

THE HIGH COURT OF JUDICATURE AT MADRAS
Judgement Reserved on: 25..01..2017
Judgement Pronounced on: 23..02..2017
CORAM
THE HON'BLE MR.JUSTICE S.NAGAMUTHU
THE HON'BLE MR.JUSTICE P.N.PRAKASH
and
THE HON'BLE MR.JUSTICE N.AUTHINATHAN
Criminal Appeal No.663 of 2016

Chinnathambi @ Subramani [A1]

... Appellant

-Versus-

State Rep. by

The Inspector of Police,
Vellakovil Police Station,
Tirupur District.

[Crime No.555 of 2005]

... Respondent

Criminal Appeal filed under Section 374(2) of Cr.P.C. challenging the judgement of conviction and sentence imposed on the accused [A1] by the learned Principal Sessions Judge, Tirupur, Tirupur District, in S.C.No.2 of 2013 dated 08.06.2016.

For Appellant

: Mr.N.Manokaran

For Respondent

: Mr.P.Govindarajan,
Addl. Public Prosecutor

Amicus Curiae

: Mr.A.Raghunathan,
Senior Counsel

JUDGEMENT

S.NAGAMUTHU, J.

The appellant is the 1st Accused in S.C.No.2 of 2013 on the file of the learned Sessions Judge, Tirupur, Tirupur District. There were two other accused by name (1) Sakthivel, S/o.Palanisamy and (2) Natraj, S/o.Muthusamy Gounder, who were arrayed as Accused Nos.2 and 3 respectively in the said case. The trial court framed as many as seven charges against the accused as detailed below:-

Charge Number	Charges framed against	Penal provision under which Charge(s) framed
(1)	A1 to A3	Section 449 of IPC

Charge Number	Charges framed against	Penal provision under which Charge(s) framed
(2)	A1 to A3	Section 457 of IPC
(3)	A1	Section 302 of IPC
(4)	A2 and A3	Section 302 r/w 34 of IPC
(5)	A2	Section 201 of IPC
(6)	A1 and A3	Section 201 r/w 34 of IPC
(7)	A1 to A3	Section 397 of IPC

The trial court, by judgement dated 08.06.2016, convicted all the three accused under various penal provisions of Indian Penal Code and sentenced them accordingly, as detailed below:-

Accused who was found guilty under charge(s)	Penal provision under which conviction was recorded	Quantum of sentence imposed on the accused
A1 to A3	Section 449 of IPC	Imprisonment for life and to pay a fine of Rs.10,000/- each in default to suffer simple imprisonment for one year
A1	Section 302 of IPC	Imprisonment for life and to pay a fine of Rs.10,000/- in default to suffer simple imprisonment for one year
A2 and A3	Section 302 r/w 34 of IPC	Imprisonment for life and to pay a fine of Rs.10,000/- each in default to suffer simple imprisonment for one year
A2	Section 201 of IPC	Rigorous Imprisonment for seven years and to pay a fine of Rs.10,000/- in default to suffer simple imprisonment for one year

Accused who was found guilty under charge (s)	Penal provision under which conviction was recorded	Quantum of sentence imposed on the accused
A1 and A3	Section 201 r/w 34 of IPC	Rigorous Imprisonment for seven years and to pay a fine of Rs.10,000/- each in default to suffer simple imprisonment for one year
A1 to A3	Section 392 of IPC	Rigorous Imprisonment for ten years and to pay a fine of Rs.10,000/- each in default to suffer simple imprisonment for one year

The trial court further ordered to pay a sum of Rs.1,05,000/- to P.W.2 as compensation under Section 357 of Cr.P.C. from out total fine of Rs.1,20,000/- on being collected from the accused. Challenging the above said conviction and sentences, A1 is before this court with the present criminal appeal.

2. The case of the prosecution in brief is as follows:- The deceased in this case was one Maakali. He was the watchman in the temple known as "Pushpagiri Arulmigu Velayuthasami Temple" at Pushpagiri Nagar in Mettupalayam. P.W.1 was a trustee of the said temple during the relevant period. The temple used to be kept open for public darshan between 06.00 a.m. and 06.00 p.m. On 04.07.2005 after the temple was closed for darshan, the deceased alone was in the temple on duty as watchman. It is alleged that around 02.00 a.m. on 05.07.2005 these three accused trespassed into the temple by breaking open the locks of the temple with a view to commit robbery of the gold and silver ornaments kept in the temple. When the deceased watchman, who was on duty in the temple, resisted, it is alleged that A1, with the help of a towel, strangled the deceased by neck and also attacked him with a crowbar on his head and neck and killed him. A2 and A3 with the common intention assisted A1 in killing the deceased. Thereafter, they dragged the body to the open terrace of Annadana Mandapam and abandoned it there. It is further alleged that these accused had opened the steel bureau and wooden boxes in the temple by breaking open the locks and removed the gold and silver ornaments belonging to the temple worth Rs.1,50,000/- and fled away from the scene of occurrence. The occurrence was not witnessed by any one.

3. P.W.1, the trustee of the temple, was informed about the

death of the deceased inside the temple and the missing of the jewels. P.W.1 thereafter went to Vellakovil Police Station and made a complaint (Ex.P.1) at 08.30 a.m. on 05.07.2005. The Sub Inspector of Police, on receipt of such complaint, registered a case in Crime No.555 of 2005 under Sections 302, 457 and 380 of IPC. Ex.P.9 is the FIR. The Sub Inspector of Police, thereafter, forwarded the complaint and the FIR to the court which were received by the learned jurisdictional Magistrate at 10.30 a.m on the same day. In the mean time, he handed over the case diary to the Inspector of Police.

4. The case was taken up for investigation by P.W.22, the then Inspector of Police, Vellakovil Police Station. He proceeded to the place of occurrence on the same day, prepared an observation mahazar (Ex.P.4) and a rough sketch (Ex.P.12) at the place of occurrence. At his request, a Finger Print Expert visited the scene of occurrence and on a thorough search, he lifted five chance finger prints from the place of occurrence. They were all photographed with the help of a photographer. Then, P.W.22 conducted inquest on the body of the deceased and forwarded the same for postmortem.

