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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.02.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

and

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

H.C.P(MD) No.1121 of 2021

Muthu Vazhivittan

... Petitioner

vs.

1.The Additional Chief Secretary to Government,
Home, Prohibition and Excise Department,
Fort St.George, Chennai-600009.

2.The District Collector and District Magistrate,
Office of the District Collector and District Magistrate,
Ramanathapuram District.

3.The Superintendent of Prison,
Central Prison,
Madurai District.

... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Habeas Corpus, by calling for the entire records, connected with the detention order passed by the Respondent No.2 in S.R.No.23/D.O/2021 dated 28.04.2021 and quash the same as illegal and direct the respondents to produce the body or person of the petitioner's son namely, Muthamilselvan aged about 25 years, Son of Muthuvazhivittan, now confined at Central Prison, Madurai before this Court and set him at liberty forthwith.

For Petitioner : Mr.K.Navaneetharaja
For Respondents : Mr.A.Thiruvadi Kumar,
Additional Public Prosecutor

ORDER

R.SUBRAMANIAN, J.
AND
N.SATHISH KUMAR, J.

The petitioner is the father of the detenu, namely, Muthamilselvan, Son of Muthuvazhivittan aged about 25 years. The detenu has been detained by the second respondent by his order in S.R.No.23/D.O/2021 dated 28.04.2021, holding him to be a "Drug



Offender", as contemplated under Section 2(e) of the Tamil Nadu Act 14 of 1982. The said order is under challenge in this Habeas Corpus Petition.

2. We have heard the learned counsel for the petitioner and the learned Additional Public Prosecutor appearing for the respondents. We have also perused the records produced by the Detaining Authority.

3. Though several grounds have been raised in the Habeas Corpus Petition, the learned counsel appearing for the petitioner would mainly focus his arguments on the ground that there is gross violation of procedural safeguards, which would vitiate the detention. The learned counsel, by placing authorities, submitted that the representations made by the petitioner were not considered in time and there was an inordinate and unexplained delay with regard to the same.

4. The learned Additional Public Prosecutor opposed the Habeas Corpus Petition. He would submit that though there was delay in considering the representation, on that score alone, the impugned detention order cannot be quashed. According to the learned Additional Public Prosecutor, no prejudice has been caused to the detenu and thus, there is no violation of the fundamental rights guaranteed under Articles 21 and 22 of the Constitution of India.

5. The learned Additional Public Prosecutor would further submit that the detenu though charged for the serious offence of possessing commercial quantity of narcotic, he was enlarged on statutory bail, as the final report had not been filed in time. It is also stated that though the final report was ready and handed over to the Public Prosecutor appointed in this regard, the same has not been properly filed in time before the Court which resulted the accused being enlarged on statutory bail.

6. The Detention Order in question was passed on 28.04.2021. The petitioner made his representation on 02.08.2021 and the same was received on 04.08.2021 and on the same day, remarks were called for by the Government from the Detaining Authority and remarks were received on 17.08.2021. Thereafter, the Deputy Secretary has dealt with the representation on 18.08.2021 and the Minister for Electricity, Prohibition and Excise has dealt with the representation on 20.10.2021, in which, there is a delay of 41 days excluding the Government Holidays of 21 days. Ultimately, the petitioner's representation came to be rejected on 20.10.2021. Thus, there is a delay of 41 days in considering the petitioner's representations which remains unexplained.

7. In **Rekha vs. State of Tamil Nadu**, reported in **2011 (5) SCC 244**, the Honourable Supreme Court has held that the procedural

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safeguards are required to be zealously watched and enforced by the Courts of law and their rigour cannot be allowed to be diluted on the basis of the nature of the alleged activities undertaken by the detenu.

8. In **Sumaiya vs. The Secretary to Government**, reported in **2007 (2) MWN (Cr.) 145**, a Division Bench of this Court has held that the unexplained delay of three days in disposal of the representation made on behalf of the detenu would be sufficient to set aside the order of detention.

