant recorded by the Assistant Police Inspector in the above referred crime as regards necessity of further investigation, so as to find out whether offence under Section 302 of the Indian Penal Code is committed or not by the accused persons.

12. The Division Bench then observed that pursuant to the provisions of Section 173 (8) of

the Code of Criminal Procedure, in the light of above statement of complainant recorded by the investigating officer, the investigating officer to file application under Section 173 (8) of the Code of Criminal Procedure to the Court. It is thereafter the Magistrate called report from the investigating officer in the matter and the said report supports the case of the defence i.e. present petitioner that no offence under Section 302 of the Indian Penal Code could be noted. Thereafter, the Magistrate has evaluated the material placed before him and proceeded to pass order in exercise of powers under Section 173(8) of the Code of Criminal Procedure directing further investigation.

13. Apart from above, it is required to be noted that the order impugned is passed by the Magistrate on 30.6.2014. The petitioner has chosen to question the said order after a period of two years, though the report of the Police Officer was received pursuant to the order on

application Exh.5. There is hardly any explanation for such delayed approach on the part of the petitioner. Apart from above, it is required to be noted that the language employed in Section 173 (8) of the Code of Criminal Procedure is very clear. Section 173 (8) of the Code of Criminal Procedure reads as under : -

" 173. Report of police officer on completion of investigation—

(1)

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2). "

14. Though the report of the investigating officer, pursuant to order of the Magistrate, passed below Exh.5, is not supporting the case of the prosecution for an offence punishable under Section 302 of the Indian Penal Code, however, it is to be noted that same, in my opinion, does not

bound the Magistrate to disagree with the same.

If the Magistrate, after application of mind, based on the material brought before it, prima facie, satisfies that case for ordering further investigation is made out, he may do so in exercise of the powers under Section 173 (8) of the Code of Criminal Procedure.

In view of factual matrix of the present case and the material considered by the Magistrate, the judgment cited supra of the Hon'ble Apex Court in matter of **Reeta Nag vs State of West Bengal** will not be of any assistance to the petitioner.

15. The Magistrate is empowered to exercise the jurisdiction under Section 173 (8) of the Code of Criminal Procedure and the Division Bench has rightly, in Criminal Writ Petition No. 1025 of 2013, observed that it is open for the prosecution to move an application to that effect, though the prosecution has not moved the application. What is apparent in the present case is that the

prosecution has placed on record its report pursuant to the observations made by the Division Bench and report called by the Magistrate. Such report, even though, in clear terms speaks of not making out offence under Section 302 of the Indian Penal Code, however, the report is not binding on the Magistrate. It is always open for the Magistrate to pass appropriate orders for further investigation.

16. In the present case, the order of the Magistrate calling report under Section 173 (8) of the Code of Criminal Procedure is not questioned. The order impugned passed by the Magistrate in exercise of power under Section 173 (8) of the Code of Criminal Procedure is questioned after an unexplained delay of two years.

17. From perusal of the order impugned, it is noticed that such recourse is taken to by the Magistrate and in view thereof no interference is called for in the exercise of Writ Jurisdiction so

as to infer that the Magistrate has exceeded its jurisdiction.

18. The other contentions of the petitioner that the complainant has taken benefit of registration of crime for offence of accident and that the petitioner should be given an opportunity of hearing before ordering further investigation for offence under Section 302 of the Indian Penal Code, cannot be read down in the provisions of Section 173(8) of the Code of Criminal Procedure Code. The remedy to question the taking of wrong benefit by the complainant under the provisions of the Motor Vehicles Act can be availed by the accused at appropriate stage before the proper forum. As such, no case for interference is made out.

19. Criminal Writ Petition stands dismissed.

(N.W.SAMBRE, J.)

