

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

**Crl. Misc. No.M-21042 of 2015 (O&M)
Date of decision : 05.07.2016**

ANIL KUMAR

.....Petitioner(s)

Versus

STATE OF HARYANA AND OTHERS

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not? Yes
3. Whether the judgment should be reported in the digest? Yes

**Present: Mr. Deepender Singh, Advocate
for the petitioner.**

Mr. Deepak Sabharwal, Addl. A.G., Haryana.

ANITA CHAUDHRY, J.

The instant petition has been filed under Section 482 Cr.P.C. read with Article 226 of the Constitution of India for quashing the order dated 09.06.2015, passed by JMIC, Faridabad in FIR No.139 dated 14.05.2015, registered under Sections 376-C, 354-A, 323, 120-B IPC, Police Station Ballabgarh Sadar, District Faridabad.

The facts which are essential to be stated are as follows. Respondent no.3, a convict undergoing sentence in a murder case made a complaint upon which FIR No.139 dated 14.05.2013 was registered under Sections 376, 354-A, 323, 120-B IPC. Allegations of sexual assault by Shahid Khan, Deputy Jail Superintendent in the District Jail, Faridabad were made. The petitioner was the Jail Superintendent in the same jail. The police

filed a cancellation report. The victims approached the High Court for intervention. Vide order dated 04.08.2014 the petition was disposed of in view of the status report that was filed by the police. It noted that cancellation report had been submitted and the Court had summoned the complainant. A protest petition was later filed.

The petitioner received a notice regarding a DNA test. He pleads that the allegations of sexual assault were against the Deputy Jail Superintendent and no allegations were levelled against the petitioner and the FIR was registered on the directions of Chief Judicial Magistrate, Faridabad and a cancellation report was submitted, which was verified by the Assistant Commissioner of Police, Ballabgarh and was filed in the Court on 12.08.2013.

The petitioner has further pleaded that respondents no.3 & 4 had approached the High Court seeking transfer of the investigation to the Crime Branch and after seeking a detailed reply and the status, the petition was disposed of with no directions. It was further pleaded that the complainant filed a protest petition, which is pending wherein the petitioner has not been made a party and the case is being adjourned from June, 2014 onwards. It was pleaded that respondents no.3 & 4 had made their respective statements in the protest petition and his name had not appeared even then.

The petitioner further pleaded that meanwhile, a complaint was given to the National Human Right Commission and as per the information available with him still there were no allegations of sexual harassment against the petitioner. It was pleaded that during the pendency of the protest petition, D.G.P. Crimes, Haryana transferred the investigation to the State

Crime Branch on 28.07.2014. It was pleaded that no investigation was pending which could be transferred and no permission from the Court was taken for further investigation.

The petitioner received a notice under Section 160 Cr.P.C. from the Inspector of the State Crime Branch on 25.04.2015 to appear in the Court of Judicial Magistrate, Faridabad to give his concurrence for a DNA test. The petitioner filed an application (Annexure P-20) before the Court asking for the status report and sought monitoring of the investigation by the Crime Branch. He also sought copy of the statements made by the complainant and the witnesses. The petitioner claimed that he had raised legal issues and without disposing of the application the Court had straightway called upon him to personally appear in the Court and make a statement as to whether he intended to give his DNA sample.

The petitioner challenges the order dated 09.05.2015 on the ground that once the cancellation report had been submitted and there was no order of further investigation and without taking the permission from the Court, the police could not start further investigations. It was pleaded that he was not named in the FIR or in the statements given in the past nor his name had appeared in the protest petition. It was pleaded that the Investigating Agency without informing the Magistrate who was dealing with the protest petition approached another Court for getting the statement of the victims recorded under Section 164 Cr.P.C. It was urged that the statement had already been given and there was no occasion for her to make another statement two years after the complaint. It was pleaded that Nirmal Bhati, a convict was trying to make a new statement and level allegations against the

petitioner. It was pleaded that the medical report dated 16.05.2013 would show that the incident was stated to be of February, 2013 and as per Modi Medical Jurisprudence, sperm cannot be detected after 17 days and nothing could have come out in the vaginal swab. It was pleaded that the Magistrate had not dealt with the important issue and had passed a casual order and no order had been passed on the application filed by him and before taking his DNA, the DNA test on the sperm should first be conducted and the report should be placed before the Court and the signature of the petitioner should be taken on the sample and thereafter, it should be sent to the forensic lab. It was pleaded that no prima facie case was made out nor any directions for his consent for the DNA test could be given and the DNA test could not be ordered. It was pleaded that Nirmal Bhati - respondent no.3 had made similar allegations against the jail officials while lodged in Bhondsi Jail, Gurgaon in 2010 and the allegations were found to be false by the Sessions Judge, Gurgaon.

