

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.R. 3448 of 2011

Urmi De

-Vs-

State of West Bengal and Ors.

For the Petitioner : Mr. Arunangshu Chakraborty
Mr. Arijit Bera
Ms. Geniya Mukherjee
Ms. Zeba Rashid
Ms. Shaika Amrin

For the State : Mr. Narayan Prasad Agarwala
Mr. Pratick Bose

Heard on : 20.12.2023, 24.01.2024, 12.03.2024
27.06.2024

Judgment on : 19.08.2024

Ananya Bandyopadhyay, J.:-

1. The instant revisional application had been filed by the petitioner praying for quashing of the proceedings of Purba Jadavpur Police Station Case No.162 of 2009 dated 13.10.2009 under Sections 302/34 of the Indian Penal Code, 1860 and all Orders passed therein, including Order dated 10.9.2010 passed by Learned Sub-Divisional Judicial Magistrate, Alipore, South 24-Parganas in connection with B.G.R No. 5197/09 which was pending before the Learned Sub-Divisional Judicial Magistrate, Alipore, South 24-Parganas,

arising out of thereby directing further investigation in connection with the aforesaid case and further directing a specific change in the investigation officer of the case and further order dated 14.9.2011 passed by the Learned Chief Judicial Magistrate-in-Charge, Alipore, South 24-Parganas thereby taking cognizance of subsequent charge-sheet under Sections 304A/34 of the Indian Penal Code, 1860 .

2. The petitioner contended to be a member and Secretary of a society named Srijan Sobha which was a society duly registered under the provisions of the Societies Registration Act, with the object of working for development, provision of care and looking after mentally challenged persons, and the petitioner was the Secretary of the society. The society had the permission and appropriate documentation from the State Government to function as such, and was a home dedicated to assisting the mentally challenged.
3. The petitioner stated the opposite party no.2 had initially approached the petitioner's society through another daycare institution for mentally disturbed students called Mono Bikash Kendra, for the purpose of admission on a residential basis and for necessary treatment, as it was found that the opposite party no.2 was unable to control the said boy at home and deal with him appropriately, as he grew older, his violent fits and moods required professional and trained attention. Accordingly, the victim was admitted.
4. The de facto complainant/opposite party no.2 filed a complaint in connection with Purba Jadavpur Police Station Case No.162(10) of 2009, inter alia, stating that his son Kingshuk Mukherjee, suffering from mental retardation, was a student of "Mono Bikash Kendra", an institution situated near Ruby

Hospital at by-pass for more than six years and had been a resident of a hostel namely “Srijan Sobha” situated near Bengal Ambuja Bus Stop at by-pass which dedicatedly provided care, security and medication to similar persons.

5. The de facto complainant deposited a sum of Rs.26,000/- and Rs.55,500/- towards expenses for residential accommodation, medical and ancillary provisions for his son. The de facto complainant used to meet his son at regular intervals.
6. On first week of September, 2009, the de facto complainant was prevented to meet his son by a staff named Amal on the pretext of his son attending his classes. The opposite party no.2 deposited fee for the month of September through a cheque and returned without meeting his son.
7. On 19th of September, 2009 while the opposite party no.2 was in Mumbai on an assignment, he received a phone call from the aforesaid hostel ‘Srijan Sobha’ informing that his son expired for consuming chilli. The opposite party no.2 returned to Kolkata and on enquiry, he learnt that his son was taken to Peerless Hospital and B. K. Roy Research Centre wherefrom a provisional death certificate was issued mentioning that his son was “*found brought dead*” and the cause of the death could “*be determined by autopsy only.*”
8. On the basis of such provisional death certificate, Purba Jadavpur P.S. had initiated an unnatural death case being No.52/09 dated 19.09.09.
9. The de facto complainant lodged a complaint at Purba Jadavpur Police Station on 20.09.09 against the staff of the aforesaid residential hostel

‘Srijan Sobha’ being aware that his son was physically tortured by the accused persons resulting in his death.