5. P.W.7, Dr.R.Arunkumar, conducted postmortem on the body of the deceased at 03.00 p.m. on 05.07.2005. He found the following injuries on the body of the deceased:-

"External Injuries:

(1) 3 x 3 cm laceration (L) shoulder.

(2) 4 x 2 cm laceration over the anterior aspect of the neck with multiple bruising and small contusion (2 x 2 cm) 3 Nos. on either side present around the anterior aspect of the neck.

(3) 5 x 4 cm contusion (R) temporal region.

Craniology: Skull intact. Brain 1400 grams intact. Base of the skull intact. Neck - Vertical # of the hyoid. Cartilage (f). Hyoid bone intact."

Ex.P.12 is the postmortem certificate. He opined that the death of the deceased was due to asphyxia as a result of strangulation.

6. After the postmortem was over, P.W.22 recovered the blood stained clothes from the body of the deceased. He also recovered blood stained material objects from the place of occurrence and forwarded all the material objects to court with a request to forward the same to the forensic science laboratory for chemical examination. He examined the doctor who conducted autopsy and collected the postmortem certificate including his final opinion regarding the cause of death. At that stage, he was transferred. He, therefore, handed over the case diary to his successor by name Mr.Gnanaravi. Though the investigation went on for few years, the culprits could not be detected.

Therefore, a report was filed by the investigating officer to the jurisdictional court to the effect that the crime was undetected. The learned Magistrate recorded the same and then closed the case.

7. On 19.02.2011, P.W.23, the then Inspector of Police, Vellakovil Police Station had some clue about the culprits involved in the present crime. On 28.02.2011, he made an application to the learned Judicial Magistrate, Kangeyam, seeking permission to further investigate the matter as provided under Section 173(8) of Cr.P.C. Accordingly, the learned Magistrate granted permission. Based on the same, on 29.02.2011, P.W.23 examined P.W.1 and few more witnesses. He came to know that A1 and A3 were already arrested in connection with some other case and lodged in Central Prison, Coimbatore.

8. P.W.21, the then Inspector of Police, Kodumudi Police Station was investigating the case in Crime No.34 of 2011 on the file of Kodumudi Police Station for offences under Sections 457 and 380 of IPC. On 18.02.2011, when he was on regular vehicle check up at Thandampalayam - Selvapuram section, a TVS motor cycle bearing Regn. TN 33A 1199 with a man driving, was found moving on the road in a suspicious manner. P.W.21 with the help of his men intercepted the vehicle. On inquiry, the person, who drove the motor cycle, disclosed his identity as Chinnathambi @ Subramani (A1). A1 gave a voluntary confession to P.W.1 in which he disclosed the place where he had hidden a crowbar and also the place where he had hidden the gold and silver ornaments. In pursuance of the same, he took the police and the witnesses to the shop of P.W.15. P.W.15 was running a gold jewellery. On such identification made by A1, P.W.15 produced a gold dollar weighing 2 1/2 sovereigns, a gold thamarai weighing 3 1/2 sovereigns, a gold rudrakashmalai weighing 2 1/2 sovereigns, a navarathna dollar weighing 1 sovereign, and a gold kanmalar (one set) weighing 1 sovereign. P.W.21 recovered these material objects (M.Os.1 to 5) under a mahazar (Ex.P.10). Then, A1 took the police and the witnesses to the shop of P.W.16. P.W.16 was also running a jewellery shop at Vellakovil. P.W.16 on such identification made by A1, produced silver jewels numbering nine (M.Os.6 to 14). P.W.21 recovered the same under a mahazar (Ex.P.11). P.W.21, thereafter forwarded the accused to court for judicial remand. A3 was also arrested and remanded to judicial custody. That is how, A1 & A3 were in the Central Prison at Coimbatore as remand prisoners.

9. P.W.23 made a formal arrest of A1 and A3 on 29.03.2011. On 10.05.2011, P.W.23 made formal arrest of A2 who was also lodged in Central Prison at Coimbatore in connection with some other case. On 12.05.2011, he took police custody of A2 on the orders of the learned Magistrate. While in custody, A2 made a

voluntary confession out of which no fact whatsoever was discovered. P.W.23 prepared a rough sketch (Ex.P.14) and an observation mahazar (Ex.P.8) in the temple in the presence of witnesses. Then, P.W.23 obtained sample finger prints of A1 and A3 and forwarded the same for comparison with the chance finger prints lifted from the scene of occurrence. P.W.8, the Assistant Director, Forensic Science Laboratory, compared the chance finger prints lifted from the place of occurrence with the admitted finger prints of A1 to A3. Such examination revealed that the admitted finger prints of A3 tallied with one chance finger print lifted from the scene of occurrence and the admitted finger print of A2 tallied with four chance finger prints lifted from the scene of occurrence. P.W.23 examined the expert and few more witnesses and recorded their statements. Since he was transferred, the investigation was taken over by his successor (P.W.24). P.W.24, on completing the investigation, laid charge sheet against the accused.

10. Based on the above materials, the trial court framed as many as seven charges as detailed in the first paragraph of this judgement. The accused denied the same. In order to prove the case, on the side of the prosecution, as many as 26 witnesses were examined, 16 documents and 54 material objects were marked.

11. Out of the said witnesses, P.W.1, the then trustee of the temple, has stated about the fact that the deceased was lastly on duty in the temple on the night intervening 04.07.2005 and 05.07.2005. Early in the morning, he was informed that the locks of the temple were broken open and the deceased had been killed. He, however, came to know that the gold and silver ornaments belonging to the temple had been stolen away. He has further stated about the complaint made by him to Vellakovil police. P.W.2, the wife, and P.W.3, the son of the deceased, have not stated anything incriminating except stating that on the crucial night of the occurrence, the deceased was on duty in the temple as night watchman. P.Ws.4, 5 and 6 have not stated anything incriminating as they have spoken only about the hearsay information. P.W.7, the doctor, has spoken about the postmortem conducted and his final opinion regarding the cause of death.