The Co-ordinate Bench had issued notice and had stayed the operation of the order on 02.07.2015.

The respondent filed their reply pleading that the name of the petitioner had appeared in the statement given by Nirmal Bhati in her statement under Section 164 Cr.P.C. and in the FSL report dated 13.06.2013 received from FSL Madhuban it was found that human semen was found and therefore, DNA test was necessary to verify facts and the plea raised by the petitioner were not sustainable. It was pleaded that the contention that the permission of the Court was not taken was wrong and misconceived and the orders had been passed by the Magistrate who allowed the application

and had the trial Court not permitted further investigation, it could have dismissed their application. It was pleaded that no formal permission of the Court was required for further investigation. It was pleaded that the Director General of Police had entrusted the investigation to the State Crime Branch on a complaint received from National Human Right Commission and it was in the interest of justice, equity, good conscious and fair play to get the matter investigated and un-earth the truth. An additional affidavit by the Deputy Inspector General of Police was filed wherein it was pleaded that the FSL report was lying sealed and had not been opened when the cancellation report was submitted and though it had been collected earlier but it was opened later on. It was pleaded that Nirmal Bhati was interrogated by a lady Inspector and her statement under Section 164 Cr.P.C. was recorded and she had levelled allegations of rape against the petitioner. It was pleaded that departmental action has been recommended against the defaulting official who had not properly dealt with the FSL report and further investigations in the FIR were on.

Report of the FSL along with the statement under Section 164 Cr.P.C. were also placed on record. The State counsel had also appended the letter received from Human Right Commission.

The submission on behalf of the petitioner is that a complaint was given to the Sessions Judge, Faridabad who was on a visit to the jail and the prosecutrix had complained of sexual assault and an officer was deputed to the jail for recording the statement, which was later sent to the police. It was urged that in that complaint, the allegations were against the Deputy Jail, Superintendent and not the petitioner and a detailed investigation was

carried out and cancellation report (Annexure P-7) was submitted. It was urged that two convicts approached the High Court with a petition (Annexure P-10) praying for entrustment of the investigation to some other agency and in that petition as well no allegations were made against the petitioner and after seeking the status report, order (Annexure P-12) was passed and it was observed that no orders were required to be passed as by then the cancellation report had been submitted and the complainant had been summoned by the Magistrate. It was urged that thereafter, protest petition (Annexure P-13) was filed by Anita wife of Kartar Singh wherein Shahid Khan, Deputy Superintendent and Sangeeta, the lady Warden were arrayed as accused and even then the name of the petitioner did not crop up and the case was being adjourned for the evidence of the complainant. It was urged that meanwhile a complaint was given to the Human Right Commission, which was forwarded to the State and even in that complaint, the name of the petitioner did not appear. It was urged that after two years, the matter was transferred to the Crime Branch and one of the victims was produced before the Magistrate and without taking any permission from the Court, her statement under Section 164 Cr.P.C. was got recorded and thereafter, an application was filed asking the Court for DNA test of the petitioner who was not an accused. It was urged that the sample of the victim was taken on 16.05.2013 and the alleged sexual assault had taken place in February, 2013 and according to Modi Medical Jurisprudence no sperm can be found after 17 days and it is surprising that spermatozoa was found in the vaginal swab. It was urged that the investigation had been transferred without permission and there can be no further investigation

without the permission of the Court. It was urged that notice under Section 160 Cr.P.C. was received by him to give his consent regarding the DNA test. It was urged that DNA profile of the sperm detected in the vaginal swab has not been done and question would arise as to whether after a gap of such a long period DNA test can be carried out. It was urged that the effort was to implicate the petitioner and he would have no objection for giving the DNA test provided the DNA profiling of the sperm be first got done and all safety measures put in place. Reliance was placed upon *Vinay Tyagi Vs. Irshad Ali @ Deepak and others* (2013) 5 SCC 762, *Manoj Narain Agrawal Vs. Shashi Agrawal & Ors.* 2009(6) SCC 385, *Tarsem Singh Vs. State of Haryana* 2007(1) Cri. CC 829, *Vikas Gupta Vs. State of Punjab* 2002(2) AICLR 307 and *Neetu Dheer & another Vs. State of Haryana and another* in CRM-M-28929-2015, D.O.D. 23.02.2016.

