
(2011) 07 DEL CK 0155

In the Delhi High Court

Case No : Criminal M. C. No. 4497 of 2003

Hoor Begum

APPELLANT

Vs

State (NCT of Delhi) and Another

RESPONDENT

Date of Decision : 04-07-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 173, 173(2), 173(8), 190

Penal Code, 1860 (IPC) — Section 302

Citation : (2011) 3 JCC 2131

Hon'ble Judges : V.K. Shali, J

Bench : Single Bench

Advocate : R.N. Mittal and Kamna Vohra, for the Appellant; Pawan Bahl, APP and Madhav Khurana, R-2., for the Respondent

Final Decision : Dismissed

Judgement

V.K. Shali, J.—This is a petition filed u/s 482 Code of Criminal Procedure by the Petitioner, Hoor Begum against the order dated 28.04.2003 passed by the learned Metropolitan Magistrate refusing to take cognizance of an offence u/s 302 IPC on the basis of a cancellation report filed by the Respondent to which the protest petition was filed by the Petitioner.

2. Briefly stated, the facts of the case leading to the filing of the present petition are that Shabab Khan aged around 20 years, the son of the present Petitioner was working as a driver of Crane Lift Machine with Shivam Fork Lift Services, Paschim Vihar, New Delhi. A complaint was lodged by the Petitioner on 27.03.1999 with the SHO, Police Station Nand Nagari alleging that on 28.12.1998 her son was found dead in a pond in the premises of M/s APS Enterprises, Mandawali where he was working. On receiving this information, Petitioner along with her husband and the police officials reached to the spot and found the dead body of her son. It was alleged by her that her son had been murdered and had not died an accidental death due to drowning. Since the police

had conducted the inquest and not registered a case u/s 302 IPC, the present Petitioner was constrained to file a writ petition before this Court bearing W.P. (Crl.) No. 1101/1999. The said writ petition was disposed of by Division Bench of this Court directing SHO Nand Nagari to register an FIR and investigate the matter. Accordingly, an FIR No. 731/1999 u/s 302 IPC was registered at P.S. Nand Nagri. The police conducted the investigation and recorded the statements of the witnesses and filed a report u/s 173 Code of Criminal Procedure for cancellation of the case stating that the death of the deceased had taken place on account of an accident by drowning. The complainant, namely, the present Petitioner was issued notice about the said cancellation report, whereupon she filed a Protest Petition and took the plea that Daulat Ram and Raju came to her house at Dabar Faridabad, Haryana and called the deceased to accompany them to factory, where he was killed and thereafter his body was thrown into the deep pond. It was alleged that in the month of December, it was very unlikely that the deceased would go for a bath in the pond when the water is cold and, therefore, this was a case of homicide and not accidental death.

3. The postmortem report of the deceased indicated that there were mild abrasions on the head and the forehead. These injuries in my opinion are not of such a significance, so as to arouse suspicion about foul play as these injuries can be sustained on the body, when the same is being fished out from the water. The death of the deceased was attributed to asphyxia due to drowning. Similarly, the CFSL report of the viscera of the contents marked as exhibits 1,2,3 & 4 gave negative test with regard to any common poison and thus, it completely ruled out foul play on the part of any person including the employer or the helper.

4. The Petitioner feeling aggrieved has preferred the present petition for setting aside the order of the learned M.M. accepting the cancellation report of the police. She has taken a plea that re-investigation or further investigation in the case be done, as it is a case of homicide.

5. I have heard Mr. R.N. Mittal, learned senior counsel for the Petitioner as well as the learned APP. I have also gone through the records including the status report filed by the learned APP.

6. Mr. Mittal, learned senior counsel contended that the death of the deceased is shrouded in mystery and the local police has not done a fair investigation into the matter so as to go into the root of the matter to find out the reasons for the death of the deceased. It was contended by him that there were number of factors which aroused suspicion to show that the death of the deceased was unnatural and homicidal rather than accidental, as alleged by the prosecution. In this regard, he has referred to the complaint purported to have been made by the mother of the deceased to the local police that Daulat Ram and Raj Mittal (Raju) had come to her house for the purpose of taking the deceased to office.

