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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(CRL) 3596/2016**

SAROJ

..... Petitioner

Through: Mr. Tanmay Mehta, Advocate with
Mrs. Swati Gupta & Mr. S. Anand,
Advocate

versus

STATE

..... Respondent

Through: Mr. Rajesh Mahajan, ASC with SI
Mahipal Singh, PS Malviya Nagar.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

14.02.2017

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The petitioner has filed the present petition, firstly, to seek a direction for transfer of investigation in case FIR No. 594/2016 from the present investigating officer to Crime Branch of Delhi Police or in the alternative to direct the Delhi Police to constitute a special investigation team (SIT) to investigate the offences under the said FIR. The petitioner also seeks a direction to the investigating agency to add Sections 34/304 IPC and Sections 22, 23 of the Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013 and Section 3(j) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015

in the said FIR.

The case of the petitioner is that her young son was made to work in clearance of the drain – a sewer, without providing the proper gear, which led to his death due to electrocution. The petitioner claims that the accused contractor had knowledge that non provision of the proper protective gear may result in a fatality of the labour engaged in the task of sewer clearance.

The petitioner has disclosed in this petition itself that the petitioner has moved the learned Magistrate under Section 156(3) Cr.P.C. to pursue the second reliefs sought in this petition. The proceedings are still pending before the learned Magistrate in this regard. In any event, this Court cannot direct the addition of provisions of the IPC or any other penal Statute to the FIR in these proceedings. Mr. Mehta has submitted that the transfer of the investigation is necessary in the facts of the present case since the investigating officer is not carrying out proper investigation. He submits that the definition of ‘Sewer’ as contained in the Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, defines sewer as, *‘underground conduit or pipe for carrying off human excreta, besides other waste matter and drainage wastes’*. He points out that the status report claims that the drain in question was a storm water drain and was not a ‘sewer’. However, Mr. Mehta has today produced in Court several news articles which show that large numbers of storm water drains in Delhi have been reduced to ‘sewers’ since they carry human and other excreta apart from rain water.

On a query by the Court, as to on what basis it is claimed that the drain in question was a storm water drain and was not a ‘sewer’, on instructions from IO, Mr. Mahajan states that the investigating officer had

made inquiry from a *rehriwala* positioned near the place of the accident. He has also concluded that the drain in question was a storm water drain and not a sewer on the basis of the scope of work of the contract for which the petitioner's son was engaged as a labourer by the Contractor. This kind of investigation does not reflect well on the competence of the investigating officer. As to whether the drain was merely a storm water drain, or a sewer cannot be determined on the basis of documents which recorded the drain as a storm water drain, or on the basis of a statement taken from a *rehriwala* who may have been positioned close to the place of the incident. For this, the investigating officer ought to have got carried out actual physical verification of the flow in the drain, and that too during the monsoon period itself, since the accident took place during the monsoon in the month of July.

Mr. Mehta has submitted that the petitioner's grievance against the investigating officer arises from the fact that a case under Section 304 and not merely Section 304A, is made out in the facts of the present case on a reading of the FIR. For this purpose, he has sought to read the contents of the FIR and to also place reliance on the judgment of the Supreme Court in *Alister Anthony Pareira Vs. State of Maharashtra* (2012) 2 SCC 648 and, in particular, paras 40, 41 and 42, which read as follows:

“40. The question is whether indictment of an accused under Section 304 Part II and Section 338 IPC can coexist in a case of single rash or negligent act. We think it can. We do not think that the two charges are mutually destructive. If the act is done with the knowledge of the dangerous consequences which are likely to follow and if death is caused, then not only that the punishment is for the act but also for the resulting homicide and a case may fall within Section 299 or Section 300 depending upon the mental state of the accused viz. as to whether the act

was done with one kind of knowledge or the other or the intention. Knowledge is awareness on the part of the person concerned of the consequences of his act of omission or commission indicating his state of mind. There may be knowledge of likely consequences without any intention. Criminal culpability is determined by referring to what a person with reasonable prudence would have known.

41. *Rash or negligent driving on a public road with the knowledge of the dangerous character and the likely effect of the act and resulting in death may fall in the category of culpable homicide not amounting to murder. A person, doing an act of rash or negligent driving, if aware of a risk that a particular consequence is likely to result and that result occurs, may be held guilty not only of the act but also of the result. As a matter of law—in view of the provisions of IPC—the cases which fall within the last clause of Section 299 but not within clause “Fourthly” of Section 300 may cover the cases of rash or negligent act done with the knowledge of the likelihood of its dangerous consequences and may entail punishment under Section 304 Part II IPC. Section 304-A IPC takes out of its ambit the cases of death of any person by doing any rash or negligent act amounting to culpable homicide of either description.*

42. *A person, responsible for a reckless or rash or negligent act that causes death which he had knowledge as a reasonable man that such act was dangerous enough to lead to some untoward thing and the death was likely to be caused, may be attributed with the knowledge of the consequence and may be fastened with culpability of homicide not amounting to murder and punishable under Section 304 Part II IPC. There is no incongruity, if simultaneously with the offence under Section 304 Part II, a person who has done an act so rashly or negligently endangering human life or the personal safety of the others and causes grievous hurt to any person is tried for the offence under Section 338 IPC.”*

On the other hand, Mr. Mahajan has placed reliance on the judgment of the Supreme Court in ***Shariff Ahmed and Others Vs. State (NCT of***

Delhi) (2009) 14 SCC 184, to submit that a Court cannot direct the investigating agency to focus on any particular offence and to carry out investigation accordingly. He has also sought to place reliance on the *Keshub Mahindra Vs. State of M.P.*(1996) 6 SCC 129 and *Mahadev Prasad Kaushik Vs. State of Uttar Pradesh and another*(2008) 14 SCC 479, to submit that in the present case, Section 304A and not Section 304 IPC is attracted.

There can be no quarrel with the proposition propounded in *Shariff Ahmed* (supra). As I have already observed, this Court is not examining the second reliefs sought by the petitioner i.e. whether, or not, the offence under Section 304 IPC and under Section 22/23 of the Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, or under the SC/ST Act are made out, which would be a matter for the learned Magistrate to consider in the petitioner's application under Section 156(3) Cr.P.C.

However, having heard learned counsel for the parties, since the petitioner has expressed dissatisfaction and raised doubts about the competence of the investigating officer in the matter, and it appears to this Court that the investigating officer has carried out the investigation peripherally, I am inclined to transfer the investigation in the case to another wing of the Delhi Police itself. Accordingly, the investigation in the case stands transferred to District Intelligence Unit (DIU) with a direction to nominate a competent officer to investigate in the said FIR.

The petition stands disposed of.

VIPIN SANGHI, J

FEBRUARY 14, 2017

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