The submission on the other hand was that the petition was not maintainable and the petitioner should have responded to the notice given to him. It was urged that the cancellation report was submitted without considering the FSL report. It was urged that the FSL report was lying with the MHC and it had not been opened and the cancellation report was submitted in a great hurry. It was urged that a complaint was given to the Human Right Commission and DGP Crimes had transferred the investigation to the State Crime Branch on 28.07.2014 and the name of the petitioner had appeared in the statement made by Nirmal Bhati. It was urged that human semen was detected in the vaginal swab and in order to find the true facts, DNA test of the petitioner became necessary. It was urged that two questions would arise as to whether the police after the submission of

the cancellation report can make further investigation and add another accused. It was urged that the permission of the Court is not required and the police can make further investigation without the permission of the Court and there is a distinction between further investigation and reinvestigation. It was urged that the Apex Court had held that the power of the Police Officer under Section 173(8) Cr.P.C. is un-restricted and it is only appropriate on the part of the Investigating Officer to inform the Court and the Investigating Officer had moved an application before the Magistrate and thereafter, the statement under Section 164 Cr.P.C. was recorded and nothing was concealed and it amounts to implied consent. It was urged that the petitioner had filed an application before the Magistrate and all the documents which he had asked for were provided and there is fresh evidence for the investigating agency and further investigation have been started. It was urged that the consent of the accused was not required for DNA test and no order had been passed on the application and notice had been issued to the petitioner. It was urged that earlier the accused used to refuse to undergo the test and the Court used to draw adverse inference but the legal position is different and DNA test has got legal recognition and the petitioner has nothing to fear and the DNA test does not violate Article 20(3) of the Constitution nor it is a infringement of the right of the privacy and it is a scientific test which is accurate. Reliance was placed upon *State of A.P. Vs. A.S. Peter 2008 AIR (SC) 1052, Dharam Pal Vs. State of Haryana and others 2016 AIR (SCW) 618, Charanjit Singh @ Bittu Vs. State of Punjab 2008(2) RCR (Criminal) 748, Veeru and others Vs. State of U.P. and another 2015(1) ADJ 788, Harjinder Kaur Vs. State of Punjab*

and others 2013(2) RCR (Criminal) 146, Maghar Singh @ Manga Vs. State of Punjab 2012(3) RCR (Criminal) 94 and Gopal Reddy Sheelum Vs. State of Karnataka and another 2014(4) AIR Kar R 126, Shailendra Singh Chauhan Vs. State of U.P. and others 2014(10) ADJ 463, K. Chandrasekhar Vs. State of Kerala 1998(2) RCR (Criminal) 719, Vijayakumar Vs. Kamarudin 1999(2) RCR (Criminal) 262 and Ravikrindi Ramaswamy and another Vs. State of A.P. 2003(3) RCR (Criminal) 362 and Koneru Vara Prasada Rao Vs. State of A.P. 2007 CriLJ 2898.

It is necessary to reproduce Section 173(8) Cr.P.C., which reads as under:-

Section 173(8) in The Code Of Criminal Procedure, 1973

(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).

The seminal issue that emerges is whether the police after the submission of the cancellation report can carry out further investigation, whether prior permission of the Magistrate is necessary and lastly whether the consent of the accused is required for the DNA test.

One of the issue had been examined in *State of A.P. Vs. A.S. Peter 2008(3) RCR (Criminal) 131* and para 5 of the judgment reads as under:-

“5. Indisputably, the law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out of a further investigation even after filing of the chargesheet is a statutory right of the police. A distinction also exists between further investigation and re-investigation. Whereas re-investigation without prior permission is necessarily forbidden, further investigation is not.”