7. It is contended by Mr. Mittal, learned senior counsel for the Petitioner that it is very unlikely that a person would go and have a bath in the pond in the winters

knowing fully well that the water would be extremely cold. It was further contended that both the postmortem report and the CFSL report has ruled out the possibility of presence of any poison in the viscera and has opined that the death of the deceased was on account of asphyxia due to drowning but it has failed to explain as to how the deceased had suffered the lacerated and contused injuries both on his forehead and the head which clearly shows that it could not have been an accident. In the light of these facts, it has been contended by the learned senior counsel that the matter needs to be re-investigated or at least further investigated so as to reach to the bottom of the matter. It has been contended by the learned senior counsel that the High Court in exercise of its powers u/s 482 Code of Criminal Procedure can give such a direction to the local police or transfer the investigation to any other investigating agency in order to conduct fair investigation of the matter. In this regard, the learned Counsel has placed reliance on the following two judgments of the Apex Court:

- i. Popular Muthiah Vs. State represented by Inspector of Police,
- ii. Kishan Lal Vs. Dharmendra Bafna and Another,

8. As against this, the learned APP has contended that the filing of the present petition by the Petitioner is a gross abuse of the processes of law on account of the fact that the matter has been thoroughly investigated and nothing amiss has been found in the death of the deceased which is an accidental death and this fact also stands corroborated by the postmortem report and the CFSL report. Therefore, the matter need not be re-investigated as is sought to be urged by the learned senior counsel for the Petitioner. It was conceded by the learned APP that the matter can be further investigated by the police on its own or on the directions of this Court but for the purpose of further investigation, the present Petitioner or any of his relatives must be in a position to give some fresh inputs on the basis of which the matter can be further investigated so as to allay the fears of the Petitioner. It has been contended by the learned APP that the contention of the learned senior counsel that the present protest petition ought to have been treated as a complaint u/s 200 of the Code of Criminal Procedure and the matter ought to have been investigated or inquired into by the learned Magistrate, does not have any merit as the learned MM has passed a speaking and reasoned order which does not call for any variation of the order. It is stated that no prayer was made before the learned MM that the protest petition be treated as a complaint and after inviting orders, it is not open to the Petitioner to assail the same.

9. I have carefully considered the submissions of the learned senior counsel and the learned APP and gone through the record.

10. Before dealing with the grievance of the present Petitioner as to whether this is a fit case where there should be further investigation or not, it may be pertinent here to mention that there is no dispute about the fact that the police suo motto in exercise of its powers u/s 173(8) Code of Criminal Procedure can

"further" investigate into the matter or such a power can be exercised by the investigating agency on the directions of the High Court given in exercise of its powers either under Article 226 of the Constitution of India or u/s 482 Code of Criminal Procedure But one thing is to be borne in mind that the word used u/s 173(8) Code of Criminal Procedure is "further investigation" and not "re-investigation". While as re-investigation would mean revisiting the evidence which has already been collected by the investigating agency which is not permissible within the domain of Section 173(8) Code of Criminal Procedure but further investigation is possible which would mean, to investigate the matter further from the point from where it has been left in the previous investigation. It is in this light that the statement of the learned senior counsel for the Petitioner is being examined. It may be worthwhile here to refer to the observations which have been made by the Apex Court in the two judgments referred herein above.

11. In case titled Popular Muthiah Vs. State represented by Inspector of Police, , it has been observed in para No. 21 as under:

21) The Code of Criminal Procedure is an exhaustive code providing a complete machinery to investigate and try cases, appeals against the judgments. It has provisions at each stage to correct errors, failures of justice and abuse of process under the supervision and superintendence of the High Court as would be evidence from the following:

(i) The Court has the power to direct investigation in cognizable cases u/s 156(3) read with Section 190 of the Code of Criminal Procedure.