9. In **Tara Chand vs. State of Rajasthan and others**, reported in **1980 (2) SCC 321**, the Honourable Supreme Court has held that any inordinate and unexplained delay on the part of the Government in considering the representation renders the very detention illegal.

10. In the present case, admittedly, there is an unexplained delay of 41 days in considering the representation. The impugned detention order is, therefore, liable to be quashed.

11. In the result, the Habeas Corpus Petition is allowed and the order of detention in S.R.No.23/D.O/2021 dated 28.04.2021, passed by the second respondent is set aside. The detenu, namely, Muthamilselvan, Son of Muthuvazhivittan, is directed to be released forthwith unless his detention is required in connection with any other case.

12. While dealing with this application, it is also brought to the notice of this Court that some important cases wherever the final report is ready and handed over to the Public Prosecutor for opinion, some of the Public Prosecutors delay the opinion, resulting in non filing of the final report within the statutory period, which facilitated the accused to get enlarged on statutory bail. It is also pointed out by learned Public Prosecutor that even some of the cases of drug offender and the cases arising out the Unlawful Activities (Prevention) Act, 1967, non rendering opinion and a consequent failure to present final report, facilitated the accused being enlarged on statutory bail and submitted that such practice of delay in filing a final report should be discouraged. The Code of Criminal Procedure does not contemplate that final report should be filed by the Public Prosecutor. It is the mandate to the investigating officer to file the final report under Section 173 of Cr.P.C. There is no need whatsoever either to get an opinion or concurrence of the Public Prosecutor to present the final report before the Court of law as per the Code of Criminal Procedure. It is relevant to refer to Section 173 of the Code of Criminal Procedure, 1973 and the same is extracted hereunder:

"173. Report of police officer on completion of investigation.-

(1) Every investigation under this Chapter shall



be completed without unnecessary delay.

[(1-A) The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station.]

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

[(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under [sections 376, 376A, 376AB 376B, 376C, 376D, 376DA, 376 DB] or section 376E of the Indian Penal Code (45 of 1860)].]

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report—

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during



investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)"

13. On a careful analysis of the above provision, which relates to the filing of the final report, it is clear that the Section nowhere mandates that final report should contain the opinion of the Public Prosecutor. Therefore, we are of the view that when the Code itself does not contemplate obtaining opinion from the Public Prosecutor before filing a final report, handing over the final report even after completion of the investigation to the Public Prosecutor for opinion is not warranted.

14. It is also useful to refer to Rule 25 of the Criminal Rules of Practice, 2019 and the same is extracted hereunder:

'25. Filing of final report by police and complaint by other investigation agencies.?

(1) Final report by police and complaint by other investigation agencies shall normally be received on all working days at fixed hours by the Court having jurisdiction to receive them. On such receipt, the same shall be entered in the "Register of Papers Received" in



Administrative Form No.60 and in the First Information Report Register in Administrative Form No.18 (Criminal Register No.18). In cases, where it is shown to the satisfaction of the Judge or Magistrate that the accused in detention in the case would become entitled to be released on compulsory bail under proviso to section 167 of the Code if the final report or complaint is not filed immediately, the Judge or Magistrate, as the case may be, shall receive the final report or complaint even on a holiday or beyond the working hours of the Court.

(2) The officer-in-charge of the police station forwarding the final report of any investigation under sub-section (2) of section 173 of the Code, shall file in Court along with such report, as many copies of such report and also of the other documents mentioned in clauses (ii), (iii) and (v) of section 207 of the Code as there are accused in the case. Whenever the Court accepts the photocopies of the documents certified by the Investigating Officer filed along with the final report, they shall be compared with the originals and certified by the Head Ministerial Officer and furnished to the accused to avoid delay and the case can be committed to the Court of Sessions or disposed of by the Trial Court, as the case may be.

(3) Nothing contained in these rules, shall, however, preclude the police officer from making any request to the Court under subsection (6) of section 173 of the Code to exclude any part of any statement recorded under section 161 of the Code from the copies to be granted to the accused or the Court from excluding such part from such copies.