In ***Charanjit Singh @ Bittu Vs. State of Punjab 2008(2) RCR***

(Criminal) 748 it was held that even after the police has submitted the challan they may make further investigation, they can produce the report under Section 173(8) Cr.P.C. Para no.6 of the judgment reads as under:-

6. After the investigation is completed, the Investigating Agency is required to submit the charge report against the accused under Section 173 Criminal Procedure Code, and the court is to try the case on the said charge report, submitted to it and it has nothing to do with the further investigation of the case. The police has been vested with the powers of further investigation under Section 173(8) Criminal Procedure Code, irrespective of the fact that reinvestigation could be conducted under the orders of the Court, but no embargo has been placed over the powers of the police for further investigating the case. From bare reading of Section 173(8) Criminal Procedure Code, it is evident that even after submission of investigation report under this Section, if the police comes across further evidence, oral or documentary, then in order to facilitate the trial and to enable the Court to reach the truth, it is vested with all powers to further investigate the matter, but cannot investigate afresh or reinvestigate the same. The dictionary meaning of 'further' when used as an adjective is 'additional', 'more', 'supplemental'. 'Further investigation' certainly is continuation of the earlier investigation and not a fresh investigation or re-investigation to be started *ab initio* wiping out the earlier investigation altogether. The provisions of sub-section (8) of Section 173 Criminal Procedure Code, clearly envisage that on further investigation, the investigating agency has to forward a further investigation report and not a fresh report regarding the further evidence obtained during such investigation and not fresh report or reports regarding further investigation obtained during such investigation. Further investigation is a continuation of such investigation, which culminates in a further police report. To put it differently, if during the further investigation, the police finds some evidence against an additional accused or it finds some of the accused innocent, then the police could submit such a report to the Court and it

is only upto the Court, which is to decide from the earlier report as well as the later report and also the evidence put up before it by the police, as to whether there was sufficient evidence for trial against them. No doubt, the Trial Court has relied upon the decision of the Apex Court in case ***K. Chandrasekhar and another v. State of Kerala, 1998(2) RCR(Crl.) 719 (SC) : 1998(2) RCR 720(SC)***, but the same is of no help to the prosecution, rather, it has clarified and created a distinction in the words, 'further investigation' and 're-investigation' or 'fresh investigation' of the case and observed that further investigation in the case notwithstanding any consent, has been obtained from the court, is not bad. Such proposition again arose before the Apex Court in a recent judgment delivered in case, ***Hasanbhai Valibhai Qureshi v. State of Gujarat and others, 2004(2) RCR(Crl.) 463 (SC) : 2004(2) Apex Crl. 609 (SC) : 2004(4) JT 305***, wherein, it was observed as under :-

"10. 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 a to arrive at the truth.

11. Sub-section (8) of Section 173 of the Code permits further investigation, and even de hors any direction from the Courts as such, it is open to the police to conduct proper investigation, even after the Court took cognizance of any offence on the strength of a police report earlier submitted. All the more so, if as in this case, the Head of the Police Department also was not satisfied of the propriety or the manner and nature of investigation already conducted.

12. In ***Om Prakash Narang and Anr. v. State (Delhi Admn.) (AIR 1979 SC 1791)*** it was observed by this Court that further investigation is not altogether ruled out merely because cognizance has been taken by the Court. When defective investigation comes to light during course of trial, it may be cured by further investigation if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that police should inform the Court and seek formal permission to make further investigation when fresh facts come to light instead of being silent over the matter keeping in view only the need for an early trial since an effective trial for real or actual offences found during course of proper investigation is as much relevant, desirable and necessary as an expeditious disposal of the matter by the Courts. In view of the aforesaid position in law if there is necessity for further investigation the same can certainly be done as prescribed by law. The mere fact that there

may be further delay in concluding the trial should not stand in the way of further investigation if that would help the Court in arriving at the truth and do real and substantial as well as effective justice. We make it clear that we have not expressed any final opinion on the merits of the case."

In *K. Chandrashekhar Vs. State of Karela 1998(2) RCR (Criminal) 719*, it was held as under:-

"25. From a plain reading of the above Section it is evident that even after submission of police report under sub-section (2) on completion of investigation, the police has a right of 'further investigation' under sub- section (8) but not 'fresh investigation' or 're-investigation'. That the Government of Kerala was also conscious of this position is evident from the fact that though initially it stated in the Explanatory Note of their notification dated June 27, 1996 (quoted earlier) that the consent was being withdrawn in public interest to order a 're-investigation' of the case by a special team of State police officers, in the amendatory notification (quoted earlier) it made it clear that they wanted a 'further investigation of the case' instead of 're-investigation of the case'. The dictionary meaning of 'further' (when used as an adjective) is 'additional'; more; supplemental. 'Further' investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started *ab-initio* wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a 'further' report or reports - and not fresh report or reports - regarding the 'further' evidence obtained during such investigation. Once it is accepted - and it has got to be accepted in view of the judgment in Kazi Lhendup Dorji, 1994(2) RCR (Crl.) 553 (supra) - that an investigation undertaken by CBI pursuant to a consent granted under Section 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that 'further investigation' is a continuation of such investigation which culminates in a further police report under sub- section (8) of Section 173, it necessarily means that withdrawal of consent in the instant case would not entitle the State police, to further investigate into the case. To put it differently, if any further investigation is to be made it is the C.B.I. alone with can do so, for it was entrusted