10. The Inspector-in-Charge of the concerned police station refused to register the F.I.R. asking the de facto complainant to wait till the issuance of the post mortem report.
11. The post mortem report received by the Investigating Officer mentioned the cause of death to be the effect of poison and was ante mortem in nature along with several marks and abrasions over the chest and upper limbs of Kingshuk (since deceased) along with ante mortem bruises on the face and right upper body. The age of injuries were 42 to 72 hours prior to the death of Kingshuk, the victim.
12. The concerned police station refused to lodge the F.I.R. at the insistence of the opposite party no.2 and was asked to wait till the receipt of the report of viscera test. The opposite party no.2, on such refusal, communicated the incident to several significant officers as well as the Chief Minister, West Bengal. Subsequently, the de facto complainant was informed by the Office of the Forensic Science Laboratory that the Senior Scientific Officer, Toxicology, Dr. N. Ghatak conducted the examination and in the viscera report opined “*no poison could be detected in the viscera of said Kingshuk.*”
13. Final report was submitted by the concerned police station under Section 173 of the Code of Criminal Procedure, 1973 being No.40 of 10 dated 25.03.10.
14. Being aggrieved by such final report whereby the allegations against the petitioners did not constitute any offence under Section 302/34 of the Indian

Penal Code the de facto complainant/opposite party no.2 filed a 'naraji petition' claiming reinvestigation by C.I.D. or any other agency.

15. The Learned Magistrate, inter alia, directed further investigation of the aforesaid police station case by the Inspector-in-Charge of Purba Jadavpur P.S. either by himself or by a competent officer of his police station barring the previous Investigating Officer.

16. The District Enforcement Bureau, South-24 Parganas and the Inspector of Enforcement Bureau, South-24 Parganas, conducted an investigation and filed a charge-sheet No.63 of 2011 dated 30.04.2011 under Section 304A of the Indian Penal Code against the present petitioners and others.

17. The Learned Advocate representing the petitioner submitted as follows:-

- i. The complaint did not reveal any offence and indeed no specific role of the petitioner had been ascribed at all who was admittedly not even present at the time of alleged incident. Moreover, it would be apparent that the de facto complainant did not define specific allegation against the petitioner and no material had transpired against her at all in the course of investigation.
- ii. It was unfortunate the Ld. Magistrate ignoring the doctor's report who treated Kingshuk Mukherjee throughout relied upon general knowledge of autopsy surgeon by ignoring the F.S.L. report.
- iii. The Learned Magistrate failed to appreciate that a further investigation could not displace the scientific reports and findings that the death of the boy was brought on probably by the chili seeds he put in his nose and mouth through an allergic reaction and the

same could not be said to in any measure fulfill the ingredients of the offences alleged in any matter at all.

- iv. It was evident from the order of further investigation by the Learned Magistrate that he had attempted to go into the merits of the case while directing a further investigation and made some observation as to the material which constitute direct and active prejudice to the petitioner in the course of the further investigation and such observation were wholly illegal and unwarranted.
- v. The investigations conducted by Inspector of Police (District Enforcement Branch) Chittaranjan Chakraborty was not only without jurisdiction but contrary to the settled legal provision that only the superior court under Section 482 of the Code or even Article 226 of the Constitution of India direct "further investigation" "fresh or de-novo" and even "reinvestigation". The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. **[2013 (5) SCC p.762 para-43, 40 – 40.4, 45, 46- Vinay Tyagi vs. Irshad Ali]**.
- vi. It was submitted that the Hon'ble Supreme Court in Vinay Tyagi vs. Irshad Ali reported in (2013) 5 SCC p.762 para 43 to 46 held inter alia that –

“Para 43. At this stage, we may also state another well- settled canon of the criminal jurisprudence that the superior courts have the jurisdiction under Section 402 of the Code or even Article 226 of the

Constitution of India to direct "further investigation", "fresh" or "de novo and even "reinvestigation" "Fresh", "de novo" and "reinvestigation are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also settled principle that this power has to be exercised by the superior courts very sparingly circumspection."