(4) Complaints filed by other investigating agencies and private complaints shall be accompanied by as many copies of the complaint and relied upon documents as similar to the number of accused in the case.

(5) Except cases arising under the Juvenile Justice (Care and Protection of Children) Act, 2015 (Central Act 2 of 2016), the investigating officer shall take photograph of the accused in warrant cases by resorting to section 5 of the Identification of Prisoners Act, 1920 (Central Act 33 of 1920) after identification parade, if required, is held and then, submit the photographs along with the final report. Such photographs can be taken in the prison, if the accused is in judicial custody, in the presence of the officer-in-charge of the prison, after obtaining orders from the Magistrate. Where the accused voluntarily gives his photograph, the Investigating Officer shall accept and



submit the same along with the final report.

(6) Final report filed by police/complaint filed by other investigating agency shall not be returned even if they are defective. A separate memorandum should be issued to rectify the defect. If the defects are not rectified within three months, the Court shall report the matter to the Commissioner of Police/Superintendent of Police, as the case may be. In the absence of defects, the same shall be taken on file within three days from the date of receipt.

(7) While receiving the final report, the Head Ministerial Officer shall verify whether the same is accompanied by the following documents, wherever applicable:?

- (i) First Information Report;
- (ii) Complaint or Statement of complainant;
- (iii) Charge sheet with memo of evidence;
- (iv) Statement of witnesses recorded under section 161 of the Code. Where the police have not recorded the statement of a particular witness, the same shall be specifically mentioned in the Memo of Evidence;
- (v) Accident Register Copy with opinion of the doctor;
- (vi) Post-mortem Certificate;
- (vii) Viscera Report;
- (viii) Biology Report;
- (ix) Serology Report;
- (x) Chemistry Report;
- (xi) Observation Mahazar;
- (xii) Seizure Mahazar;
- (xiii) Police Form 91 (for Tamil Nadu) and Police Form 95 (for Puducherry) for seizure of properties;
- (xiv) Rough sketch;
- (xv) Photographs if the photographer has been cited as witness. Such photographs shall bear the certification under section 65-B of the Evidence Act;
- (xvi) Confession statement of the accused recorded by the police;
- (xvii) Statement of the accused under section 164 of the Code recorded by the Court, if any;
- (xviii) Proceedings of the Test Identification Parade, if any;
- (xix) Statement of witnesses under section 164 of the Code recorded by the Court, if any;
- (xx) Requisition given by the Inspector of Police for sending of properties for Chemical Analysis;
- (xxi) Office copy of the covering letter of Committal Court for sending the properties to laboratory as per the request of the police; 2930



- (xxii) Requisition given by the Inspector of Police to conduct post-mortem on the body of the deceased;
(xxiii) Inquest report with questionnaires;
(xxiv) Material objects as per seizure mahazar, if any;
(xxv) Alteration report, if any;
(xxvi) Death intimation received from the hospital;
(xxvii) Dying declaration of the injured/deceased, if any;
(xxviii) Sexual offence certificate;
(xxix) DNA Test report; and
(xxx) Community Certificate.

P.S.

(i) Final Report should not be returned on the ground that item nos.(vii) to (x) and (xxix) above have not been filed. Such report can be brought on record subsequently either under section 293 or 294 of the Code.

(ii) If such report reaches the Magistrate after the committal proceedings, the same shall be sent immediately to the Sessions Court after furnishing a copy to the Investigating Officer, free of cost.

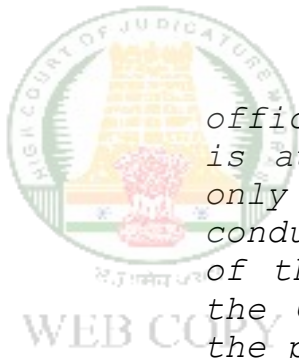
(8) On requisition by the investigating agency, if any expert opinion is sought by the Court, the communication from the Court to the expert, shall specify that a copy of the report be sent to investigating agency concerned. As and when the opinion of the expert is received directly by the Court, a photocopy of the same shall be furnished to the investigating agency, free of cost, if a copy of it has not been given to the investigating agency.