12. P.W.8 is an important witness for the prosecution. He has stated that he compared the chance finger prints lifted from the scene of occurrence and the admitted finger prints of A1 to A3. He found that one chance finger tallied with the finger print of A3 and four chance finger prints tallied with the finger print of A2. P.W.9 has spoken about the photographs taken at the place of occurrence as instructed by the investigating officer.

13. P.W.10, a constable, has stated that he handed over the complaint and the FIR to the learned Magistrate at 10.30 a.m. on 05.07.2005. P.W.1 has spoken about the preparation of the observation mahazar and the rough sketch at the place of occurrence at the place of occurrence. P.Ws.12 and 13 have turned hostile and they have not supported the case of the prosecution. P.W.14 has spoken about the arrest of A3 when he was proceeding in his TVS XL Super motor cycle [Regn. No.TN 38 K 096 on 18.02.2011. P.Ws.15 and 16, the jewellery shop owners have turned hostile and they have not supported the case of the prosecution. P.W.17, a constable, has stated that he handed over the dead body to the doctor for postmortem as instructed by the investigating officer.

14. P.W.18 has spoken about the confession made by A2 while in police custody. P.W.19 has spoken about the registration of the case on the complaint of P.W.1. P.W.20 has spoken about the arrest of A3, disclosure statement made by him. P.W.21 has spoken about the arrest of A1, the disclosure statement made by him and the consequential recovery of M.Os.1 to 14. He has stated that M.Os.1 to 5 were recovered from the shop of P.W.15 and M.Os.6 to 14 were recovered from the shop of P.W.16. P.Ws.22, 23, 24 and 26 have spoken about the investigation done in this case. P.W.25 has spoken about the chemical analysis conducted on the material objects. He has stated that there were human blood stains on the material objects. P.W.24 has also spoken about the filing of charge sheet against the accused.

15. The above incriminating materials were put to the accused under Section 313 of Cr.P.C. they denied the same as false. However, they did not choose to examine any witness nor did they mark any document on their side. Their defence was a total denial. Having considered all the above, the trial court convict them as detailed in the first paragraph of this judgement. Challenging the above said conviction and sentences, A1 alone is now before this Court with the present criminal appeal.

16. When this appeal was heard by a Division Bench consisting of two of us [S.NAGAMUTHU and N.AUTHINATHAN.JJ] on 18.01.2017, among other issues, the learned counsel Mr.N.Manokaran, submitted that the order of the learned Magistrate granting permission to the police to further investigate the matter, after the acceptance of the final report filed earlier by the police, is illegal and the same vitiates the conviction of A1. In support of his argument, the learned counsel Mr.N.Manokaran, relied on a judgement of a Division Bench of this court in K.K.S.S.Ramachandran v. State Rep. by the Inspector of Police, (2015) 2 MLJ (Cr1) 257 and a judgement of a

learned single Judge of this court in S.Sam Sundar Singh v. The Inspector of Police, Radhapuram Police Station, Tirunelveli District, 2016 (2) LW (Crl) 642. Since the legal issue raised by Mr.N.Manokaran is an important issue, we thought it fit to request Mr.A.Raghunathan, the learned senior counsel to assist the court as Amicus Curiae on the said legal issue. Accordingly, the Division Bench consisting of two of us, called the appeal on 19.01.2017. On that day, the learned counsel appearing for the appellant Mr.N.Manokaran, reiterated his earlier arguments based on the judgments cited supra.

17. Per contra, the learned Additional Public Prosecutor relied on a judgement of this court in R.Ramamurthy v. State, 1991 (1) LW (Crl) 352; Kamlapati Trivedi v. State of West Bengal, (1980) 2 SCC 91; State of Rajasthan v. Aruna Devi, (1995) 1 SCC 1; and Raman Lal Narang v. State (Delhi Administration), (1979) 2 SCC 322.

18. After having heard the counsel on either side, the Division Bench held that since there were conflicting judgments and since the issue involved is very important, the Division Bench felt that it would be in the interest of justice that this appeal be heard by a larger bench of three-Judges so as to resolve the above legal issue. Accordingly, the Hon'ble Chief Justice, by order dated 24.01.2017 has constituted this Full Bench to hear this appeal and to resolve the above legal issue. That is how, this appeal is before this Full Bench for disposal.

19. We have heard the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the State and we have also perused the records carefully.

20. Before going into the facts of the case, let us go into the legal issue raised by Mr.N.Manokaran. The crux of his contention is that in the instant case, since earlier the jurisdictional Magistrate had accepted the final report filed by the police reporting that the crime could not be detected, the learned Magistrate had no jurisdiction or power to grant permission for further investigation of the case and thus, the order of the learned Magistrate, granting permission, the consequential further investigation done by the police, the final report filed, the order of the Magistrate taking cognizance of the offences on the said final report and the ultimate conviction by the trial court stand vitiated. This contention is founded mainly on the judgement of a Division Bench of this court in K.K.S.S.Ramachandran's case [cited supra].

21. Let us now have a look into the circumstances under which the said issue came up before the Division Bench. In that

case, the case was registered by the police under Section 174 of Cr.P.C. for suspicious death in Crime No.188 of 2007. After about three years that was on 31.01.2010, the investigating officer filed a report before the learned Magistrate-II, Sattur wherein the police officer had reported that the crime mentioned in the complaint had not been detected. On the basis of the said report, the learned Magistrate had recorded the same as "undetected". Later on, on 30.03.2012, on the request made by the investigating officer, the learned Magistrate permitted further investigation of the said case. The learned Magistrate had inadvertently used the word "reinvestigation". Based on the said permission granted by the learned Magistrate, further investigation was done and a final report was filed against the accused for offences under Sections 120-B, 176, 201, 217, 218, 302 and 302 r/w 34 of IPC. The learned Magistrate took cognizance of the said offences. At that juncture, the accused in that case filed a petition in CrI.O.P.(MD) No.18476 of 2013 before the Madurai Bench of this court under Section 482 of Cr.P.C. seeking to quash the entire proceedings. When the said matter came up before a learned single Judge, the learned Judge referred the matter before a larger Bench to answer the following question of law:-

"Whether the judicial act of acceptance of a referred charge sheet (negative final report) by a Magistrate would have to be challenged and set aside before resort is had to further investigation under Section 173(8) of Cr.P.C.?"

