

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-16159-2016 (O&M)
Date of Order:30.09.2019

Inderjit Bishnoi @ Inderaj

..Petitioner

Versus

State of Punjab and another

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. P.S.Ahluwalia, Advocate,
for the petitioner.

Mr. Bhupender Beniwal, AAG, Punjab

ANIL KSHETARPAL, J.

Through present petition filed under Section 482 Cr.P.C, quashing of FIR No.06, dated 22.01.2105, registered under Sections 406/420/465/467/468/471/120-B IPC, at Police Station Khuhian Sarwar, District Fazilka and order dated 23.11.2015, passed by the learned Judicial Magistrate Ist Class, Abohar, has been prayed for.

Some facts are required to be noticed.

FIR No.06 dated 22.01.2015 was registered giving details of known/suspected accused in column no.7. It is the case of the prosecution that the first informant is in the business of running a fuel station-Usman Khera Filling Station at village Gujmaal which was being managed by his employees. On checking of the stock and documents, it was found that there is a shortage of 70717 litres of diesel and 4057 litres of petrol. On being enquired into from the employees, no satisfactory reply was received. It was alleged that the first informant has been defrauded to the extent of

Rs.60,00,000/- approximately.

Police after completion of investigation, presented a report under Section 173(2) Cr.P.C against 4 accused-Permanand, Rajesh Kumar son of Om Parkash , Joginder Kumar and Rajesh Kumar son of Bihari Lal, on 19.04.2015, Annexure P-3. However, Investigating Agency filed a supplementary report under Section 173(8) Cr.P.C., on 12.06.2015 wherein it was brought to the notice of the Judicial Magistrate that on further investigation Rajesh and Permanand have been found innocent whereas Dalip Kumar and Indraj were prima-facie found to be involved in the crime. Hence, the Judicial Magistrate passed an order discharging two accused namely Rajesh Kumar and Permanent and issued arrest warrants against petitioner and Dalip Kumar.

Pursuant to the notice in the present case, reply has been filed. It has been stated that investigating officer (SHO) on a fresh application of the first informant further enquired into the matter and found involvement of petitioner and Dalip Kumar on the basis the incriminating evidence which had come on the file and hence, a supplementary report was submitted to the Court.

This court has heard learned counsel for the parties at length and with their able assistance gone through the paper book.

Learned counsel appearing for the petitioners submitted that the Police had no jurisdiction to further investigate the case once a final report had been submitted to the Judicial Magistrate Ist Class on 07.04.2015. He relied upon the judgment passed by the Hon'ble Supreme Court in the case of *Vinay Tyagi v. Irshad Ali @ Deepak & Ors, (2013) 5 SCC 762*. He further submitted that the additional accused (petitioner

herein) who was earlier cited as a prosecution witness could not be summoned as an accused by the Court. He submitted that such course is possible only either under Section 190 Cr.P.C by the Magistrate or could be summoned as an additional accused under Section 319 Cr.P.C or on the basis of further investigation conducted under Section 173(8) Cr.P.C. after getting prior permission of the Magistrate. Hence, he submitted that the FIR and the order under challenge are liable to be quashed.

On the other hand learned counsel for the State has opposed the prayer by bringing to the notice of the court that the trial has made substantial progress as 8 prosecution witnesses have already been examined and therefore the Court should desist from interfering at this stage.

This court has carefully gone through the judgment passed by the Hon'ble Supreme Court in the case of **Vinay Tyagi (supra)**. In the aforesaid case, two questions were posed by the Hon'ble Supreme Court for answer which are extracted as under:-

Question No.1 : *Whether in exercise of its powers under Section 173 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), the Trial Court has the jurisdiction to ignore any one of the reports, where there are two reports by the same or different investigating agencies in furtherance of the orders of a Court? If so, to what effect?*

Question No.2 : *Whether the Central Bureau of Investigation (for short 'the CBI') is empowered to conduct 'fresh'/'re-investigation' when the cognizance has already been taken by the Court of competent jurisdiction on the basis of a police report under Section 173 of the*

Code?

The aforesaid two questions were answered. However, while answering those questions, the Hon'ble Supreme Court in paragraphs 38 and 39 held as under:-

38. 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.

39. Such a view can be supported from two different points of view. Firstly, through the doctrine of precedence, as aforenoticed, 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.

Let us examine in detail in the context the aforesaid observations which have been made by the Hon'ble Supreme court.