(9) System generated final report filed by the police manually or electronically shall be accepted by the Court.

(10) In the final report and complaint, the e-mail id and mobile number of the complainant, witnesses and accused, if available, shall be furnished.'

15. The above rule makes it very clear that the final report normally should not be returned on the ground that forensic report or experts opinion is not available on the final report. Even such reports are not available, the Court has to send the communication to the expert to forward the copies to the Court. It is useful to refer to the judgment of Hon'ble Apex Court in **R.Sarala Vs. T.S.Velu and Ors** reported in **2000 (4) SCC 459**. In the above judgment, the Hon'ble Apex Court has held as follows:

"Investigation is defined in Section 2(h) of the Code, as including "all the proceedings under this Code for the collection of evidence conducted by a police



officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf." We are only concerned in this case with the investigation to be conducted by a police officer and hence the latter limb of the definition has no relevance now. Chapter XII of the Code contains provisions regarding "information to the police and their powers to investigate".

After dealing with various aspects of the investigation from Section 154 to Section 168 of the Code, the statute says in the next two sections regarding the subsequent step. Section 169 of the Code enjoins on the officer in charge of the police station concerned to release the accused from custody on executing a bond if it appears to him that "there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a magistrate". Section 170 of the Code directs that if upon investigation "it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a magistrate empowered to take cognizance of the offence upon a police report". Section 173(1) casts an obligation for completing the investigation without unnecessary delay and sub-section (2) enjoins on the officer in charge of the police station to forward to the magistrate a report in the form prescribed by the State Government, on completion of such investigation. The aforesaid power of the officer in charge of the police station is subjected only to the supervision of superior police officers in rank as envisaged in Section 36 of the Code. There is no stage during which the investigating officer is legally obliged to take the opinion of a Public Prosecutor or any authority, except the aforesaid superior police officer in rank.

There is no material difference regarding general powers of investigation by police as between the present Code and the corresponding provisions contained in Chapter XIV of the erstwhile Code of Criminal Procedure 1898. In H.N. Rishbud and Inder Singh vs. The State of Delhi {1955(1) SCR 1150} a three Judge Bench of this Court, after delineating the different steps in investigation as contemplated in the Code, has pointed out that the formation of the opinion, whether or not there is a case to place the accused on trial, should be that of the officer in charge of the police station and none else. Following observations are to be noted in this context:



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"The scheme of the Code also shows that while it is permissible for an officer in charge of police station to depute some subordinate officer to conduct some of these steps in the investigation, the responsibility for every one of these steps is that of the person in the situation of the officer in charge of the police station, it having been clearly provided in section 168 that he should report the result to the officer in charge of the police station. It is also clear that the final step in the investigation, viz. The formation of the opinion as to whether or not there is a case to place the accused on trial is to be that of the officer in charge of the police station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under Section 551."

Public Prosecutor is appointed, as indicated in Section 24 of the Code, for conducting any prosecution, appeal or other proceedings in the court. He has also the power to withdraw any case from the prosecution with the consent of the court. He is the officer of the court. Thus Public Prosecutor is to deal with a different field in the administration of justice and he is not involved in investigation. It is not in the scheme of the Code for supporting or sponsoring any combined operation between the investigating officer and the Public Prosecutor for filing the report in the court.

In this context a reference can be made to the following observation made by the Judicial Committee of the Privy Council in Emperor vs. Khwaja Nazir Ahmad (AIR 1945 PC 18):

"In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court."



Following the above, a two Judge Bench of this Court has stated in *Abhinanadan Jha vs. Dinesh Mishra* (AIR 1968 SC117) as follows:

"We have already pointed out that the investigation, under the Code, takes in several aspects, and stages, ending ultimately with the formation of an opinion by the police as to whether, on the material covered and collected a case is made out to place the accused before the Magistrate for trial, and the submission of either a charge- sheet, or a final report is dependent on the nature of the opinion, so formed. The formation of the said opinion, by the police, as pointed out earlier, is the final step in the investigation, and that final step is to be taken only by the police and by no other authority."

