

(2017) 02 KL CK 0020

In the High Court Of Kerala

Case No : W.A. No. 1937 of 2012 () IN W.P.(C). 1161 of 2012

B.C. Ramachandra Thilakan

APPELLANT

Vs

The Director, Central Bureau of Investigation

RESPONDENT

Date of Decision : 20-02-2017

Acts Referred:

Constitution of India, 1950 — Article 21, Article 226

Citation : (2017) CriLJ 1906 : (2017) 2 ILRKerala 373 : (2017) 2 KerLJ 57 : (2017) 1 KLT 87

Hon'ble Judges : Mr. Antony Dominic and Mr. Dama Seshadri Naidu, JJ.

Bench : Division Bench

Advocate : Sri. A.X. Varghese and Sri. A.V. Jojo, Advocates, for the Appellant; Sri. P. Chandrasekhara Pillai, SC, C.B.I, for the Respondent Nos. 1 and 2; Sri. C. Sreedharan Nair, Director General of Prosecution, for the Respondent Nos. 1, 2, and 7; Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Dama Seshadri Naidu, J.—Facts in Brief:

The appellant, a father, has lost his son in what is believed to be a tragic accident. Unconvinced of the cause of his son's death, the appellant filed W.P.(C) No. 1161 of 2012. His principal grievance was that his son had fallen in love with a police officer's daughter; that the police officer's son and his friends threatened the petitioner's son with dire consequences, if he continued his love affair; that eventually he had been done away with. He accuses the police of shoddy and ineffectual investigation. Therefore, he filed the writ petition seeking reinvestigation by the Central Bureau of Investigation into his son's death.

2. This Court, per a learned Single Judge, through a judgment dated 27.07.2012, dismissed the writ petition. Further aggrieved, the father filed this writ appeal.

Submissions:

Appellant's:

3. Sri. A.X. Varghese, the learned counsel for the appellant, has submitted that the appellant's son, hale and hearty, was in the prime of his youth-aged 27 years. According to the learned counsel, the appellant's son fell in love with a police officer's daughter. After coming to know of their love affair, the girl's brother with his friends assaulted the appellant's son and threatened him that they would do away with him unless he desisted from loving his sister. It is the appellant's specific case, as contended by the learned counsel, that when his son was going on his motorbike on 13.07.2011, some unknown assailants waylaid and killed him.

4. The learned counsel for the appellant has submitted that even in the autopsy, the cause of death, though said to be an accident, has never been conclusive. Had it been a case of hit and run, there ought to have been tyre-marks of the offending vehicle or any other tell-tale signs of an accident, of collision. The learned counsel has emphasised that the motorbike ridden by the deceased was undamaged-and it was, further, found neatly parked to the side of the road.

5. Elaborating his submissions, the learned counsel has drawn our attention to the forensic report, where the doctors have concluded that "tyre marks of any vehicle could not be detected". According to the learned counsel, the judgment appealed against suffers from fatal flaws because it has failed to consider the vital aspects, such as the ineffectual investigation by the police for the suspect is from their ranks. Eventually, the learned counsel has urged this Court to set aside the impugned judgment and direct the CBI to investigate the crime afresh.

Respondents":

6. The learned Director General of Prosecution (DGP), on his part, has submitted that the police have conducted a thorough, professional investigation. According to him, they have never been biased or influenced. He has further submitted that even the appellant did not allege that the police have been influenced. In further elaboration of his submissions, the learned DGP would contend that an investigation by the CBI could not be for mere asking if the State Police force is found neither wanting in skills nor guilty of any professional misconduct.

7. As we have directed earlier, the prosecution has provided the entire Case Diary. Drawing our attention to the CD, thus placed before us, the learned DGP has pointed out that the medical reports concluded that the appellant's son had been heavily drunk; an inordinate amount of alcohol was found in his blood. He has also emphasised that it was more than probable that the appellant's son had been run over by a speeding heavy-vehicle. Eventually, the learned DGP has urged us not to interfere with the impugned judgment, which, according to him, has considered all factors before declining the appellant's request to direct a CBI investigation into the cause of his son's death.

8. Heard the learned counsel for the appellant and the learned Director General of Prosecution, besides perusing the record.