to investigate into the case by the State Government. Resultantly, the notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and unsustainable in law. In view of this finding of ours we need not go into the questions, whether Section 21 of the General Clauses Act applies to the consent given under Section 6 of the Act and whether consent given for investigating into Crime No. 246/94 was redundant in view of the general consent earlier given by the State of Kerala."

In *Manoj Narain Agrawal Vs. Shashi Agrawal & Ors.* 2009(2)

RCR (Criminal) 803, referring to a number of judgments concluded that it was open to the police to conduct further investigation but after seeking formal permission of the Court to make further investigation.

In *Vinay Tyagi Vs. Irshad Ali @ Deepak and others* (2013) 5

SCC 762, the Apex Court had examined the significant aspect as to how the provisions of Section 173(8) Cr.P.C. have to be understood and applied by the Courts and the investigating agencies. Para nos. 49, 50 and 54 are relevant and read as under:-

49. Now, we may examine another significant aspect which is how the provisions of Section 173(8) have been understood and applied by the courts and investigating agencies. It is true that though there is no specific requirement in the provisions of Section 173(8) of the Code to conduct 'further investigation' or file supplementary report with the leave of the Court, the investigating agencies have not only understood but also adopted it as a legal practice to seek permission of the courts to conduct 'further investigation' and file 'supplementary report' with the leave of the court. The courts, in some of the decisions, have also taken a similar view. The requirement of seeking prior leave of the Court to conduct 'further investigation' and/or to file a 'supplementary report' will have to be read into, and is a necessary implication of the provisions of Section 173(8) of the Code. The doctrine of contemporanea expositio will fully come to the aid of such interpretation as the matters which are understood and implemented for a long time, and such practice that is supported by law should be accepted as part of the interpretative process.

50. Such a view can be supported from two different points of view.

Firstly, through the doctrine of precedence, as afore-noticed, since quite often the courts have taken such a view, and, secondly, the investigating agencies which have also so understood and applied the principle. The matters which are understood and implemented as a legal practice and are not opposed to the basic rule of law would be good practice and such interpretation would be permissible with the aid of doctrine of contemporanea expositio. Even otherwise, to seek such leave of the court would meet the ends of justice and also provide adequate safeguard against a suspect/accused.

54. No investigating agency is empowered to conduct a 'fresh', 'de novo' or 're-investigation' in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned magistrate.

Investigation can be ordered in varied forms and at different stages namely initial investigation, further investigation and lastly *de novo* or reinvestigation. The initial investigation empowers the police officer to conduct the investigation in furtherance to the registration of the FIR which can lead to the filing of a final report. Further investigation is where the Investigating Officer obtains further oral or documentary after the final report has been filed before the Court in terms of Section 173(8) Cr.P.C. The basis of further investigation is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence. In other words, it has to be understood in complete contradiction to a reinvestigation or *de novo* investigation. The scope of further investigation is restricted to the discovery of further oral or documentary evidence and its principle is to bring through facts before the Court even if they are discovered at a subsequent stage to the primary investigation.

In Vinay Tyagi's case (*supra*), the Hon'ble Apex Court had

observed in para no.49 that it had become a practice to seek permission of the Court to conduct further investigation, though there was no specific requirement in the provisions contained in Section 173(8) Cr.P.C.

Having examined the legal position, it is clear that the police can carry out further investigation and file a supplementary report if it finds fresh material, oral or documentary. The basis of further investigation clearly is discretionary and in continuation of the same offence and chain of events relating to the same occurrence. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. It would be useful to quote para no.22 of the judgment reported in Vinay Tyagi's case (supra) and reads thus:-

"22. Further investigation' is where the Investigating Officer obtains further oral or documentary evidence after the final report has been filed before the Court in terms of Section 173(8). This power is vested with the Executive. It is the continuation of a previous investigation and, therefore, is understood and described as a 'further investigation'. Scope of such investigation is restricted to the discovery of further oral and documentary evidence. Its purpose is to bring the true facts before the Court even if they are discovered at a subsequent stage to the primary investigation. It is commonly described as 'supplementary report'. 'Supplementary report' would be the correct expression as the subsequent investigation is meant and intended to supplement the primary investigation conducted by the empowered police officer. Another significant feature of further investigation is that it does not have the effect of wiping out directly or impliedly the initial investigation conducted by the investigating agency. This is a kind of continuation of the previous investigation. The basis is discovery of fresh evidence and in continuation of the same offence and chain of events relating to the same occurrence incidental thereto. In other words, it has to be understood in complete contradistinction to a 'reinvestigation', 'fresh' or 'de novo' investigation."