(ii) A Magistrate can postpone the issue of process and inquire into the case himself u/s 202(1) of the Code of Criminal Procedure.

(iii) When a charge -sheet is filed, the Court can refuse to accept the same and proceed to take cognizance of the offence on the basis of the materials on record. The court can direct further investigation into the matter.

(iv) The Magistrate may treat a protest petition as a complaint and proceed to deal therewith in terms of Chapter XV of the code of Criminal Procedure.

(v) Once the case is committed, the Sessions Judge may refer the matter to the High Court.

(vi) In the event, without taking any further evidence, it is found that while passing the order of commitment, the Magistrate has committed an error in not referring the case of an accused or left out an accused after evidence is adduced, the Court may proceed against a person who was not an accused provided it appears from the evidence that he should be tried with the accused.

(vii) The Revisional Court during pendency of the trial may exercise its revisional jurisdiction u/s 397 in which case, it may direct further inquiry in terms of Section 398 of the Code of Criminal Procedure.

(viii) The revisional powers of the High Court and the Sessions Court are pointed

out in the Code separately from a perusal whereof it would appear that the High Court exercises larger power.

(ix) In the event of any conviction by a Court of Sessions, an appeal there against would lie to the High Court. The appellate court exercises the power laid down u/s 386 of the Code of Criminal Procedure in which event it may also take further evidence or direct it to be taken in terms of Section 391 thereof.

(x) The High Court has inherent power u/s 482 of the Code of Criminal Procedure to correct errors of the Courts below and pass such orders as may be necessary to do justice to the parties and/or to prevent the abuse of process of court.

12. Similarly, in *Kishan Lal Vs. Dharmendra Bafna and Another*, it has been observed in paragraphs 11, 12 and 15 as under:

11) It is now a well-settled principle of law that when a final form is filed by any investigating officer in exercise of his power under Sub-section (2) of Section 173 of the Code, the first informant has to be given notice. He may file a protest petition which in a given case may be treated to be a complaint petition, on the basis whereof after fulfilling the other statutory requirements cognizance may be taken. The learned Magistrate can also take cognizance on the basis of the materials placed on record by the investigating agency. It is also permissible for a learned Magistrate to direct further investigation. The investigating officer when an FIR is lodged in respect of a cognizable offence, upon completion of the investigation would file a police report.

12) The power of investigation is a statutory one and ordinarily and save and except some exceptional situations, no interference therewith by any Court is permissible. In *Naresh Kavarchand Khatri Vs. State of Gujarat and Another*,

6. The power of the Court to interfere with an investigation is limited. The police authorities, in terms of Section 156 of the Code of Criminal Procedure, exercise a statutory power. The Code of Criminal Procedure has conferred power on the statutory authorities to direct transfer of an investigation from one police station to another in the event it is found that they do not have any jurisdiction in the matter. The court should not interfere in the matter at an initial stage in regard thereto. If it is found that the investigation has been conducted by an investigating officer who did not have any territorial jurisdiction in the matter, the same should be transferred by him to the police station having the requisite jurisdiction.

15) An order of further investigation can be made at various stages including the stage of the trial, that is, after taking cognizance of the offence. Although some decisions have been referred to us, we need not dilate thereupon as the matter has recently been considered by a Division Bench of this Court in *Mithabhai Pashabhai Patel v. State of Gujarat* in the following terms (SCC pp. 336-37, paras 12-13)

12. This Court while passing the order in exercise of its jurisdiction under Article

32 of the Constitution of India did not direct reinvestigation. This Court exercised its jurisdiction which was within the realm of the Code. Indisputably the investigating agency in terms of Sub-section (8) of Section 173 of the Code can pray before the Court and may be granted permission to investigate into the matter further. There are, however, certain situations, where such a formal request may not be insisted upon.