The above said reference was placed before a Division Bench constituted at Madurai Bench. The Division Bench considered the judgement of the Hon'ble Supreme Court in Kamalapati Trivedi v. State of West Bengal, (1980) 2 SCC 91, Vinay Tyagi v. Irshad Ali, (2013) 5 SCC 762 and few more judgments of the Hon'ble Supreme Court. In para 11 of the judgement, the Division Bench observed as follows:-

"11. From a cursory look of the observation made by the Hon'ble Apex Court it is easily discernible that if a Magistrate accepts report of the Police, act of Magistrate must be construed as a judicial act. If it is judicial act, the concerned Magistrate, who passes judicial order, cannot revoke the same in suo motu and the order of the Magistrate has to be challenged before superior forum."

22. In paragraphs 14 and 15 of the judgement, the Division Bench has held as follows:-

14. The Hon'ble Apex Court has further observed that "Magistrate has no power to direct "reinvestigation or "fresh investigation" (de

novo) in the case initiated on the basis of police report. A Magistrate has the power to direct "further investigation" after filing a police report in terms of section 173(8) of the Code.

15. From the conjoint reading of the observations made by the Hon'ble Apex Court, it is easily discernible that the concerned Magistrate is having power to permit further investigation under Section 173(8) of the Code of Criminal Procedure, 1973. But he has no power to give necessary permission to conduct "reinvestigation" or "fresh" investigation (de novo).

23. In para 21, the Division Bench passed on to the next aspect of the question and dealt with the same as follows:-

"21. The Reference made by the learned Single Judge is as to "whether the judicial act of acceptance of a referred charge sheet (negative final report) by a Magistrate would have to be challenged and set aside before resort is had to further investigation under Section 173(8) of the Code of Criminal Procedure, 1973?"

22. It has already been pointed out that an order passed by a Magistrate on the basis of referred charge sheet (negative final report) is nothing but a judicial order and the same has to be challenged before superior forum and further, further investigation cannot be sought for under Section 173(8) of the Code of Criminal Procedure, 1973 in case of referred charge sheet and at the most, permission to conduct "reinvestigation" or "de novo" investigation can be sought for before appropriate forum and not before Magistrate, since Magistrate has no power to give necessary permission for conducting "reinvestigation" or "de novo" investigation.

24. Finally, the Division Bench in para 24 concluded as follows:-

24. In fine, it is held that acceptance of a referred charge sheet (negative final report) by a Magistrate has to be challenged before appropriate forum for setting aside the same. Further it is held that Magistrate has no power to give necessary permission for conducting

"reinvestigation" "fresh or de novo" investigation and accordingly the Reference is answered. The Registry is directed to post CrI O.P(MD)No.18476 of 2013 and connected Miscellaneous Petitions before the concerned Court."

25. The above said judgement of the Division Bench of Madurai Bench of this court was followed by a learned single Judge sitting in Madurai Bench of this court in S.Sam Sundar Singh v. The Inspector of Police, Rathapuram Police Station, Tirunelveli District, 2016 (2) LW (CrI) 642. That was a case where a case initially registered under Section 174 of Cr.P.C. was altered into one under section 302 of IPC. On completing the investigation, the Police Officer laid a report before the learned Magistrate on 21.03.2009 thereby reporting the crime as "undetectable". The learned Magistrate accepted the said report. Subsequently, on 27.07.2010, an application was made by the investigating officer before the jurisdictional Magistrate seeking permission to further investigate the matter. The learned Magistrate passed the following order:-

"Records perused. Case reopened and the Inspector of Police is permitted to investigate the matter further as contemplated U/s. 173(8) of Cr.P.C."

This order of the learned Magistrate was challenged by way of revision before the Madurai Bench. Making reliance on the judgement of the Division Bench of this court in K.K.S.S.Ramachandran's case cited supra, the learned judge followed the Division Bench Judgement and held that the order of the learned Magistrate accepting the negative final report as "undetectable" is a judicial order and, therefore, the learned Magistrate had no power to set aside his own order and to order for fresh investigation. On the said view, the learned single Judge set aside the order of the learned Magistrate. Thus, the view taken by these two benches is that if once a negative final report is accepted by a Magistrate, the said order of the Magistrate is a judicial order and thereafter, the Magistrate lacks jurisdiction to grant permission to the investigating officer under Section 173(8) of Cr.P.C. to conduct further investigation and if the police officer wants to do further investigation, he has to challenge the order of the learned Magistrate accepting the final report before a higher forum and only after getting the said order set aside, the investigating officer could further investigate the case.

26. We regret, with respect, that we are unable to subscribe to the above view taken by the Division Bench as well as the learned single Judge in the cases cited supra in view of the contrary view taken by the Hon'ble Supreme Court in a number

of judgements.

27. In *Anju Chaudhary v. State of UP*, (2013) 6 SCC 384 upon which a reference has been made by the Division Bench, the Hon'ble Supreme Court has highlighted the difference between "Reinvestigation" "De novo investigation" and "Further investigation". and held that the Magistrate has no power to order for "Reinvestigation" or "De novo investigation". At the same time, the Supreme Court has not held that the Judicial Magistrate does not have power to grant permission for "Further investigation". In *State of Punjab v. Central Bureau of Investigation*, (2012) 2 MLJ (Cri) 420 (SC) which has also been considered by the Division Bench, the Hon'ble Supreme Court has dealt with the power of a Magistrate to grant permission for "Further investigation" as provided in sub-section (8) of Section 173 of Cr.P.C. wherein the Hon'ble Supreme Court has held as follows:-

"Sub-section (8) of Section 173 states that nothing in the Section shall be deemed to preclude any further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate. Thus, even where charge sheet or challan has been filed by the police under sub-section (2) of Section 173, the police can undertake further investigation but not fresh investigation or re-investigation in respect of an offence under sub-section (8) of Section 173 of the Cr.P.C."