The Power of the High Court to Order Investigation by CBI:

9. Investigating agencies are guardians of the liberty of innocent citizens; they have a heavy burden cast on them to see that innocent persons are not charged on an irresponsible, false implication. No one should be put through the harassment of a criminal trial unless there are good and substantial reasons. So holds the Apex Court in *Navinchandra N. Majithia v. State of Meghalaya*.

10. The Supreme Court, in fact, through a series of judgments has held that if a court concludes that there was a serious irregularity in the investigation of a crime, the court may direct a further investigation under Section 173(8) Cr.P.C., even by transferring the investigation to an independent agency. It cannot direct a reinvestigation, however. Unless an extraordinary case of gross abuse of power is made out by those in charge of the investigation, the court should, holds the Supreme Court in *S.N. Sharma*, be quite loathe to interfere with the investigation, a field of activity reserved for the police and the executive. True, if the police exercise their investigative power mala fide, the court can interfere. *Kashmeri Devi* and *Hema* are two such instances where the Supreme Court transferred the investigation to the CBI, after its concluding that the earlier investigation was unfair.

11. There lingered a doubt whether a High Court exercising its jurisdiction under Article 226 of the Constitution of India can, without the consent of the State Government, direct the CBI to investigate a cognisable offence alleged to have taken place within the territorial jurisdiction of that State. A Constitution Bench of the Supreme Court in *State of West Bengal v. Committee for Protection of Democratic Rights* answered the question, on reference, affirmatively. Keeping in view the constitutional contours, the Bench viewed the issue comprehensively: when the scheme of Constitution prohibits encroachment by the Union upon a matter which exclusively falls within the domain of the State Legislature-say, public order, police, and so forth-can the third organ of the State, viz., the Judiciary, direct the CBI, an agency established by the Union, to do something about a State subject, without that State's consent?

12. The Constitution Bench, to begin with, acknowledges that Section 5(1) of the Delhi Police Act empowers the Central Government to extend the powers and jurisdiction of members of the Delhi Special Police Establishment to any area in a State. But Section 6 mandates that it must be only with the consent of the State Government concerned. For in a federal structure, the Union is not permitted to encroach upon the legislative powers of a State regarding the matters specified in List II of the Seventh Schedule.

13. The Court, in this context, has invoked the dictum of the Seven-Judge Bench in *Delhi Laws Case* that the essential characteristic of federalism is "the distribution of limited executive, legislative, and judicial authority among bodies which are coordinate with and independent of each other". The supremacy of the Constitution is fundamental for a federal State and for preventing either the

legislature of the federal unit or those of the member States from destroying or impairing that delicate balance of federal power-the federal power satisfying the State's desire for union without losing its identity or individuality. This supremacy of the Constitution is protected by an independent judicial body interpreting the distribution of powers.

14. The Court has noticed the federal ferment on the delicate distribution of powers between the Union and the constituent States. So it posed a question unto itself: can the doctrine of separation of powers curtail the power of judicial review conferred on the Constitutional Courts, on the ground that exercise of such power would impinge upon the said doctrine, even where the fundamental rights are sought to be abrogated or abridged?

15. To answer the above question, the Court, invoking its earlier precedents, has observed that the Court is not helpless to grant relief if the right to life and personal liberty is threatened. And it should be prepared "to forge new tools and devise new remedies" for vindicating these precious fundamental rights. On the scope of Article 226 of the Constitution, the Court has observed that the power of judicial review conferred on the High Court, in a way, is wider in scope. The High Courts are authorised under Article 226 of the Constitution, to issue directions, orders, or writs to any person or authority, including any Government, to enforce fundamental rights and, "for any other purpose".

16. Before proceeding further, it is meet to mention the exhortation of *Tirupati Balaji Developers (P) Ltd. & Ors. v. State of Bihar*: Under the constitutional scheme as framed for the judiciary, both the Supreme Court and the High Courts are courts of record. The High Court is not a court "subordinate" to the Supreme Court. In a way the canvas of judicial powers vesting in the High Court is wider because it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution to enforce the rights conferred by Part III of the Constitution and for any other purpose, while the Supreme Court's original jurisdiction to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with such matters as, for example, Presidential elections or inter-State disputes, which the Constitution does not envisage being heard and determined by High Courts.

