

(2008) 03 KL CK 0033

In the High Court Of Kerala

Case No : Writ Petition (C) No. 5979 of 2008 (J)

Sajina T.

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 28-03-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 482
Penal Code, 1860 (IPC) — Section 376(2)

Citation : (2008) CriLJ 2712 : (2008) 2 KLJ 43

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : A.X. Varghese and A.V. Jojo, for the Appellant; Gikku Jacob, GP, for the Respondent

Final Decision : Dismissed

Judgement

R. Basant, J.—Is the dictum in Sakiri Vasu v. State of UP. 2008 AIR SCW 309 in conflict with the earlier decisions in S.N. Sharma v. Bipen Kumar 1970 SC 786, State of Bihar v. J.A.C Saldanna 1980 S.C. 326 and State of West Bengal v. Sampat Lal 1985 SC 195 Does Vasanthi Devi Vs. S.I. of Police and Others, require reconsideration ? These questions are raised by Advocate AX Varghese before me in this Writ Petition with vehemence.

2. Petitioner claims to be the unfortunate victim of an instance of gang rape. In respect of the crime committed against her, crime 273 of 2007 Payyannur police station has been registered u/s 376(2) IPC She had allegedly undergone this trauma while she was pregnant. A series of instance took place between the second week of April, 2007 to the end of April, 2007. The petitioner is a married woman, aged about 19 years. She lives with her husband. The husband in connection with his employment was obliged to be away from home on several days. It is alleged that several persons -17 accused persons have been arrayed by now, have committed the offence of rape/ gang rape against her during this

period. She could not muster courage to lodge a complaint until long later when she was constrained to break down in front of her husband and reveal all the details to him. The crime was registered on 30-06-07. Investigation in progress.

3. The allegations raised include allegations against influential persons in the political field. There is also allegations that the wives of some of the accused had also actively taken part in the perpetration of the offence of rape against the petitioner.

4. Because of the nature of the crime and allegations of involvement of political functionaries, the crime attracted a lot of public attention and sensation and the Director General of Police was ultimately persuaded to issue Ext.P1 order entrusting the investigation to the Crime Branch C.I.D. of Kannur District. Investigation is now going on. The 4th respondent is the Deputy Superintendent of Police, who is conducting the investigation under his superior-the 3rd respondent, who is the Superintendent of Police, C.B.C.I.D. at Kozhikode. The petitioner has now come to this Court with a grievance that the 4th respondent is not conducting a proper investigation. The investigators appear to be more interested in persuading the petitioner to settle and compromise the dispute rather than to ensure that the offenders are brought to book. The learned Counsel for the petitioner, in these circumstances, prays that there may be a direction that proper investigation must be conducted by the investigators. It is prayed that State of Kerala and the Director General of Police may be directed by a Writ of Mandamus to constitute a special investigating team consisting of conscientious officers with untarnished service history, preferably C.B.I., to investigate into the crime with proper monitoring of the investigation by this Court. When this petition came up for admission, the learned Counsel for the petitioner was requested to explain how in the light of the decision in *Sakiri Vasu v. State of U.P.* 2008 AIR SCW 309, this petition under Article 226 of the Constitution of India is maintainable.

5. The learned Counsel for the petitioner takes the stand first of all the *Sakiri Vasu* does not represent the correct law to the extent that it says that aggrieved persons cannot always come before this Court to seek appropriate directions for a proper and efficient investigation u/s 482 Cr.P.C. and/or Article 226 of the Constitution of India. The learned Counsel for the petitioner contends that in any view of the matter, the two Judge Bench decision in *Sakiri Vasu* must be held to be in conflict with the three Judge Bench decisions in *S.N. Sharma v. Bipen Kumar* (1970) S.C. 786). *State of Bihar v. J.A.C. Saldanna* 1980 S.C. 326 and *State of West Bengal v. Sampat Lal* 1985 S.C. 195. The learned Counsel for the petitioner, in these circumstances, contends that the Magistrate has no powers whatsoever u/s 156(3) CrP.C. to supervise, monitor or interfere with the investigation.

6. Secondly and alternatively the learned Counsel for the petitioner contends that even assuming that *Sakiri Vasu* represents the correct law, it only says that the High Court should not encourage the practice of parties coming to them with

applications u/s 482 Cr.P.C. and Article 226 of the Constitution of India with grievance about inadequate investigation "ordinarily". This is an extraordinary case where even going by the dictum in Sakiri Vasu, this Court can justifiably invoke the powers u/s 482 Cr.P.C/Article 226 of the Constitution of India, it is prayed. Detailed arguments have been advanced before this Court. The question had come up before this Court earlier and in Vasanthi Devi. this Court had considered the question in detail. The only additional point which the learned Counsel for the petitioner has chosen to raise in this petition is that Sampat Lal and S.N. Sharma have not been specifically referred to in Sakiri Vasu. The counsel contends that though Saldanna has been referred to in Sakiri Vasu in para.30, such reference was made for a totally different purpose and in these circumstances it must be held that Sakiri Vasu does not lay down the correct law as it is in conflict with all the three decisions referred above.