28. Similarly, in *Ramachandran v. R.Udhayakumar*, (2008) 5 SCC 413 upon which also reference has been made by the Division Bench, the Hon'ble Supreme Court has reiterated the above legal position in the following words:-

"..... at this juncture, it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8) , but not fresh investigation or reinvestigation."

Having referred to the above judgement of the Hon'ble Supreme Court, the Division Bench in *K.K.S.S.Ramachandran's* case [cited supra] in para 20 has held as follows:-

"As per the dictums given by the Hon'ble Apex Court, it has already been pointed out that Magistrate has no power to give necessary permission for conducting "reinvestigation" "fresh or de novo" investigation. Further, it is found earlier that the order passed by the

concerned Magistrate on the basis of police report is nothing but judicial order and the same cannot be recalled nor revoked by the concerned Magistrate himself. Therefore, it is quite clear that permission to conduct reinvestigation on the basis of requisition dated 30.03.2012 by the Judicial Magistrate No.II, sattur is ab initio void since the same has been passed without jurisdiction.

29. In respect of the above conclusion arrived at by the Division Bench, we have no different opinion, since the settled legal position is that the Magistrate has no power to give permission for conducting reinvestigation or fresh investigation (de novo). But, at the same time, we would like to reiterate that as held by the Hon'ble Supreme Court in the above judgements, the power of the Magistrate under sub-section (8) of Section 173 of the Code to grant permission for "Further investigation" cannot be doubted.

30. In para 20 of the judgement, the Division Bench has further held that the order accepting the report of the police that the crime could not be detected is a judicial order. Now, we have to examine as to "What is the order that constitutes a judicial order that is passed on receipt of a police report under Section 173(2) Cr.P.C.,?" Section 173(2) Cr.P.C., states that on completing investigation, the Investigating Officer shall forward a report to a Magistrate empowered to take cognizance of the offence on a police report. The said report need not necessarily be a positive report which is otherwise called as a 'charge sheet'. It can even be a 'negative report' or at times, it may be stated that the crime could not be detected. On receipt of the charge sheet (police report), the Magistrate may take cognizance of the offence or he may order for further investigation at that stage itself. If he takes cognizance, it is undoubtedly a judicial order. If he orders further investigation, it is not a judicial order, but an executive order as held by the Hon'ble Supreme Court in Kamlapati Trivedi v. State of West Bengal, (1980) 2 SCC 91. We may usefully quote the relevant portion of the afore-said judgement hereunder:-

"50. Now what are the courses open to the Magistrate in such a situation? He may, as held by this Court in Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117:

- (1) agree with the report of the police and file the proceedings, or
- (2) not agree with the police report and
 - (a) order further investigation, or

(b) hold that the evidence is sufficient to justify the forwarding of the accused to the Magistrate and take cognizance of the offence complained of.

51. The appropriate course has to be decided upon after a consideration of the report and the application of the mind of the Magistrate to the contents thereof. But then the problem to be solved is whether the order passed by the Magistrate pertains to his executive or judicial capacity. In my opinion, the only order which can be regarded as having been passed by the Magistrate in his capacity as the supervisory authority in relation to the investigation carried out by the police is the one covered by the course 2(a). The order passed by the Magistrate in each of the other two courses, that is, (1) and 2(b), follows a conclusion of the investigation and is a judicial order determining the rights of the parties (the State on the one hand and the accused on the other) after the application of his mind. And if that be so, the order passed by the Magistrate in the proceeding before us must be characterized as a judicial act and therefore as one performed in his capacity as a Court." [Emphasis supplied]

31. Secondly, on investigation, if it is found that there was no crime at all committed or that the accused persons against whom the case was registered had not committed any such crime, then the Investigating Officer shall submit a report under Section 173(2) Cr.P.C., in the negative form. Law mandates that on receipt of the said negative report, the Court shall issue notice to the defacto complainant and the other interested parties (vide judgment of the Hon'ble Supreme Court in Bhagwat Singh v. Commissioner of Police, [AIR 1985 SC 1285 : (1985) 2 SCC 537]). As has been held by the Hon'ble Supreme Court in a catena of judgments, on receipt of the said notice, the defacto complainant or any other interested person is entitled to file a protest petition. After hearing the Investigating Officer and the protesters, if the Court passes any order accepting the said negative final report of the Police, then the said order is also a judicial order as there is an element of adjudication.

32. Thirdly, if the Investigating Officer, despite the earnest efforts taken, is unable to detect the crime, he will submit a report to the Magistrate stating that the crime is "undetectable". In such a case, it cannot be construed that

the investigation has been completed. If once the investigation is completed, then only a report could be filed under Section 173(2) Cr.P.C. A report of this kind where the Police Officer states that the crime is undetectable, does not terminate the investigation and thus, the investigation is construed to be in progress. It is like an interim report not falling within the scope of Section 173(2) Cr.P.C. On receipt of such a report, the learned Magistrate does not pass a judicial order but, instead, he simply receives and records the same. There is absolutely no element of any adjudication. This order of the learned Magistrate is undoubtedly not a judicial order.

33. Section 173(8) Cr.P.C., empowers the Police to further investigate. Though the said provision does not explicitly say that the Investigating Officer should get prior permission from the jurisdictional Magistrate before whom earlier a report was submitted by him, the Courts have held the view that in order to maintain procedural propriety, the Investigating Officer is required to seek a formal permission from the Court to do further investigation if the conditions of Section 173(8) Cr.P.C., are satisfied. This power of the learned Magistrate under Section 173(8) Cr.P.C., is not a power to review, revise, vary or cancel the earlier judicial order passed by the learned Magistrate accepting the final report under Section 173 (2) Cr.P.C. Notwithstanding the fact whether the order of the learned Magistrate is either a judicial order or a mere ministerial order, the power of the learned Magistrate under Section 173(8) Cr.P.C., is an independent judicial power to grant permission because, statutorily the Investigating Officer has been empowered to do further investigation provided the conditions of the said provisions are satisfied.