17. The Court, in the end, has observed that Article 21 of the Constitution, in its broad perspective, seeks to protect the people's lives and liberties from being affected, except according to the procedure established by law. That Article not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of committing a cognisable offence. The person may be its own officer. In certain situations, the State needs to protect even a witness.

18. Keeping in line with the above observations, the Court has gone onto hold that the High Court, exercising its jurisdiction under Article 226 of the

Constitution, can direct the CBI to investigate, without the State's consent, a cognisable offence alleged to have been committed within that State's territory; the direction will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of powers. And it shall be valid in law. As the protectors of the citizen's civil liberties, the Supreme Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular- zealously and vigilantly.

19. Emphatic as its observations are, the Apex Court, nevertheless, served a caveat: despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Constitutional Courts must bear in mind certain self-imposed limitations on exercising these Constitutional powers. The very plenitude of the constitutional powers requires the courts to be caution and circumspect in exercising those powers. As to the Court's directing the CBI to investigate a case, no inflexible guidelines can be laid down about how and when such power should be exercised. But, as oft repeated, such an order is not to be passed routinely or merely because a party has levelled some allegations against the local police.

20. To a telling effect the Supreme Court observes that the court should exercise this extra-ordinary power sparingly, cautiously, and exceptionally, to provide credibility and instill confidence in the investigation, or when the incident may have national or international ramifications, or when such an order may be necessary for doing complete justice, and for enforcing the fundamental rights. Otherwise the CBI would be flooded with many cases. And with limited resources, it may find it difficult to properly investigate even serious cases. In this process, it may lose its credibility and purpose with unsatisfactory investigations.

Do the Facts of this Case Justify an Investigation by the CBI?

21. Though unfortunate that the appellant's son had met an untimely end, there is no whisper, as rightly contended by the learned DGP, in the pleadings that the police had come under any extraneous influence or pressure, or that they had been biased in their investigation. The singular allegation, as we could gather, is that the investigation was improper or ineffectual. Further, the appellant's sheet-anchor is that no tyre marks were found on the dead body; the motorbike, too, was found parked to the side of the road.

22. The learned counsel for the appellant has repeatedly asserted that had it been a case of accident, first, the vehicle would have been damaged; second, there ought to have been some telltale signs, such as tyre marks, on the dead body. As neither of them was found, the police ought not to have concluded that it was a mere accident. Much less could the learned Single Judge have concluded, the learned counsel argues, that the incident deserved no investigation by the CBI.

23. The fatality occurred on 13.07.2011; the postmortem was performed on 14.07.2011. Ext. P2 postmortem certificate, according to the learned counsel, is the earliest document that would throw light on the incident shunning embellishment. The certificate describes the body's postmortem condition: "fingernails blue, face deformed and compressed from right to left, an oblique scar 6.5 cms long on the right iliac fossa. Chest seen compressed and depressed; Cornea clear; rigor mortise present in the limbs only; no signs of decomposition". Under the caption "other findings", the certificate further notes as follows: Air passages contained blood. Lungs (right 250 gm., Left 210 gm) Pale stomach (250 gm) contained creamy white viscous material in a whitish fluid medium having no unusual smell, mucosa pale. Urinary bladder empty and other internal organs pale, otherwise normal.

24. The opinion on the cause of death reads thus: "The death was due to injuries sustained to head and abdomen."

25. The learned counsel has laid frontal thrust on the finding that the stomach contained whitish fluid having no unusual smell. According to him, had the deceased been inebriated, the stomach contents must have been smelling of alcohol. He has suggestively argued that the chemical analysis report is a later development, not entirely clear of embellishment or afterthought.

26. The Forensic Laboratory of the Police Department, Trivandrum, submitted its report on 31.05.2012 to the Judicial Magistrate. True, it has concluded that no tyre-marks of any vehicle could be detected on the material objects it had examined. As seen from the report, the Forensic Laboratory examined five material objects: (1) a strained and cut-open blue colour jeans (2) a stained, cut-open, and torn full-sleeve shirt (3) stained and cut-open brownish underwear (4) an old cut-open belt and (5) six numbers of tiny broken pieces of mirror wrapped in a packet.