The position that emerges from the above is that *de novo*

investigation or reinvestigation cannot be carried out except in exceptional cases wherein investigation already conducted is unfair, tainted and malafide as held in Vinay Tyagi's case (supra).

Yet again when the matter came up before the Supreme Court in 2016 in Dharampal's case (supra), the Apex Court had noted with approval the judgment reported in Vinay Tyagi's case and it was held as under:-

17. In this context, we may notice the statutory scheme pertaining to investigation. Section 173 Cr.P.C. empowers the Police Officer conducting investigation to file a report on completion of the investigation with the Magistrate empowered to take cognizance of the offence. Section 173(8) Cr.P.C. empowers the office-in-charge to conduct further investigation even after filing of a report under Section 173(2) Cr.P.C. if he obtains further evidence, oral or documentary. Thus, the power of the Police Officer under Section 173(8) Cr.P.C. is unrestricted. Needless to say, the Magistrate has no power to interfere but it would be appropriate on the part of the investigating officer to inform the Court. It has been so stated in ***Rama Chaudhary v. State of Bihar, 2009(2) R.C.R.(Criminal) 570 : 2009(2) Recent Apex Judgments (R.A.J.) 675 : (2009) 6 SCC 346.***

18. In ***Vinay Tyagi v. Irshad Ali, 2013(2) R.C.R.(Criminal) 197 : 2013(2) Recent Apex Judgments (R.A.J.) 69 : (2013) 5 SCC 762***, wherein a two-Judge Bench, after referring to the decision in ***Bhagwant Singh v. Commr. Of Police, 1985(2) R.C.R.(Criminal) 259 : (1985) 2 SCC 537*** has held thus:-

"However, having given our considered thought to the principles stated in these judgments, we are of the view that the Magistrate before whom a report under Section 173(2) of the Code is filed, is empowered in law to direct "further investigation"

and require the police to submit a further or a supplementary report. A three-Judge Bench of this Court in Bhagwant Singh has, in no uncertain terms, stated that principle, as aforenoticed."

The position that emerges is that Section 173(8) Cr.P.C. empowers the Officer/Incharge to conduct further investigation even after filing of the report Section 173(2) Cr.P.C., if he obtains further evidence, oral or documentary. Though there is no statutory mandate of taking prior permission but the requirement of seeking prior leave of the Court to conduct further investigation and/or file a supplementary report will have to be read into and it is a necessary implication of the provisions of Section 173(8) Cr.P.C. of the Code.

In the present case, no permission/formal permission of the trial Court was taken. The argument that there was a implied approval cannot be accepted. The investigator had approached a Duty Magistrate with a prayer for recording the statement under Section 164 Cr.P.C. The counsel representing the respondent has been unable to show that a formal permission was sought from the Magistrate. The position that emerges on consideration of the legal position thus would be that the police even after submission of the cancellation report can carry out further investigation but formal permission of the Magistrate/trial Court would be necessary.

In so far as the last issue is concerned, the position of law is clear that a DNA test can be ordered by the Court and if an accused refuses then he can be physically compelled to undergo the DNA test. The question on the validity and the use of DNA analysis is not an issue nor Section 45 of

the Evidence Act causes any legal obstacle to the admissibility of the DNA analysis. Even subjecting the accused to DNA test does not violate Article 20(3) of the Constitution.

So far as the apprehensions of the petitioner are concerned, they do not seem to be reasonable. The petitioner has not spelt out as to why and on whose behest he would be framed. It is always expected that the investigators would perform an unfair and unbiased investigation that would not frustrate the essential principles inhered under Article 21 of the Constitution.

Having answered the seminal issues, the petition is disposed of. The respondents would approach the trial Court and seek formal permission to conduct further investigation and then proceed in accordance with law.

05.07.2016

sunil

(ANITA CHAUDHRY)
JUDGE