

(2012) 06 KL CK 0186
In the High Court Of Kerala
Case No : Criminal M.C. No. 4957 of 2010

Central Bureau of Investigation

APPELLANT

Vs

Jitha Kumar. K, PCT-7256, Sree Kumar. S.V. ARPCT T-1795
and Soman, PCT-6685

RESPONDENT

Date of Decision : 29-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 102, 174, 41(1)(d), 482
Penal Code, 1860 (IPC) — Section 116, 120B, 167, 193, 201

Citation : (2012) 4 KLT 306

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : MVS Namboothiry, Sri. B. Raman Pillai, Sri. N.K. Shyju, Sri. R. Anil, Sri. Anil K. Mohammed, Sri. Shyam Aravind, Sri. T. Anil Kumar, Sri. Manu Tom, Sri. P. Chandrasekhara Pillai, C.B.I, for the Appellant; C. Prathapachandran Pillai, Sri. P. Krishna Kumar (Alappuzha), Sri. Sunil J. Chakkalackal, Sri. T. Ramprasad Unni, Smt. Smitha George, Sri R. Renjith, Public Prosecutor and Sri. P. Chandrasekharan Pillai, S.C. for CBI, for the Respondent

Final Decision : Dismissed

Judgement

Justice S.S. Satheesachandran

1. The above petition has been filed u/s 482 of the Code of Criminal Procedure, for short, the "Code" to quash Annexure-A2 charge framed by the learned Sessions Judge, Fast Track III, Thiruvananthapuram in S.C. No. 1542 of 2006 and to order de novo trial in the case on the basis of the report filed in R.C. 10/S/07/CBI/SCB/Chennai. Brief facts necessary for disposal of the petition can be summed up thus:

Petitioner is the Central Bureau of Investigation, for short, the "C.B.I.", which was entrusted with the investigation of a crime, Crime No. 704 of 2005 of Fort Police Station, Thiruvananthapuram involving the death of one Udayakumar allegedly on account of police torture while in custody at the above police station.

C.B.I. was entrusted with the investigation by order of this Court in a writ petition filed by the mother of the victim at a stage when trial against three accused persons on the basis of a report filed after completion of the investigation by the Crime Branch was in progress before the Sessions Judge with the case numbered as S.C.No.1542 of 2006. Two crimes registered as Crime Nos. 703 of 2005 and 704 of 2005 of Fort Police station have bearing over the death of Udayakumar, the investigation of which was later conducted by the C.B.I. Initially, local police conducted the investigation over such crimes, but, later on, it was taken over by the Crime Branch Crime Investigation Department. Udayakumar, who was proceeded with another in Crime No. 703 of 2005 u/s 41(1)(d) and 102 of the Code had developed some bodily distress while in custody and later after taken to hospital he was declared dead was the basis to register Crime No. 704 of 2005 u/s 174 of the Code. However, investigation by the local police and, later, by the CBCID coming to a conclusion that the death of Udayakumar was on account of torture in police custody, three police personnel were charge sheeted in Crime No. 704 of 2005 for the offences punishable under Sections 323, 331, 348 and 302 read with Section 34 of the Indian Penal Code. After committal proceedings, the case against those accused was numbered as S.C. No. 1542 of 2006 on the file of the Additional Sessions Judge, Fast Track Court III, Thiruvananthapuram. The accused in the case pleading not guilty, the trial proceeded, and 34 witnesses on the side of the prosecution were examined and some of them including police officials turned hostile. Special Public prosecutor appointed in the case thereupon moved an application for further investigation in the case. The mother of the victim also approached this Court with a writ petition for investigation by the C.B.I. This Court vide judgment dated 20.09.2007 ordered for further investigation of the case by the C.B.I. Accordingly, petitioner C.B.I. took over the investigation of both the crimes, Crime Nos. 703 and 704 of 2005 of Fort Police Station, Thiruvananthapuram, re-registering the crimes as R.C. 5/S/08/CBI/SCB/Chennai and R.C. 10/S/07/CBI/SCB/Chennai respectively. After further investigation, arriving at the conclusion that Udayakumar had a homicidal death on account of torture while in custody by three police personnels, A1 to A3, and that, after his death fabrication and falsification of records were made to screen the offenders from legal punishment, in which, senior police officials were also involved, and, accordingly, Crime No. 703 of 2005 was falsely registered at the Station, C.B.I. filed supplementary charge sheet against the accused, 14 in number, imputing offences under Sections 323, 331, 348 and 302 read with Section 34 of the Indian Penal Code and Sections 120B read with Sections 201, 116 and 193 of the Indian Penal Code against A1 to A3, and offences punishable u/s 120B read with Sections 331, 348, 302, 116 and 193 of the Indian Penal Code against A4 to A14 in the Crime numbered as R.C. 10/S/07/CBI/SCB/Chennai which arose from Crime No. 704 of 2005 of Fort Police Station. A separate charge was also filed against 11 accused persons, who included some arrayed as accused in the other case, for offences punishable u/s 120B read with Sections 466, 474, 193, 167 and 201 of the Indian Penal Code in R.C. 5/S/08/CBI/SCB/Chennai which arose from Crime No.

703 of 2005 of Fort Police Station, Thiruvananthapuram.