"Para 44. We have deliberated at some length on the issue that the powers of the High Court under Section 482 of the Code do not control or limit, directly or impliedly, the width of the power of the Magistrate under Section 228 of the Code. Wherever a charge-sheet has been submitted to the court, even this Court ordinarily would not reopen the investigation, especially by entrusting the same to a specialised agency. It can safely be stated and concluded that in an appropriate authorities is not in the proper direction and that in order to complete justice and where the facts of the case demand, it is always open to the court to hand over the investigation to a specialised agency. These principles have been reiterated with approval in the judgments of this Court in Disha v. State of Gujarat²⁵, Vineet Narain v. Union of India⁶, Union of India v. Sushil Kumar Modi²⁷ and Rubabbuddin Sheikh v. State of Gujarat."

"Para 45. The power to order/direct "reinvestigation" or "de novo" investigation falls in the domain of higher courts, that too in exceptional cases. If one examines the provisions of the Code, there is no specific provision for cancellation of the reports, except that the investigating agency can file a closure report (where according to the investigating agency, no offence is made out). Even such a report is subject to acceptance by the learned Magistrate who, in his wisdom, may or may not accept such a report. For valid reasons, the court may, by declining to accept such a report, direct "further investigation", or even on the basis of the record of the case and the documents annexed thereto, summon the accused."

"Para 46. The Code does not contain any provision which deals with the court competent to direct "fresh investigation, the situation in which such investigation can be conducted, if at all, and finally the manner in which the report so obtained shall be dealt with. The superior courts can direct conduct of a "fresh"/"de novo" investigation, but unless it

specifically directs that the report already prepared or the investigation so far conducted will not form part of the record of the case, such report would be deemed to be part of the record. Once it is part of the record, the learned Magistrate has no jurisdiction to exclude the same from the record of the case. In other words, but for a specific order by the superior court, the reports, whether a primary report or a report upon "further investigation" or a report upon "fresh investigation", shall have to be construed and read conjointly. Where there is a specific order made by the court for reasons like the investigation being entirely unfair, tainted, undesirable or being based upon no truth, the court would have to specifically direct that the investigation or proceedings so conducted shall stand cancelled and will not form part of the record for consideration by the court of competent jurisdiction."

- vii. The Hon'ble Supreme Court recently in State through C.B.1. vs. Hemendra Reddy (Criminal Appeal No..... of 2023) arising out of S.L.P. (Criminal) No. 7628-7630 of 2017 in para-83 summed up the power of the Magistrate to Order for further investigation under Section 173(8) after the final report submitted under Section 173(2) of the Cr.P.C. had been accepted. The Hon'ble Supreme Court in para-83 summarized the conclusion:

"Para 83: We may summarize our final conclusion as under:

- a. *Even after the final report was laid before the Magistrate and was accepted, it was permissible for the investigating agency to carry out further investigation in the case. In other words, there was no bar against conducting further investigation under Section 173(8) of the Cr.P.C. after the final report submitted under Section 173(2) of the Cr.P.C. had been accepted.*
- b. *Prior to carrying out further investigation under Section 173(8) of the Cr.P.C. it was not necessary that the order accepting the final report should be reviewed, recalled or quashed.*
- c. *Further investigation was merely a continuation of the earlier investigation; hence it could not be said that the accused were being*

subjected to investigation twice over. Moreover, investigation could not be put at par with prosecution and punishment so as to fall within the ambit or Clause (2) of Article 20 of the Constitution. The principle of double jeopardy would, therefore, not be applicable to further investigation.

d. There was nothing in the Cr.P.C. to suggest that the court was obliged to hear the accused while considering an application for further investigation under Section 173(8) of the Cr.P.C.”

viii. The Ld. Magistrate took cognizance on the basis of the Charge Sheet filed by the District Enforcement Branch without considering the earlier Final Report passed by the Investigating Officer passed under Section 173(2) of Cr.P.C.

ix. The Hon'ble Supreme Court in Criminal Appeal No. 256 of 2022 (Luckose Zachariah @ Zak Nedumchira Luke @ Ors. vs. Joseph Joseph @ Ors. in para-16 held inter alia -