34. The Division Bench in K.K.S.S.Ramachandran's case in para 11 of the judgement has taken the view that an order of the learned Magistrate recording the report that the crime could not be detected is a judicial order. In our considered view, it is not the correct position of law. As we have held, it is not at all a judicial order as there is no element of adjudication. We concur with the conclusion of the Division Bench that an order accepting the report of the Police either a charge sheet or a negative report, under Section 173(2) Cr.P.C., is a judicial order. But, the further finding of the Division bench that since, it is a judicial order, for doing further investigation, the Police Officer has to challenge the said order before a higher court and he cannot seek permission under Section 173(8) Cr.P.C., from the same Magistrate is again not a correct position of law. As we have already held, the power under Section 173(8) Cr.P.C., is an independent power and the exercise of the same would not amount to either reviewing, modifying, varying or canceling the earlier order passed by the same

Magistrate on accepting the report under Section 173(2) Cr.P.C.

35. In this regard, we may refer to the law declared by the Hon'ble Supreme Court in UPSC v. S.Papaiah, (1997) 7 SCC 614 and followed in Vinay Tyagi v. Irshad Ali @ Deepak , (2013) 5 SCC 762. In para 35 of the judgement in Vinay Tyagi case, the Hon'ble Supreme Court has held as follows:-

"35. We may also notice here that in UPSC v. S.Papaiah (1997) 7 SCC 614 the Magistrate had rejected an application for reinvestigation filed by the applicant primarily on the ground that it had no power to review the order passed earlier. This court held that it was not a case of review of an order, but was a case of further investigation as contemplated under Section 173 of the Code. It permitted further investigation and directed the report to be filed."

[Emphasis supplied]

36. In Vinay Tiagi's case in para 40 in conclusion, the Hon'ble Supreme Court has held as follows:-

"40. Having analysed the provisions of the Code and the various judgements as aforeindicated, we would state the following conclusions in regard to the powers of a Magistrate in terms of Section 173(2) read with Section 173(8) and Section 156(3) of the Code

40.1 The Magistrate has no power to direct "reinvestigation" or "fresh investigation" (de novo) in the case initiated on the basis of a police report.

40.2 A Magistrate has the power to direct "further investigation" after filing a police report in terms of Section 173(6) of the Code.

40.3 The view expressed in sub-para 40.2 above is in conformity with the principle of law stated in Bhagwant Singh v. Commissioner of Police, (1985) 2 SCC 537 by a three-Judge Bench and thus in conformity with the doctrine of precedent.

40.4 Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

40.5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the court to the extent that even where the facts of the case and the ends of justice demand, the court can still not direct the investigating agency to conduct further investigation which it could do on its own.

40.6 It has been a procedure of propriety that the police has to seek permission of the court to continue "further investigation" and file supplementary charge-sheet. This approach has been approved by this Court in a number of judgements. This as such would support the view that we are taking in the present case."

The Hon'ble Supreme Court has held more precisely, in para 40.4 that the language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly, in face of the provisions of Section 156(3) and the language of Section 173(8) of Cr.P.C. itself. As held by the Hon'ble Supreme Court, in fact, such power would have to be read into the language of Section 173(8) of Cr.P.C. The Hon'ble Supreme Court has further held that it has been a procedure of propriety that the police has to seek permission of the court to continue "further investigation" and file supplementary charge-sheet. This approach has been approved by Supreme Court in a number of judgements.

37. In view of the above declaration of law made by the Hon'ble Supreme Court, the conclusion arrived at by the Division Bench of this Court in K.K.S.S.Ramachandran v. State Rep. by the Inspector of Police, (2015) 2 MLJ (Cr1) 257 that acceptance of the report that the crime could not be detected by the learned Magistrate is a judicial order and without challenging the final report before the superior forum, further investigation cannot be sought for under Section 173(8) of Cr.P.C. is not the correct position of law. In view of the judgement of the Hon'ble Supreme Court in Vinay Tyagi case [cited supra] we hold that it is not the case of review of an order, but a case of further investigation as contemplated under Section 173(8) of Cr.P.C. Therefore, for seeking permission for further investigation from the learned Magistrate, one need not challenge the earlier order of the learned Magistrate accepting the negative final report.

38. Let us, now, have a quick look into the judgement of the Hon'ble Supreme Court in State of Rajasthan v. Aruna Devi, (1995) 1 SCC 1. In that case, on a reference made by a Magistrate under Section 156(3) of Cr.P.C. the police registered a case for offence under Section 420 and 467 of Cr.P.C. Thereafter, the investigating officer filed a final report stating that the allegations were false. That final report was accepted by the Magistrate. However, the Superintendent of Police ordered for further investigation and on such further investigation, materials were collected and final report was filed before the same court making out a case involving offences under Sections 420 & 467 of IPC. The learned Magistrate took cognizance of offences on the said police report. That was challenged. The Hon'ble Supreme Court in para 3 to 6 of the judgment held as follows:-

"3. A perusal of the impugned judgement of the High Court shows that it took the view that the Magistrate had no jurisdiction to take cognizance after the final report submitted by

police had been once accepted. Shri Gupta, appearing for the appellant, contends that this view is erroneous in law inasmuch as Section 173 (8) of the Code permits further investigation in respect of an offence after a report under sub-section (2) has been submitted. Sub-section (8) also visualises forwarding of another report to the Magistrate. Further investigation had thus legal sanction and if after such further investigation a report is submitted that an offence was committed, it would be open to the Magistrate to take cognizance of the same on his being satisfied in this regard.