2. Though. Crime No. 703 of 2005 had been initially registered against the victim and another by the local police, after investigation, the C.B.I. came to the conclusion that fabrication and falsification of records were made in registering of that crime to screen the offenders who caused the homicidal death of the victim, and accordingly, the aforesaid offences were imputed against the accused named in the report filed. During the course of investigation of the crime, A5 to A12 in R.C. 10/S/07/CBI/SCB/Chennai arising from Crime No. 704 of 2005 had revealed true facts though they had previously deposed falsehood in the trial of the case, according to the C.B.I. The aforesaid accused were taken as approvers and their evidence collected in the approver proceedings, according to the C.B.I., has strengthened its case. Evidence given by such accused persons, who have been taken as approvers are totally opposite to the depositions which they had given as witnesses in the previous trial. 161 statements recorded from them during the investigation previously conducted by the local police and C.B.C.I.D and also the evidence given by those persons as witnesses in the previous trial, which are in conflict with and opposing to the evidence given by them in the approver proceedings by them, are to be eschewed from consideration and a de novo trial in S.C.No.1542 of 2006 before the Sessions Court, Fast Track-III, Thiruvananthapuram quashing Annexure-A2 charge framed by that court previously against some of the accused in that case, A1 to A3, has to be ordered by this Court invoking its inherent powers u/s 482 of the Code, is the case of the investigating agency, the C.B.I.

3. Learned Standing Counsel appearing for the C.B.I adverting to the circumstances under which investigation over the death of Udayakumar was handed over to that agency by, order of this Court in a writ petition, contended that this Court has to exercise its inherent powers to grant the reliefs canvassed in the petition to preserve the justice delivery system. A de novo trial on the basis of the supplementary charge filed by the C.B.I in the case, with direction that the evidence given by some of the accused persons, who have been later accepted as approvers, when examined as witnesses in the previous trial, and also their 161 statements previously recorded by the local police and C.B.C.I.D, are not to be considered in the trial to be proceeded afresh, is the submission of the Standing counsel. Reliance is placed by the counsel in Dinesh Dutt Joshi Vs. The State of Rajasthan and Another, , Zahira Habibulla H. Sheikh and another v. State of Gujarat and others (2004 CrI.L.J. 2050) and Joseph Vs. Antony, to contend that to do real and substantial justice and to prevent abuse of process of the court, this Court has to invoke its inherent power to order de novo trial with direction as aforesaid. Learned counsel Sri. Raman Pillai appearing for the 2nd respondent and Sri. C. Prathapachandran Pillai, learned counsel appearing for the 1st respondent, both of them resisted the petition contending that it is devoid of any merit. It is submitted that in view of the supplementary charge filed including additional accused persons, a fresh trial after framing charges afresh, following the procedural requirements thereof is inevitable. At any rate, the C.B.I

cannot canvass for a retrial of the case eschewing the evidence collected in the judicial proceedings conducted earlier and also for discarding the 161 statements recorded from the witnesses during investigation of the crime by the local police and C.B.C.I.D, projecting the circumstance that some persons implicated as accused by them have been later accepted as approvers, is the further submission. There is no dispute that what has been ordered in the writ petition filed by the mother of the victim by this Court is only for further investigation of the crime by the C.B.I while the trial of the case was in progress. Now after further investigation, a retrial of the case on the basis of the report filed by the C.B.I eschewing from consideration whatever evidence collected during the previous trial and also the 161 statements recorded by the previous investigating agency has to be ordered is the case of the petitioner/C.B.I invoking the inherent jurisdiction of this Court u/s 482 of the Code. Even assuming that there were lapses and perhaps even reason to hold that the previous investigation done in the crime was faulty for one reason or other, it does not follow that 161 statements of the witnesses questioned during the previous investigation and the evidence recorded before the court can be totally discarded from consideration. This Court has ordered only further investigation of the crime and not re-investigation of the crime. A de novo trial of the case eschewing the evidence recorded in the previous trial canvassed by the C.B.I is not allowable. Some of the accused named by the C.B.I after investigation have turned to be approvers and previously they had given conflicting versions in their evidence before the court as against the evidence as approvers, is the plea canvassed for ordering such de novo trial. After further investigation ordered by this Court, when a report has been filed including additional accused; whether they have become approvers or not, and other offences not included earlier are also levelled against accused persons, framing/altering of charges afresh by the court is inevitable. As rightly contended by the learned counsel for the respondents, a trial has to commence afresh on fresh charges so framed. What, if any, is the value to be attached to the evidence recorded from any witnesses previously examined in relation to evidence to be let in through him in the trial to be proceeded with after framing of charges on the basis of the supplementary report filed by the C.B.I is a matter which falls within the appreciation of evidence by the court. Similarly, 161 statement recorded from any of the witnesses during the course of investigation previously done by the local police can be used only for the purpose of contradiction if the maker of such statement is examined as a witness before the court by the prosecution. None of the decisions cited by the counsel has any application to the facts of the case. In *Zahira Habibulla H. Sheikh's* case, cited *supra*, where retrial was ordered, the Apex Court has held that the above case was one without parallel and stood on its own as an exemplary one demanding a retrial of the case. In cases where further investigation is ordered by this Court, it cannot be contended that since there was defective investigation earlier evidence, if any, collected before the court previously, and also 161 statements recorded from the persons questioned during the previous investigation, should be eschewed from consideration in the trial proceeding on the supplementary

report. In Dinesh Dutt Joshi's case, cited supra, what has been dilated upon is only the ambit and scope of powers enjoined by this Court u/s 482 of the Code, which, in the given facts of the case, would no way assist the petitioner C.B.I to sustain the case canvassed of. Similarly, Joseph's case, referred to supra, rendered by this Court ordering further investigation with some directions how it is to be proceeded with is totally inapplicable to the questions involved in the present petition. There is no merit in the petition filed by the C.B.I, and the CrI. M.C. is dismissed.