In the case of **Vinay Tyagi (supra)**, two alleged police informers who had refused to work on a specified task in Kashmir were sought to be falsely implicated by the Special Cell of Delhi Police on a petition filed in the High Court, vide order dated 09.05.2006, Central Bureau of Investigation was directed to hold enquiry. In the preliminary report, Central Bureau of Investigation reported that the case of the Delhi Police does not inspire confidence, however, further investigations are needed. After the High Court permitted further investigations, the Central Bureau of Investigation submitted a closure report. Learned trial Court vide order dated 13.02.2009 observed that Central Bureau of Investigation has not investigated all aspects of the matter and therefore, declined to accept the closure report at this stage. The Court also noticed that two versions of different investigating agencies have come on file, therefore, the Court adjourned the case for arguments on charge. The aforesaid order passed by the trial Court was challenged before the High Court. It was held that the Central Bureau of Investigation is the investigating agency and therefore, the learned Judicial Magistrate is required to consider the closure report submitted by Central Bureau of Investigation.

In appeal, Hon'ble Supreme Court disposed of the petition by directing the Judicial Magistrate/trial Court to consider the entire record. In

fact, the observations made in paragraphs 38 and 39 did not directly arise in the facts of the aforesaid case.

On reading of the aforesaid extracted paragraphs, it is apparent that the Hon'ble Supreme Court in the case of Vinay Tyagi (supra) has observed as is being contended by learned counsel for the petitioner. However, on careful perusal of Section 173 Cr.P.C. as rightly noticed in the judgment passed by the Hon'ble Supreme Court in the case of Vinay Tyagi (supra), itself that there is no restriction/prohibition on the power of the Police to carry on with the further investigation even after presentation of the final report. Rather Section 173(8) Cr.P.C. empowers the Police to carry out further investigation in respect of an offence after a report under sub-section 2 has been forwarded to the Magistrate. In this regard, it may be noticed that while deciding the case of Vinay Tyagi, attention of the court was not drawn to the previous judgments interpreting Section 173 Cr.P.C. First judgment in this regard is in the case of Ram Lal Narang vs. State (Delhi Administration) (1979) 2 SCC 322. The Hon'ble Supreme Court was examining this issue in the context of interpretation of Section 173 and Section 190 of the Code of Criminal Procedure, 1898. The provisions of Section 173(8) Cr.P.C, 1973 was also examined and it was laid down as under:-

19. *Some High Courts took the view that with the submission of a charge-sheet under Section 173 the power of the police to investigate came to an end and the Magistrate's cognizance of the offence started. It was said that any further investigation by the police would trench upon the magisterial cognizance. In Hanuman & Anr. v. Raj, it was held that when a case was pending before a Magistrate, the action of the police in resuming*

investigation and putting up a new challan against a person not originally an accused as a result of the further investigation was unauthorised and unlawful. In State v. Mehar Singh & Ors., a Full Bench of the High Court of Punjab and Haryana held that the police became functus officio once the Court took cognizance of an offence on the filing of a charge-sheet by the police and thereafter further investigation by the police was not permissible. The police, it was said, could not 'tinker' with the proceedings pending in the Court. It was, however, observed that it would be open to the Magistrate to 'suspend cognizance' and direct the police to make further investigation into the case and submit a report. The High Court of Punjab and Haryana acknowledged the existence of the practice of submitting supplemental charge-sheets, but was of the view that such practice was not sanctioned by the Code. Faced with the impracticality of banning all further investigation once cognizance of an offence was taken by the Court, the High Court tried to find a solution to the problem by suggesting the procedure of the Magistrate suspending cognizance and ordering further investigation. The procedure of 'suspending cognizance' suggested by the High Court of Punjab and Haryana does not appear to us to be warranted by the provisions of the Criminal Procedure Code.

20. *Anyone acquainted with the day to day working of the criminal courts will be alive to the practical necessity of the police possessing the power to make further investigation and submit a supplemental report. It is in the interests of both the prosecution and the defence that the police should have such power. It is easy to visualise a case where fresh material may come to light which would implicate persons not previously accused or absolve persons already accused. When it comes to the*

notice of the investigating agency that a person already accused of an offence has a good alibi, is it not the duty of that agency to investigate the genuineness of the plea of alibi and submit a report to the Magistrate ? After all the investigating agency has greater resources at its command than a private individual. Similarly, where the involvement of persons who are not already accused comes to the notice of the investigating agency, the investigating agency cannot keep quiet and refuse to investigate the fresh information. It is their duty to investigate and submit a report to the Magistrate upon the involvement of the other persons. In either case, it is for the Magistrate to decide upon his future course of action depending upon the stage at which the case is before him. If he has already taken cognizance of the offence, but has not proceeded with the enquiry or trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused, in a single enquiry or trial. If the case of which he has previously taken cognizance has already proceeded to some extent, he may take fresh cognizance of the offence disclosed against the newly involved accused and proceed with the case as a separate case. What action a Magistrate is to take in accordance with the provisions of the Code of Criminal Procedure in such situations is a matter best left to the discretion of the Magistrate. The criticism that a further investigation by the police would trench upon the proceedings before the Court is really not of very great substance, since whatever the police may do, the final discretion in regard to further action is with the Magistrate. That the final word is with the Magistrate is sufficient safeguard against any excessive use or abuse of the power of the police to make further investigation. We should not, however, be understood to say that the police should ignore the pendency of a

proceeding before a Court and investigate every fresh fact that comes to light as if no cognizance had been taken by the Court of any offence. We think that in the interests of the independence of the magistracy and the judiciary, in the interests of the purity of the administration of criminal justice and in the interests of the comity of the various agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the Court and seek formal permission to make further investigation when fresh facts come to light.