“Para 16: In view of the clear position of law which has been enunciated in the judgments of this Court, both in Vinay Tyagi (supra) and Vinubhai Haribhai Malaviya (supra), it is necessary for the Magistrate, to have due regard to both the reports, the initial report which was submitted under Section 173(2) as well as the supplementary report which was submitted after further investigation in terms of Section 173(8). It is thereafter that the Magistrate would have to take a considered view in accordance with law as to whether there is ground for presuming that the persons named as accused have committed an offence. While the High Court has relied upon the decision in Vinay Tyagi (supra), it becomes necessary for this Court to set the matter

beyond any controversy having due regard to the fact that the Sessions Judge in the present case had while remitting the proceedings back to the Magistrate relied on the judgment of the Single Judge of the Kerala High Court in Joseph (supra) which is contrary to the position set out in Vinay Tyagi. Hence, the JFCM 1 Alappuzha shall reexamine both the reports in terms of the decisions of this Court in Vinay Tyagi vs Irshad Ali alias Deepak and Vinubhai Haribhai Malaviya vs State of Gujarat as noted above and in terms of the observations contained in the present judgment. The Magistrate shall take a considered decision expeditiously within a period of one month from the date of the present order.”

- x. The investigation conducted by the Inspector, District Enforcement Branch by no stretch of imagination could be treated within the sphere of further investigation and in the present case the Learned Magistrate also did not direct Inspector, District Enforcement Branch to conduct further investigation.
- xi. The Hon'ble Supreme Court in Chandrababu @ Moses vs. State through Inspector of Police & Ors. reported in (2015) 8 SCC p.774 para 20, 21, 22 held inter alia that the Magistrate could Order for further investigation but he/she could not direct other investigating agency to investigate as that would not be within the sphere of further investigation.

“Para 20: We have reproduced the conclusion in extenso as we are disposed to think that the High Court has fallen into error in its appreciation of the order passed by the learned Chief Judicial Magistrate. It has to be construed in the light of the eventual direction. The order, in fact, as we perceive, presents that the learned Chief Judicial Magistrate was really inclined to direct further investigation but

because he had chosen another agency, he has used the word "reinvestigation". Needless to say, the power of the Magistrate to direct for further investigation has to be cautiously used. In Vinay Tyagi³ it has been held: (SCC p. 791, para 41) "41.... The power of the Magistrate to direct further investigation is a significant power which has to be exercised sparingly, in exceptional cases and to achieve the ends of justice. To provide fair, proper and unquestionable investigation is the obligation of the investigating agency and the court in its supervisory capacity is required to ensure the same. Further investigation conducted under the orders of the court, including that of the Magistrate or by the police of its own accord and, for valid reasons, would lead to the filing of a supplementary report. Such supplementary report shall be dealt with as part of the primary report. This is clear from the fact that the provisions of Sections 173(3) to 173(6) would be applicable to such reports in terms of Section 173(8) of the Code."

"Para 21: In the said case, the question arose, whether the Magistrate can direct for reinvestigation. The Court, while dealing with the said issue, has ruled that: (Vinay Tyagi case 3, SCC p. 791, para 43) "43. At this stage, we may also state another well-settled canon of the criminal jurisprudence that the superior courts have the jurisdiction under Section 482 of the Code or even Article 226 of the Constitution of India to direct 'further investigation, 'fresh or de novo and even reinvestigation'. 'Fresh', 'de novo' and 'reinvestigation' are synonymous expressions and their result in law would be the same. The superior courts are even vested with the power of transferring investigation from one agency to another, provided the ends of justice so demand such action. Of course, it is also a settled principle that this power has to be exercised by the superior courts very sparingly and with great circumspection." And again: (SCC p. 794, para 51) "51.... Whether the Magistrate should direct further investigation or not is again a matter which will depend upon the facts of a given case. The learned Magistrate or the higher court of

competent jurisdiction would direct further investigation or 'reinvestigation' as the case may be, on the facts of a given case. Where the Magistrate can only direct further investigation, the courts of higher jurisdiction can direct further, reinvestigation or even investigation de novo depending on the facts of a given case. It will be the specific order of the court that would determine the nature of investigation."