In this context we may also point out that the investigating officer, though is subject to supervision by his superiors in rank is, not to take instructions regarding investigation of any particular case even from the executive government of which he is a subordinate officer. This position which was well delineated by the celebrated Lord Denning, has since been followed by this Court. In *R. Vs. Metropolitan Police Commissioner* [1968 (1) All.E.R. 763] Lord Denning had said thus:

"I have no hesitation, however, in holding that, like every constable in the land, he should, and is, independent of the executive. He is not subject to the orders of the Secretary of State..I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."



In Vineet Narain vs. Union of India [1998 (1) SCC 226] a three-judge bench of this court after quoting the above passage has stated: "There can hardly be any doubt that obligation of the police in our constitutional scheme is no less."

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In State vs. Raj Kumar Jain [1998(6) SCC 551] a two judge bench considered the legality of an order passed by a Special Judge before whom the CBI filed final report in respect of a junior engineer who was pitted against offences under the Prevention of Corruption Act. The CBI in the report held that the allegations made against him were unsubstantiated. But the Special Judge declined to accept the said report as in his opinion the CBI should have taken the view of the Sanctioning Authority. So the Special Judge directed the CBI to conduct further investigation after approaching the Sanctioning Authority. Though the High Court of Delhi did not interfere with the said direction, this Court interfered with it for which their Lordships followed the decision in Abhinandan Jha (supra). The bench then observed thus:

"Viewed in that context, the CBI was under no obligation to place the materials collected during investigation before the sanctioning authority, when they found that no case was made out against the respondent. To put it differently, if the CBI had found on investigation that a prima facie case was made out against the respondent to place him on trial and accordingly prepared a charge-sheet (challan) against him, then only the question of obtaining sanction of the authority under Section 6(1) of the Act would have arisen for without that the Court would not be competent to take cognizance of the charge-sheet. It must, therefore, be said that both the Special Judge and the High Court were patently wrong in observing that the CBI was required to obtain sanction from the prosecuting authority before approaching the Court for accepting the report under Section 173 (2) Cr.PC for discharge of the respondent."

It is worthy of notice that even when law required that prosecution could be commenced only with the sanction of the authority concerned this Court took the stand that such Sanctioning Authority is not a consultee of the investigating officer to form his opinion regarding the final shape of investigation. The position in the present case is even much lighter and hence the



investigating officer cannot be directed to be influenced by the opinion of the Public Prosecutor.

The High Court has committed an illegality in directing the final report to be taken back and to file a fresh report incorporating the opinion of the Public Prosecutor. Such an order cannot stand legal scrutiny and hence we allow this appeal and set aside the impugned order."

(Underlining made by this Court to supply emphasis)

16. The law laid down by the Hon'ble Apex Court considering various judgments referred to in the above judgment, makes it very clear that the investigating officer is not legally obliged to take the opinion of the Public Prosecutor or any authority except the superior police officer in rank as discussed in the above judgment.

17. In such view of the legal position enunciated in the above judgment, further the Code of Criminal Procedure does not contemplate the opinion from the Public Prosecutor before laying final report, we deem it necessary to issue a direction to the Director General of Police to issue a Circular in this regard to all the investigating officers to file a final report within a time period prescribed under the Criminal Procedure Code indicating that the investigating officer need not submit the final report to the Public Prosecutor for their opinion. Such Circular shall be issued immediately after receipt of the copy of the order.

Sd/-

Assistant Registrar ()

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Sub Assistant Registrar(CS)

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To

1.The Additional Chief Secretary to Government,
Home, Prohibition and Excise Department,
Fort St.George, Chennai-600009.

2.The District Collector and District Magistrate,
Office of the District Collector and District Magistrate,
Ramanathapuram District.



3.The Superintendent of Prison,
Central Prison,
Madurai.

4.The Director General of Police,
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5.The Joint Secretary to Government,
Public(Law & Order),
Fort St.George,
Chennai-9.

6.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

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