



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 13.01.2020
CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

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Crl.O.P.(MD)No.5997 of 2016
and
CRL.M.P.(MD)Nos.2949 & 2950 of 2016

A.Vijaya Kumar

... Petitioner/Accused(Single)

Vs.

The State rep. by,
The Deputy Superintendent of Police,
Organised Crime Unit,
Crime Branch C.I.D.,
Tirunelveli City.

... Respondent/Respondent

Prayer: Criminal Original petition is filed under Section 482 of Cr.P.C, to call for the entire records in P.R.C.No.31 of 2015 on the file of the learned Judicial Magistrate No.1, Tirunelveli, Tirunelveli District and quash the same.

For Petitioner : Mr.I.Subramanian,
Senior Counsel,
for Mr.R.Anand.

For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor.

O R D E R

The petitioner is figuring as the sole accused in P.R.C.No.31 of 2015 on the file of the Judicial Magistrate No.I, Tirunelveli.

2. Cognizance of the offence under Section 304(II) of I.P.C. was taken. At this stage, the accused has filed this criminal original petition for quashing the entire proceedings.

3. The learned senior counsel appearing for the petitioner submitted that the petitioner was working as Inspector of Police, Nanguneri Circle. On 24.07.2012, he received information that one Vaanamamalai and Ayyappan of Marukkalkurichi Village were engaged in a serious quarrel with the persons who were removing sand with lawful permit. He also received information that armed with deadly weapons, they have been damaging the vehicle tyres also. Thereupon the petitioner herein along with police personnel proceeded to the



said village in his vehicle. It is relevant to mention here that Vaanamamalai was a wanted accused.

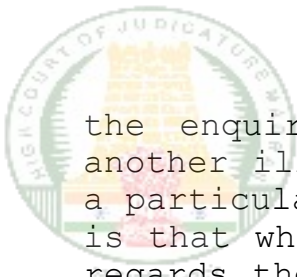
4. According to the petitioner, when he went to the spot, Vaanamamalai became aggressive and attacked him with a weapon. Left with no other alternative, the petitioner fired a shot at him resulting in his death. Thereupon, Crime No.190 of 2012 was registered on the file of Nanguneri police station for the offences under Sections 353 and 307 of I.P.C. Interestingly, in the said case filed by the accused/petitioner herein, Vaanamamalai and Ayyappan were shown as accused. Since Vaanamamalai died on the spot, the First Information Report was altered to one under Section 174 of Cr.P.C.

5. Since it was a case of unnatural death, request was made to the Judicial Magistrate, Nanguneri to conduct an inquest. The learned Magistrate appears to have initially declined to do so. But then, the learned Principal Sessions Judge instructed him to conduct the inquest under Section 176(1)(A) of Cr.P.C. Thereupon the inquest was conducted and a report came to be submitted on 16.08.2012.

6. The learned Judicial Magistrate came to the conclusion that Vijayakumar, Inspector of Police, had used his fire arms against the United Nations Convention and also violated the provision of Cr.P.C. and the death was not caused in exercise of right of private defence. Vijayakumar, Inspector of Police was the wrongdoer. Therefore, the First Information Report was directed to be registered. Investigation was ordered to be done by the State CBCID. Thereupon, the State CBCID took over the investigation and after conducting the investigation, filed final report on 20.04.2015. The substance of the final report filed by the State CBCID is that the petitioner herein/Vijayakumar, Inspector of Police is liable to be prosecuted for having committed the offence under Section 304(II) of I.P.C.

7. Cognizance of the said offence was taken and when the case was pending at the committal stage, this quash petition came to be filed.