4. Shri Francis for the respondents, however, contends that the order of the Magistrate taking cognizance pursuant to filing of further report amounted to entertaining second complaint which is not permissible in law. To substantiate the legal submissions, we have been first referred to Pramatha Nath Taluqdar v. Saroj Ranjan Sarkar, AIR 1962 SC 876, in which a three-Judge Bench of this Court dealt with this aspect. A perusal of the judgement of the majority shows that it took the view that dismissal of a complaint under Section 203 of the code is no bar to entertainment of a second complaint on the same facts; but the same could be done only in exceptional circumstances some of which have been illustrated in the judgement. Further observation

in this regard is that a fresh complaint can be entertained, inter alia, when fresh evidence comes forward. In the present case, this is precisely what had happened, as on further investigation being made, fresh materials came to light which led to the filing of further report stating that a case had been made out.

5. The case of Bindeshwari Prasad Singh v. Kali Singh, (1977) 1 SCC 57, which also has been referred by Shri Francis, has not really dealt with the point under consideration, as the legal question examined therein was whether a Magistrate possesses inherent powers to review or recall any order passed by him. Of course, the order recalled in that case was also one of dismissing of complaint under Section 203 on the ground of complainant being absent which showed that he had no interest in the matter.

6. The aforesaid being the position in law, we are of the view that the High Court erred in quashing the cognizance taken by the learned Magistrate. The appeal is, therefore, allowed by setting aside the impugned judgement. It would, however, be open to the respondents, on the matter being further taken up by the Magistrate, to urge that no case against them has been made out, whereupon such order shall be passed by the Magistrate as deemed legal and just."

39. This judgment of the Hon'ble Supreme Court clearly answers the issue involved in the present case. In this case, the Hon'ble Supreme Court has held that though the Magistrate had earlier accepted the negative final report that would not deter the police from further investigating the matter as provided in sub-section (8) of Section 173 of Cr.P.C. There is nothing illegal on the part of the learned Magistrate in taking cognizance of the offences on the said police report. But, unfortunately, this judgment of the Hon'ble Supreme Court in State of Rajasthan v. Aruna Devi was not brought to the notice of the Division Bench. In view of the law reiterated by the Hon'ble Supreme Court in Aruna Devi case [cited supra], we have no hesitation to hold that the judgment of the Division Bench in K.K.S.S.Ramachandran's case is not the correct position of law.

40. In this regard, we may further refer to a judgment of a Hon'ble single Judge of this Court [M.Karpagavinayagam, J. as he then was] in R.Ramamurthy v. State, 1999 (1) LW (Cr1) 352. The question formulated by the learned single Judge as found in para 1 of the judgment is as follows:-

"Could the Magistrate permit the police to reopen the case for further investigation, once the said Magistrate passed an order earlier on the report filed by the police as "recorded as undetected"?

The learned Judge after having elaborately dealt with the judgment by referring to the judgment of the Hon'ble Supreme Court in State of Rajasthan v. Aruna Devi and various other judgments held in para 16 of the judgment as follows:-

"16. It is also relevant to note in this case that even when the report was filed earlier as "undetected", it was mentioned in the report that if fresh information comes to light, the further investigation would be done. Therefore, it cannot be contended that once it is recorded as "undetected", neither the Magistrate would have power to permit for further investigation nor the police would have power to reopen the case to make further investigation, especially, when fresh information has been received by the police to detect the offence alleged."

We approve the said view taken by the Hon'ble Judge [M.Karpagavinayagam.J] in view of the law declared by the Hon'ble Supreme Court in State of Rajasthan v. Aruna Devi case cited supra.

41. An argument was also advanced before us that a positive report filed under sub-section (2) of Section 173 of Cr.P.C. Cannot be equated to a negative report filed by the police. It was also contended that in Ram Lal Narang V. State (Delhi Administration), (1979) 2 SCC 322, the Hon'ble Supreme Court held that after the learned Magistrate had taken cognizance of the offences on a police report, further investigation could be ordered and on such further investigation a supplementary charge sheet could be filed. The learned counsel submitted that Ram Lal Narang's case cited supra is not about the acceptance of a negative report and order for further investigation thereafter. Therefore, it is contended that the law laid down in Ram Lal Narang's case cannot be applied to a case where a negative report has been filed by the police and accepted by the Magistrate. This argument deserves to be simply rejected in view of the law laid down by the Hon'ble Supreme Court in State of Maharashtra v. Shardchandra Vinayak Dongre, (1995) 1 SCC 42 : 1995 SCC (Cri) 16, wherein the Hon'ble Supreme Court has held that both negative report as well as charge sheet have to be considered as report under Section 173(2) of Cr.P.C.

42. Mr. Justice M.Karpaganavinayagam.J., had the benefit of

taking note of two other judgments of two different single Judges in *Namasivayam v. State*, (1981) LW (Crl) 151 and *Ramasubba.K v. State* (1987) LW (Crl) 79 taking a contrary view. Mr. Justice M. Karpaganavinayagam, J. relying on the judgment in *Aruna Devi's* case has held that these two judgments cannot be held to be a good law. We concur with the said view taken by Mr. Justice M. Karpaganavinayagam in *R. Ramamurthy's* case.

43. In view of the foregoing discussions and in view of the law laid down by the Hon'ble Supreme Court in the judgement cited supra, with regret, we over rule the Division Bench judgement in *K.K.S.S. Ramachandran v. State Rep. by the Inspector of Police*, (2015) 2 MLJ (Crl) 257 and the judgements of the learned single Judges in *S. Sam Sundar Singh v. The Inspector of Police, Radhapuram Police Station, Tirunelveli District*, 2016 (2) LW (Crl) 642, in *Ramasubba v. State*, 1987 LW (Crl) 79 and in *Namasivayam v. State*, 1981 LW (Crl) 151. We approve the view taken by the Hon'ble Mr. Justice M. Karpaganavinayagam in *R. Ramamurthy v. State*, 1991 (1) LW (Crl) 352.

44. We sum up our conclusions as follows:-

(i) An order of the Magistrate taking cognizance of offences on a police report is a judicial order.