"Para 22: We respectfully concur with the said view. As we have already indicated, the learned Chief Judicial Magistrate has basically directed for further investigation. The said part of the order cannot be found fault with, but an eloquent one, he could not have directed another investigating agency to investigate as that would not be within the sphere of further investigation and, in any case, he does not have the jurisdiction to direct reinvestigation by another agency. Therefore, that part of the order deserves to be lanced and accordingly it is directed that the investigating agency that had investigated shall carry on the further investigation and such investigation shall be supervised by the Superintendent of Police concerned. After the further investigation, the report shall be submitted before the learned Chief Judicial Magistrate who shall deal with the same in accordance with law. We may hasten to add that we have not expressed any opinion relating to any of the factual aspects of the case."

- xii. No evidence brought on record to show direct nexus between negligence of the accused and the death of victim. That various witnesses added by the prosecution but there were no eye witness.
- xiii. A three Judges Bench of the Hon'ble Supreme Court in Nanjundappa & Anr. vs. the State of Karnataka Criminal Appeal No. 900 of 2017 reported in May, 17, 2022 mandated (para 12) that for convicting the accused of negligence under Section 304 (A) read with Section 34 of

I.P.C. direct nexus between negligence of the accused and the death of the victim had to be proved.

“Para 12: For bringing home the guilt of the accused, prosecution has to firstly prove negligence and then establish direct nexus between negligence of the accused and the death of the victim. Perusal of the record reveals that out of various witnesses arrayed by the prosecution, there are no eye witnesses. Any evidence brought on record is merely circumstantial in nature. We are constrained to repeat our observation that it sounds completely preposterous that a telephone wire carried 11KV current without melting on contact and when such current passed through the Television set, it did not blast and melt the wiring of the entire house. It is even more unbelievable that Appellant no. 2 came in contact with the same voltage and managed to get away with a few abrasions. The Appellants therefore are entitled to be given the benefit of doubt; more so, when there is no report of a technical expert to corroborate the prosecution story.”

18. The Learned Advocate for the State submitted a certified copy of the case diary before this Court. Perusal of the same indicated prima facie elements to constitute a cognizable offence alleged in view of the charge-sheet filed after reinvestigation disclosing a certificate issued by a doctor of “Unit Kolkata Eye Research Foundation” dated 01st December, 2009 narrating a case summary whereby the victim had been to the said centre on 16.09.09 with a complaint of blunt trauma in the left eye two days back being accompanied by an adult attendant. Incidentally the de facto complainant had been to the aforesaid residential hostel to meet his son and was denied of an encounter with the same on the pretext of his being occupied in the

class room. There has been deviation in the opinion enumerated in the post mortem examination report and the report of viscera.

19. The injuries detected on the body of the victim being ante mortem in nature as specified in the post mortem examination whether fatal or not as opined in the viscera report are to be conclusively determined through the process of trial.
20. The consumption of chilli power, capsicum, etc. claimed by the management of the residential hostel, requires to be proved through the process of trial upon appreciation of evidence.
21. The complaint or the F.I.R. is not the encyclopaedia and the role of the present petitioner is to be scrutinized through evidence at trial as far as the presence at the spot and/or active participation is concerned.
22. The High Court, in exercising its revisional jurisdiction under Section 482 of the Code of Criminal Procedure, cannot act as a Trial Court and, therefore, considering the gravity of the instant case, it is incumbent that the trial must proceed to unravel the truthfulness of the complaint in its proper perspective.
23. In the case of ***State of Haryana and Others v. Bhajan Lal and Others***¹ the Hon'ble Supreme Court observed as follows :

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above,

¹ 1992 SCC(Cri) 426

we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the

proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

24. In view of the above discussions, the instant criminal revisional application being CRR 3448 of 2011 is dismissed.
25. Connected applications, if any, are also disposed of.
26. There is no order as to costs.
27. Let the copy of this judgment be sent to the learned trial court as well as the police station concerned for necessary information and compliance.
28. All parties shall act on the server copy of this judgment duly downloaded from the official website of this court.

(Ananya Bandyopadhyay, J.)