13. It is, however, beyond any cavil that "further investigation" and "reinvestigation" stand on different footing. It may be that in a given situation a superior court in exercise of its constitutional power, namely, under Articles 226 and 32 of the Constitution of India could direct a "State" to get an offence investigated and/or further investigated by a different agency. Direction of a reinvestigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. Pasayant, J. in Ramachandran v.R. Udhayakumar, opined as under: (SCC p.415 para 7)

7. At this juncture, it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under Sub-section (2) of Section 173 of the Code, the police has right to further investigate under Sub-section (8), but not fresh investigation or reinvestigation.

We have referred to the aforementioned decision only because Mr. Tulsi contends that in effect and substance the prayer of the Appellant before the learned Magistrate was for reinvestigation but the learned Magistrate had directed further investigation by the investigating officer inadvertently.

13. I have gone through the aforesaid two judgments. I have also carefully considered the submissions made by the learned senior counsel for the Petitioner.

14. So far as the propositions of law laid down by the Apex Court in the two judgments which have been cited by the learned senior counsel for the Petitioner is concerned, there is no dispute.

15. Popular Muthiah's case has been essentially relied upon by the learned Counsel to urge the contention that the objection which was filed by the Petitioner ought to have been treated as a complaint and the Magistrate ought to have held an inquiry into the matter and thereafter take cognizance.

16. So far as the judgment in Kishan Lal's case is concerned, the contention of the learned senior counsel for the Petitioner was that in exercise of powers u/s 173(8), the learned Magistrate could have also directed further investigation to be conducted by the investigating agency in order to find out the real reasons for homicide of the deceased.

17. The order passed by the learned Magistrate shows that not even a single factor was pointed out by the Petitioner before him which has not been considered by the IO or which warranted holding of an inquiry by him which would have persuaded him to take the cognizance of the offence.

18. It may be pertinent here to refer to the inquest report, which was admittedly conducted in the presence of the father of the deceased who had signed such proceedings where he had not suspected any foul play in the death of his deceased son. It is only after a considerable lapse of time that the Petitioner is purported to have made the complaint making allegations that she is suspecting a foul play in the death of her son. In the complaint also, there were charges and counter charges both from the Petitioner and the Respondent No. 2 and 3 with regard to the insertion of certain lines in the complaint which were stated to be not in existence in the complaint which was lodged with the police.

19. I do not think it necessary to go into that aspect of the matter as to whether anything was interpolated in the complaint by the Petitioner or not as in my considered opinion, nothing turns on the same. The important fact which is ignored by the learned senior counsel for the Petitioner is the finding of the post mortem report. It categorically shows that the death of the deceased was on account of asphyxia which occurred because of drowning. The Viscera report does not show that any poisonous substance have been administered to the deceased as all the contents of the exhibit marked as marks 1 to 4 gave negative results.

20. In the light of these facts, the only aspect which needs to be considered is the injuries on the body of the deceased which are mild abrasions found on the head and the forehead. These injuries are of such a minor nature as is apparent in the post mortem report that they could have been very well caused while taking out the dead body from the pond. Therefore, much importance could not be attached to this.

21. The other aspect of the matter which was urged before this Court by the learned senior counsel for the Petitioner was that the incident is purported to have taken place in the month of December when the water in the pond was expected to be fairly cold during the wee hours of the morning. There could hardly be any plausible reason for a normal person to go and have a dip in the pond.

22. I do not consider this as an important fact to attribute the reason to investigate into the matter further because a man's mind is the most unpredictable and it is possible that the deceased despite knowing fully well that it was cold, wanted to have a dip in the pond. In any case, not even a single factor has been mentioned by the Petitioner before the learned MM which would have aroused any reasonable suspicion that there was any foul play in the death of the deceased.

23. I feel that the Petitioner being the mother and on account of the sad and untimely loss of her son, is distressed and therefore, wants to fix the responsibility on to somebody for this. She has chosen the Respondent Nos. 2 and 3 as the convenient target.

24. I do not find any infirmity in the order of the learned Magistrate warranting

any interference by this Court. Accordingly, the petition filed by the Petitioner is totally misconceived and the same is dismissed.