(ii) An order of a Magistrate ordering further investigation on receiving a police report is a non judicial order.

(iii) An order of a Magistrate accepting a negative police report after hearing the parties is a judicial order.

(iv) An order of a Magistrate recording the report of the police as "undetectable" is not a judicial order.

(v) The power of the Magistrate to permit the police to further investigate the case as provided under Section 173(8) of the Code is an independent power and the exercise of the said power shall not amount to varying, modifying, or cancelling the earlier order of the Magistrate on the report of the police, notwithstanding the fact whether the said earlier order is a judicial order or a non judicial order of the Magistrate.

(vi) For seeking permission for further investigation under Section 173(8) of Cr.P.C. by the police, the earlier order, either judicial or non judicial, passed by the Magistrate on the report of the police need not be challenged before the higher forum.

(vii) The power to grant permission for further investigation under Section 173(8) of Cr.P.C. after cognizance has been taken on the police report can be exercised by the Magistrate only on a request made by the investigating agency and not, at the instance of anyone other than the investigating agency or even suo motu. [vide judgement of the Hon'ble Supreme Court in *Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel*, 2017 (2) Scale 198].

(viii) The power to grant permission for further investigation under Section 173(8) of Cr.P.C. can be exercised by the Magistrate before accepting the negative police report thereby acting on the protest petition by the victim or the de facto complainant. [vide Kishan Lal v. Dharmendra Bafna and another, (2009) 7 SCC 685]

(ix) We clarify that anyone who is aggrieved by any order made by the Magistrate on a police report as aforesaid in sub-paragraphs (i) to (iv) hereinabove may approach the higher forum for remedy, if any.

45. In view of the above legal position, in the instant case, we reject the argument advanced by Mr.N.Manokaran that the permission granted by the Magistrate under Section 173(8) of the Code is without jurisdiction and that the conviction of the appellant/A1 is vitiated.

46. Now, turning to the facts of the present case, this is a case based on circumstantial evidence. The foremost circumstance is that on the night intervening 04.07.2005 and 05.07.2005, the deceased alone was inside the temple and the dead body was found on the early morning on 05.07.2005. This has been established. From out of medical evidence, it has also been clearly established that the deceased died out of a homicidal violence.

47. Now, the question is, Who were the perpetrators of the crime? In order to prove that A1 to A3 are the perpetrators of the crime, who caused the death of the deceased and committed robbery of the gold and silver ornaments (M.Os.1 to 14) belonging to the temple, the prosecution relies only on circumstantial evidences. The chance finger prints lifted from the place of occurrence tallied with the finger prints of A2 and A3 and the same had not tallied with the admitted finger prints of the appellant/A1. It is the positive case that M.Os.1 to 5 were sold to P.W.15 and M.Os.6 to 14 were sold to P.W.16 by A2. But, P.W.15 and P.W.16 have turned hostile and they have not supported the case of the prosecution in any manner. Thus, it has not been established that these gold and silver ornaments were found in the possession of either A1 or A2 soon after the commission of the crime. Assuming that M.Os.1 to 14 were sold to P.W.15 and P.W.16 by A2 that cannot be construed as an incriminating evidence against the appellant/A1. Apart from the above, absolutely there is no evidence against the appellant/A1.

48. Curiously, in this case, the learned Public Prosecutor who conducted trial before the Court of Sessions had submitted to the court that the appellant was involved in five previous cases of house-breaking and theft including murder; A2 was involved in 18 previous cases; and A3 was involved in 27

previous cases. Unfortunately, the trial court has referred to these previous cases against the accused and has held that from out of these cases, it could be inferred that the appellant had the modus operandi of making house trespass into the temples and houses and killing the inmates to commit robbery. This conclusion of the trial court is totally erroneous and illegal as pendency of other criminal cases against the accused cannot be a ground even to remotely assume that the appellant/A1 was the perpetrator of the crime in the instant case. The further observation of the trial court that the investigating officer would not have arrested him in this case, but for his involvement in this crime, only bears testimony to the imagination of the Judge and for such imagination, there is no legal sanction. The courts of law cannot allow themselves to be swayed by these kind of totally irrelevant substances which are brought to the notice of the court not by way of evidence, but by way of wholly unrelated materials. The courts of law cannot assume the role of a monarch or dictator so as to impose any punishment on anyone at their whims and fancies even in the absence of any legal evidence.

49. In this country, life and liberty, as guaranteed under Article 21 of the Constitution of India as a fundamental right, cannot be deprived of except by following the procedure established by law. Such procedure denotes fair procedure which in turn demands proof of guilt of the accused beyond reasonable doubts. In other words, choked with emotion or driven by local sentiments, out of mere surmise or suspicion, a court of law cannot afford to convict an accused. Such conviction is certainly unconstitutional as violative of Article 21 of the Constitution of India. In the instant case, the trial court has convicted the appellant/A1 only based on mere surmise. As we have already pointed out, absolutely, there is no evidence against the appellant and the appellant/A1 is, therefore, entitled for acquittal.

50. In the result, the criminal appeal is allowed; the conviction and sentences imposed on the appellant/A1 is set aside and he is acquitted from all the charges. Fine amount already paid, if any, shall be refunded to him. The appellant/A1-Chinnathambi @ Subramani is directed to be set at liberty forthwith unless and otherwise his presence is required in connection with any other case.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kmk

To

- 1.The Principal Sessions Judge, Tirupur, Tirupur District.
- 2 The Judicial Magistrate,
Judl. Magistrate Court., Kangayam
- 3 Do Thro The Chief Judl. Magistrate,
Coimbatore
- 4 The Superintendent, Central Prison, Coimbatore
- 5.The Inspector of Police, Vellakovil Police Station, Tirupur
District.
- 6 The Director Central of Police,
Mylapore
- 7 The District Collector, Tirupur
- 8.The Public Prosecutor, High Court, Chennai.

+lcc to Mr.N. Manokaran, Advocate, S.R.No.11793

vri(CO)
md(13/03/2017)

Crl.A.No.663 of 2016



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