7. I have considered the contention very anxiously, but I am afraid, I am unable to agree with the learned Counsel for the petitioner. In para.29 of Sakiri Vasu, the Supreme Court had referred to the decision in Union of India (UOI) Vs. Prakash P. Hinduja and Another, which in turn refers to all the decisions on the point till then. Saldanna has been specifically referred to in Prakash P. Hinduja and Saldanna in turn makes reference to S.N. Sharma. According to me, the question is not whether the various decisions on this aspect have been referred to specifically or not. The law on the point appears to have been clarified and explained in para.29 of Sakiri Vasu which reads as follows:

Para.29: Union of India v. Prakash P. Hinduja AIR 2003 SCC 195 (Vide para 13), it has been observed by this Court that a Magistrate cannot interfere with the investigation by the police. However, in our opinion, the ratio of this decision would only apply when a proper investigation is being done by the police. If the Magistrate on an application u/s 156(3) Cr.P.C. is satisfied that proper investigation has not been done, or is not being done by the officer-in-charge of the concerned police station, he can certainly direct (the officer-in-charge of the police station to make a proper investigation and can further monitor the same (though he should not himself investigate)

8. The learned Judges have referred to the binding ratio that the Magistrate cannot interfere with the investigation by the police. However conscious of the said legal principle and ratio they have explained that the said principle would apply only when a proper investigation is being done by the police. It has been made very clear that if proper investigation is not done, the Magistrate can certainly direct the officer in charge to make a proper investigation and can further monitor the same though he should not himself investigate. The learned Counsel for the petitioner is correct in his submission that though Prakash P. Hinduja refers to Saldanna, which in turn refers to S.B. Sharma, Sampat Lal has not been referred to specifically in either Sakiri Vasu or in Prakash P. Hinduja. But according to me, the ratio in all these decisions that a Magistrate cannot interfere with the investigation by the police having been referred to by the learned

Judges in Sakiri Vasu in para 29 and the said principle having been explained in the said para 29, this Court is bound by the decision in Sakiri Vasu which refers to the principle laid down in all the previous decisions that a Magistrate cannot interfere with the investigation.

9. That being so, I am not persuaded to agree that this Court can or should hold that Sakiri Vasu does not lay down the law correctly on the ground that the same is in conflict with the ratio laid down in Sampat Lal, S.N. Sharma and Saldanna. As already explained in Vasanthi Devi this Court is bound by the interpretation of a later smaller bench as to how the principle laid down in a previous larger Bench decision is to be understood. Sakiri Vasu refers to Prakash P. Hinduja, which refers to Saldanna, which refers to S.N. Sharma and more importantly Sakiri Vasu specifically refers to the principle that the Magistrate cannot interfere with the investigation. But proceeds to explain that interdict would apply only when a proper investigation is conducted. I am not hence persuaded to agree that Sakiri Vasu does not lay down the law correctly.

10. Sakiri Vasu is authority for the proposition that the Magistrate has the reservoir of powers u/s 156(3) Cr.P.C. to issue appropriate directions and ensure that a proper investigation is conducted. It is authority for the further proposition that a person aggrieved by an inadequate or improper investigation cannot ordinarily be permitted to come to this Court with a grievance about such improper investigation. He must normally be asked to seek his equally efficacious alternative remedy u/s 156(3) Cr.P.C. available with the Magistrate. Para.25 of Sakiri Vasu clearly says that ordinarily the High Court must refuse to interfere in such matter.

11. The petitioner must hence go before the Magistrate and make her grievance of inadequate and improper investigation. If she does not get the relief there, certainly higher avenues of grievance redressal may be available to her. But ordinarily she cannot be permitted to knock at the doors of this Court at the first instance. That appears to be the unmistakable binding law laid down in Sakiri Vasu as understood in Vasanthi Devi. No reference to a larger Bench appears to be necessary in these circumstances. Can this case be reckoned as an extraordinary case where the normal rule in the Sakiri Vasu cannot be held to apply? I have been taken through the F.I.R. I have been taken through the sequence of events in this case. I need only say that I am not persuaded to agree that any circumstance exists in this case which can persuade this Court to reckon this case as an extraordinary case where ignoring the dictum in Sakiri Vasu, the petitioner's grievance-ought to be entertained by this Court at the first instance.

12. The learned Counsel for the petitioner thirdly and finally contends that there is a request in this Writ Petition that the C.B.I. may be directed to conduct the investigation. The learned Counsel for the petitioner relies on the dictum in Central Bureau of Investigation Vs. State of Rajasthan and Another, , and contends that the Magistrate cannot direct the conduct of investigation by the

C.B.I. The learned Judges in Sakiri Vasu had reiterated the principle in Central Bureau of Investigation v. State of Rajasthan that direction for conduct of investigation by the C.B.I. must be done only in rare and exceptional cases. To identify such a rare and exceptional case, this Court will certainly ask a question whether the petitioner has already approached the avenues of grievance redressal ordinarily available to her. She having not done the same, this cannot be reckoned as a rare or exceptional case to direct investigation by the C.B.I. At the moment, I am satisfied that the third ground raised cannot also succeed. I must also note that the mere inclusion of a prayer to direct investigation by the C.B.I. cannot frustrate the play of the dictum in Sakiri Vasu. It would be myopic and inexpedient to conclude that the inclusion of such a prayer in the pleadings will ipso facto help the petitioner to gain entry into this Court notwithstanding the dictum in Sakiri Vasu.

13. This Writ Petition is accordingly dismissed. Needless to say that the dismissal of this Writ Petition will not in any way fetter the rights of the petitioner to approach the learned Magistrate with appropriate request u/s 156(3) Cr.P.C. In the light of the decision in Sakiri Vasu as understood by this Court in Vasanthi Devi it is certainly for the learned Magistrate to consider such request u/s 156(3) Cr.P.C. and proceed to pass appropriate orders on merits.