8. The learned senior counsel appearing for the petitioner after narrating the aforementioned facts raised twofold contentions. His first contention is that the death occasioned in this case cannot be characterised as a custodial death. Therefore, enquiry under Section 176(1)(A) of Cr.P.C. done by the learned Judicial Magistrate was absolutely unwarranted. He also pointed out that the learned Judicial Magistrate could not have rendered any finding to the prejudice to the petitioner herein. The only function of the enquiry officer under Section 176 of Cr.P.C. was to discover the cause of death. In this case, the learned Magistrate has conducted



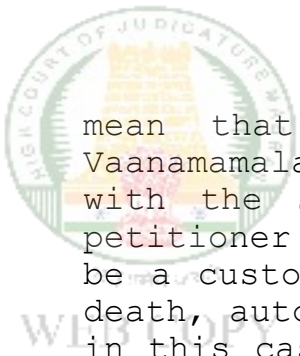
the enquiry and pronounced the petitioner guilty. He also did another illegality by directing the investigation to be taken up by a particular agency. The learned senior counsel's pointed contention is that when the learned Judicial Magistrate has given a finding as regards the guilt of the petitioner, the hands of the investigation were virtually tied; they could not have rendered any contra finding. Thus grave prejudice has been occasioned in this case to the petitioner. The learned senior counsel therefore submitted that in as much as the investigation done by the State CBCID pursuant to the direction given by the learned Magistrate is vitiated, it has to be set aside.

9. His final prayer was that in view of the lapse of time, there is no point in remanding the matter and he wanted this Court to allow this petition as prayed for.

10. Per contra the learned Additional Public Prosecutor appearing for the prosecution would submit that the death occasioned in this case ought to be treated as a custodial death. He drew my attention to Section of 46 of Cr.P.C. to show that in making an arrest, the police officer or other person making the same shall actually touch or confine the body of the person to be arrested. In this case, the learned Additional Public Prosecutor took me through the relevant materials, namely, statement under Section 161 of Cr.P.C. to show that the petitioner had actually touched the body of Vaanamamalai to bundle him into the police vehicle. Therefore the death took place, only in police custody and that therefore, enquiry conducted by the learned Judicial Magistrate cannot be said to be unwarranted. His further contention is that even assuming that the enquiry is illegal still the investigation cannot be set aside. He relied on the decision of the Hon'ble Supreme Court reported in (1971) 1 SCC 483 (State of Andhra Pradesh V. P.V.Narayana) for the proposition that the proceedings cannot be quashed solely on the ground of illegal investigation. He also pointed out that in as much as the accused happened to be the jurisdictional Inspector of Police, in view of the guidelines issued by the National Human Rights Commission, the investigation could have been conducted either by CBI or by the State CBCID. Therefore, the petitioner cannot complain of any real prejudice.

11. I carefully considered the rival contentions.

12. It is true that the petitioner attempted to apprehend Vaanamamalai. But then, Vaanamamalai did not submit to custody. Section 46(1) of Cr.P.C. reads that in making an arrest, the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action. In this case the deceased was touched. Merely because in the course of making arrest, the police officer touched the body of the deceased, it does not

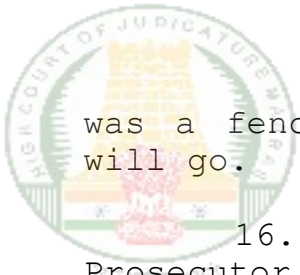


mean that he had come under arrest. The fact remains that Vaanamamalai did not submit to custody. Therefore, I fully agree with the stand of the learned senior counsel appearing for the petitioner that the death occasioned in this case, cannot be said to be a custodial death. Once it is found that it is not a custodial death, automatically Section 176(1)(A) of Cr.P.C. goes. The enquiry in this case ought to have been conducted only under Section 176(1) of Cr.P.C. In fact the learned Judicial Magistrate was reluctant to undertake the enquiry. That is seen from his own written endorsement that he was instructed by the learned Principal Sessions Judge. It was only thereafter the learned Judicial Magistrate had taken up the enquiry. But then as rightly pointed out by the learned Additional Public Prosecutor, as per Section 460 of Cr.P.C. if any Magistrate not empowered by law to hold an inquest under Section 176 of Cr.P.C., does so erroneously in good faith, it shall not be set aside merely on the ground of his not being so empowered.