27. The learned DGP in rebuttal has contended that only the clothes have been subjected to forensic examination but not the very body. According to him, if a tyre ran over any bare part of the body, there was no occasion for the forensic lab to examine that aspect. The case diary contained certificate of chemical analysis issued 07.12.2012 by the Chemical Examination Laboratory Department. From the certificate, we gather that the Department examined the visceral remnants of the deceased: stomach and part of the intestine that contained a part of liver, one kidney, 20 ml of blood, and 30 ml of saturated saline.

28. To ascertain the cause of death, we will keep aside all other factual aspects and focus on only the scientific evidence as obtained from the case diary. Indeed, the Chemical Examiners Laboratory Department records as follows:

"Ethyl alcohol was detected in item Nos. I, II and III. The sample of blood under item No.III contained 454 mg (four hundred and fiftyfour milligram) of ethyl alcohol in 100 ml blood. No other poison was detected in item Nos. I, II and III. No poison including ethyl alcohol was detected in item No. IV the sample of

preservative."

29. Further, the statement of the Doctor who conducted the postmortem, as recorded by the investigating agency, would reveal thus:

"From the injuries sustained to the deceased in the case, it can be said that a vehicle was run over the body when he was lying supine. From the nature and extent of injuries on the upper portion of the chest and the face, a Heavy vehicle could have caused those injuries and the numbers of tyres caused the injuries can't be clearly said. The possibility of running over of more than one vehicle is practically nil. Any Blood Alcohol Concentration (BAC) in the blood of a normal human in the range of 400 to 500 mg/100 ml of blood could be FATAL. But BAC of 454 mg/100ml of blood in the body of a CHRONIC ALCOHOL may cause only difficulty of movement or loss of consciousness. Blood Alcohol Concentration of 454 MG/100 ml of blood normally renders a human being incapable of driving or riding and even walking. All the inquiries sustained in this case are ANTEMORTEM and NO POSTMORTEM injuries were found in my examination. The death in this case is consistent with death due to vehicle Run-over."

(italcis supplied)

30. The Doctor with all his expertise has concluded that the deceased was highly intoxicated. Given the blood alcohol concentrate in his body, the deceased, according to the Doctor, must have been unable to move properly or rendered himself unconscious. With no control over his motor-functions, the deceased-we may take the doctor's supposition a little further-must have tried to cross the road or could have fallen unconscious in a drunken stupor, and he could have been hit or run over by a motor vehicle. The conclusion, we note, may be conjectural, but that cannot be avoided to connect the dots, to supply the missing links.

31. It is axiomatic to observe that any amount of suspicion would not equal an ounce of proof. Here, the appellant, bereaved as he has been having lost his dear son, had been distraught; he wailed that the police did not investigate properly. But the fact remains that there was no specific allegation that the police had been influenced in any manner. Further, as seen from the case diary, the deceased, unfortunately though, was found inebriated; in that condition on a highway, could we say it was illogical of the doctor to conclude that the deceased must have met with an accident-on his own account?

32. In para 11 of the writ petition, the petitioner has pleaded that the police officials "who enquired about the accident at the first instance had come to the conclusion that the accident was suspicious enough to be a murder, the body was transferred to the Ernakulam General Hospital and to the Alapuzha Medical College for conducting postmorem." This averment compels us conclude that the police approached the issue with an open mind; they harboured no preconceived notions about the cause of death. The police officer whose daughter the appellant's son allegedly had fallen in love with was a constable,

not a high-ranking official. He is said to have retired pending the investigation. Barring a lurking innuendo, the appellant attributed no overt, incriminating acts to the constable or his son, who had earlier allegedly assaulted the deceased. They were not made parties to the proceedings, either.

33. The record further reveals that the police, as part of their investigation, have questioned the persons who allegedly assaulted the deceased and also checked their call records. According to them, no incriminating evidence could be found. All these factors, in our opinion, unmistakably lead to a conclusion that the police had properly investigated the crime and concluded, with whatever element of tentativeness, that the deceased may have died in an accident. 34. Regrettably, we have failed to persuade ourselves to hold that this case presents any of the contingencies contemplated in Committee for Protection of Democratic Rights (*supra*), deserving an investigation by the CBI.

35. Under these circumstances, we find no compelling reason to conclude, much less direct, that a specialised agency like CBI should investigate the crime. We, therefore, dismiss the writ appeal.