21. *As observed by us earlier, there was no provision in the Code of Criminal Procedure, 1898 which, expressly or by necessary implication, barred the right of the police to further investigate after cognizance of the case had been taken by the Magistrate. Neither Section 173 nor Section 190 lead us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offence. Practice, convenience and preponderance of authority, permitted repeated investigations on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under Section 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the Court by seeking its formal permission to make further investigation.*

It may be noticed that a Full Bench of the Punjab and Haryana High Court in the case of **State vs. Mehar Singh, 1974 Crl. Law Journal, 970** was over ruled. Subsequently, this issue again directly arose before the

Hon'ble Supreme Court in the case of **State of Andhra Pradesh vs.**

A.S.Peter, (2008) 2 SCC 383. The Hon'ble Supreme Court while following the earlier view taken in the case of Ram Lal Narang(supra) held that there is no requirement of prior permission of the Magistrate to carry out further investigation subsequent to submission of charge sheet under Section 173 (2) Cr.P.C. High Court had set aside the supplementary report submitted by the police on the basis of further investigation but Hon'ble Supreme court reversed the judgment of the High Court. The Hon'ble Supreme Court, however, distinguished that if the Police wants to carry out re-investigation or de-novo investigation such re-investigation or de-novo investigation without prior permission of the competent Court i.e. under Section 482 Cr.P.C., Article 226/227 or Article 32 of the Constitution of India is prohibited. However, the police has a right to carry on further investigation without seeking prior permission from the Magistrate.

This question can further be examined from another angle. It is the Magistrate who has to finally form an opinion. The initial report submitted under Section 173(2) of the Code of Criminal Procedure or a supplementary report submitted under Section 173(8) of the Code of Criminal Procedure comes up for consideration before the Court of Magistrate only. Still further, as noticed earlier, neither there is any provision which mandates the investigating agency to take prior permission of the Magistrate before carrying out further investigation nor attention of the Court has been drawn to any provisions in the Code of Criminal Procedure enabling the Court to ignore subsequent supplementarity reports submitted on the ground that such supplementary report is without taking prior permission of the Court. Still further, on careful reading of the judgment passed by the Hon'ble Supreme Court in the case of Ram Lal

Narang(supra) it is apparent that the Hon'ble Supreme Court has laid down that the formal permission or intimation to the Court on the part of the investigating agency would be appropriate if a report under Section 173(2) of the Code of Criminal Procedure has already been submitted. However, such observations made by the Hon'ble Supreme Court in the case of Ram Lal Narang(supra) cannot be construed to mean that if a further investigation has been carried out without a formal approval or intimation to the Magistrate, such further investigation carried out and a supplementary report based thereupon submitted to the Court of Judicial Magistrate is without jurisdiction or is liable to be ignored only on this ground. Attention of the Court has not been drawn to any express or implied bar on the police to carry out further investigation if fresh material comes to its notice.

In the present case, as per supplementary report submitted by the prosecution petitioner is an accused. The petitioner was not nominated as an accused previously. Therefore, the petitioner, even otherwise cannot be permitted to assert that there has been further investigation. As regards, petitioner, the only final report which has been presented is dated 19.04.2015, Annexure P-3 on further investigation.

It may be noticed here that trial has already been made substantial progress. Exercise of powers under Section 482 Cr.P.C., at this stage, in the considered view of this court shall not be proper. It is ultimately for the Magistrate to decide whether an accused is guilty or not? The Police after completion of the investigation only brings the accused to the court for facing prosecution. Ultimate call has to be taken by the Court. Further, in absence of any prohibition or restriction, it would not be appropriate for the Court to read into a statutory provision what has not

been provided therein.

Hence, in the facts of the case, it is held that the judgment passed by the Hon'ble Supreme Court in the case of *Vinay Tyagi (supra)* is ratio decidendi qua the two questions which were posed and answered.

As regards second argument of learned counsel of summoning the additional accused, it may be noticed that in the present case the additional accused has been summoned on the basis of supplementary report under Section 173(8) Cr.P.C., which is permissible.

Hence, Judicial Magistrate has not committed any error.

Accordingly the present petition is disposed of by relegating the petitioner to the remedy before the court of Judicial Magistrate. The petitioner shall be at liberty to defend the case set up against him by the prosecution in accordance with law.

30th September, 2019
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No