13. The sole function of the Magistrate in this case was to discover the cause of death. The cause of death was obviously that the death was due to bullet injuries. But then the learned Magistrate has virtually conducted a trial and he has pronounced the petitioner guilty. He had also stated that the investigation must be done by the State CBCID. As rightly pointed out by the learned senior counsel appearing for the petitioner, a learned Judge of this Court in Crl.O.P.(MD)Nos.3027 and 3042 of 2010 vide order dated 04.02.2016 held that if the order of the Magistrate directs investigation by particular agency, that would amount to breach of the dictate of the Hon'ble Supreme Court in Chandrababu @ Moses Vs. State Tr.Inspector of Police and others(Criminal Appeal No.866 of 2015). In this case, the learned Judicial Magistrate, Nanguneri could not have given such a direction. In fact the statement of Thiru.P.Karuppusamy, Deputy Superintendent of Police recorded under Section 161 of Cr.P.C. refers to the finding given by the learned Judicial Magistrate, Nanguneri. Therefore, there can be no doubt that the report of the learned Judicial Magistrate has cast a shadow on the defence of the petitioner herein. I have no hesitation to set aside the report dated 16.08.2012 submitted by the learned Judicial Magistrate, Nanguneri under Section 176(1)(A) of Cr.P.C. It is accordingly set aside.

14. Now the question is whether the impugned proceedings should also be quashed as a consequence.

15. I have to take note of the conduct of the petitioner. He is not a rustic villager. He is an Inspector of Police. The report of the learned Judicial Magistrate was submitted as early as on 16.08.2012. The final report filed by the State CBCID was submitted on 20.04.2015. This criminal original petition for quashing the proceedings was filed only on 04.04.2016. The petitioner chose to wait for the outcome of the investigation by the State CBCID. He



was a fence-sitter. He wanted to see which way the investigation will go.

16. As rightly pointed out by the learned Additional Public Prosecutor by placing reliance on the Judgment of the Hon'ble Supreme Court reported in 1971(1) SCC 483 (State of Andhra Pradesh V. P.V.Narayana), merely because of the illegal direction issued by the learned Magistrate, the investigation cannot be quashed.

17. As rightly pointed out by the learned Additional Public Prosecutor, this is a case in which the death of a person due to bullet firing has taken place; the police officer happens to be an accused. Therefore, the investigation could have been conducted either by the CBCID or by the State CBCID. Therefore, nothing wrong in the State CBCID undertaking the investigation.

18. In this case, the cause of death was due to bullet firing. Therefore, even without a formal enquiry report under Section 176 of Cr.P.C., the prosecution can definitely stand on its own.

19. I decline to grant relief to the petitioner primarily because of the gross delay in approaching this Court. The petitioner could have very well moved this Court even some time in the year 2013 itself for restraining the State CBCID from conducting the investigation. He had not done so. The learned Additional Public Prosecutor placed before me material to indicate that the petitioner herein was examined by the State CBCID on 17.12.2012. Thus the petitioner had full knowledge that the investigation has already been undertaken by the State CBCID pursuant to the direction of the learned Judicial Magistrate. Therefore, he cannot complain after four years that the investigation done by the State CBCID is illegal. Since the petitioner chose to wait till the final report was filed, I decline to grant relief on the ground of laches. Though the report filed by the learned Judicial Magistrate, Nanguneri under Section 176 of Cr.P.C., has been set aside, I still decline to quash the proceedings in P.R.C. No.31 of 2015 on the file of the Judicial Magistrate No.I, Tirunelveli.

20. This criminal original petition stands disposed of on these terms. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar ()

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Sub Assistant Registrar(CS)



To:

- 1.The Judicial Magistrate No.1,
Tirunelveli,Tirunelveli District.
- 2.The Deputy Superintendent of Police,
Organised Crime Unit,
Crime Branch C.I.D.,Tirunelveli City.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

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